claimed against, and approved of an issue for the trial of the cause.

Counsel for the Pursuer and Reclaimer—MacRobert, K.C.—Duffes. Agents—Arch. Menzies & White, W.S.

Counsel for the Defenders and Respondents—D.-F. Constable, K.C.—Gilchrist. Agents—Campbell & Smith, S.S.C.

Thursday, November 25.

FIRST DIVISION.

[Exchequer Cause.

ADAM STEAMSHIP COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue—Excess Profits Duty—Deductions—Insurance—Calls Paid by Members of Mutual Assurance Association—Proof that Payments were for Insurance or Other Trade Purposes—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 40, *Fourth Schedule, Part I.*

A steamship company being desirous of insuring their ships, joined a mutual assurance association and came under obligation to pay certain sums of money under the name of calls. The objects of the association included, in addition to insuring its members, that of promoting the interests of shipowners as a body by contributing to the funds of a shipping federation. The company having claimed that the amount of the calls paid by them should be attributed to the benefits of insurance and be deducted from their gross returns in arriving at the assessment of their profits for the purposes of excess profits duty, the Commissioners required the company to produce the accounts of the federation and other papers relative to that body. The company having failed to produce these particulars the Commissioners confirmed the assessments.

The Court *recalled* the confirmation and remitted to the Commissioners to give the appellants an opportunity of producing evidence as to how much of the calls paid by them were for insurance or other trade purposes.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) enacts—Section 40, sub-section (1)—"The profits arising from any trade or business to which this part of this Act applies shall be separately determined for the purposes of this part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modification set out in the first part of the fourth schedule to this Act and to any other provisions of this Act."

The Adam Steamship Company, *appellants*, being dissatisfied with a decision of the Commissioners for the General Purposes of Income Tax at Aberdeen confirming the assessments made upon them for excess profits duty of £49, 10s. for the accounting period ended 30th April 1915, £124, 5s. 4d. for the accounting period ended 30th April 1917, and £123, 4s. for the accounting period ended 30th April 1918 under the Finance (No. 2) Act 1915, the Finance Act 1916, and the Finance Act 1917, obtained a Case for appeal, in which D. Matheson, Surveyor of Taxes, Aberdeen, was *respondent*.

The Case stated—"The point on which the decision of the Court is sought is whether the General Commissioners were entitled to require the appellants to produce or cause to be produced particulars of the purposes for which the amounts of the calls after referred to were expended by the Shipping Federation, Limited, and in default of such production by or through the appellants to dismiss the appeal, or were bound to decide on the evidence produced whether the amounts of the said calls were proper deductions for the purpose of excess profits duty.

"The following *facts* were admitted or proved—1. The appellants are members of the North of England Protecting and Indemnity Association (hereinafter called 'The Association'), which is a mutual insurance association, and which in turn is a member of the Shipping Federation, Limited. 2. The assessments are additional assessments made under No. 11 of the Regulations prescribed by the Commissioners of Inland Revenue under section 45 (7) of the Finance (No. 2) Act 1915 in respect of certain calls made on the appellants by the Association in terms of the articles of association and relative rules of the Association. 3. Clause 26 of the said articles of association provides—'The directors may from time to time make calls upon the members for payment, either in one amount or by instalments, of any sums which the members are liable to pay to the Association.' Clause 33—'If any member makes default in payment of any call at the time and place appointed for payment thereof, he may be forthwith sued by the Association for the amount thereof, and he shall pay interest thereon at the rate of £7, 10s. per cent. per annum from the day appointed for payment to the time of actual payment. And the directors may also by resolution declare that such defaulter shall as from the date of the default, or as from any later date fixed by the directors, cease to be in any way protected or indemnified in the Association, but the member shall, notwithstanding any such resolution, remain liable to pay to the Association the amount of all calls owing by him at the date of the resolution, and of all subsequent calls in respect of obligations incurred during his membership, with interest thereon at the rate aforesaid.' 4. Clause 62 of the said articles of association is in the following terms—'The directors may put out of the funds of the Association any sum or sums of money not exceeding in the whole in any one year the sum of £500, or such greater sum as the Association in general meeting may from time to time determine, to any hospital or to any benevolent, charitable, educational, industrial training or

other institution, society or fund, or other like object. The directors may join in the promotion or support of a central association or other organisation having for its object the defence or promotion of the interests of shipowners as a body, and may make calls upon the members for the purpose of contributing from time to time to the funds of such central association, or other organisation, such sums as they may deem necessary.' 5. Rule (1) of the Rules of the Association, Schedule B, Class II (Indemnity), provides as follows — 'These rules are subject to the memorandum and articles of association of the North of England Protecting and Indemnity Association, and the members for the time being of this class shall form one separate class within the said Association, and shall be bound by the said memorandum and articles of association, and by these rules.' Rule (2) specifies the various liabilities against which an owner is indemnified by the Association, and these may be summarised as follows — (*a*) Claims by the owners of cargo carried in the steamer against her owners. (*b*) Excess liability for damages, &c. not covered by ordinary policies. (*c*) Losses incurred through innocent breaches of customs laws by servants of the shipowner. (*d*) Losses through failure to have negligence clauses in shipping documents. (*e*) Cargo's proportion of general average. Rule 17 of the said rules provides —'The liabilities to the Association arising under this class are enforceable in the manner provided by the articles of association as to calls.' Rule 18 of the said rules provides — 'For the purpose of providing funds for the payment of claims and other liabilities of the Association every member of this class shall (in addition to the entrance fee and subscription mentioned in Rule 14 hereof) pay to the Association two half-yearly contributions of ½d. per ton, or such sum as the directors may determine, on the tonnage entered by him. If the amount realised by the said contributions shall at any time prove insufficient to meet the said claims and liabilities, the directors may make calls for further contributions, which members shall be bound to pay. If the amount realised by the said contributions shall be more than sufficient to meet the said claims and liabilities, then in the discretion of the directors the whole or any portion of the surplus may be retained for the purposes of the Association, or the whole or any portion of the surplus may be returned to the members in proportion to the amounts respectively contributed by them . . . (6) The calls referred to were made on the appellants by the Association in accordance with the articles and rules of the Association. In each case the call was consequent on a call for a like amount having been made upon the Association by the Federation in accordance with a resolution of its executive council. The call dated the 10th July 1916 was a special one for the purposes of a reserve fund. The amounts of these calls were duly paid by the appellants to the Association, who in turn paid them to the Shipping Federation, Limited.

"The Commissioners on 14th August 1919 adjourned the meeting and directed their clerk to issue a precept to the appellants in the following terms:—

'*Excess Profits Duty.*

'*Precept for Schedule of Particulars.*

'To Adam Steamship Company, Limited, *per* L. Mackinnon junr., Esq., Advocate, of 23 Market Street, Aberdeen.

'With reference to your notice of appeal against the assessments to excess profits duty numbered 1119, 1120, 1121, the Commissioners for the General Purposes of the Income Tax, acting under the authority of the Finance (No. 2) Act 1915, in relation to the excess profits duty within the Division of Aberdeen, in the County of City of Aberdeen, do hereby require you to return or cause to be returned, at their office situate at 1 Huntly Street, Aberdeen, within the space of 21 days after the date hereof, a schedule containing the following particulars, viz.—

1. The memorandum and articles of association of the Shipping Federation, Limited.
2. Rules and regulations do do
3. The accounts from 1911 to 1918.
4. Statement showing how each call was applied.

'Dated this 15th day of August 1919.

'JOHN BARNET,

'*Clerk to the said Commissioners.*'

"The appellants on 5th September 1919 lodged a minute in the following terms:—

'Minute for the Adam Steamship Company, Limited, in reply to the precept of 15th August 1919, issued under the hand of the clerk to the Commissioners.

'The minuters respectfully state that the particulars called for are not in their possession nor under their control, and they accordingly regret that they are unable to comply with the request. The minuters further respectfully submit that in any event the information called for is irrelevant to the question under consideration in respect that the expenditure of the Shipping Federation, Limited, to whom monies may be paid by the North of England Protecting and Indemnity Association can have no bearing upon the assessment of the minuters, in that the payments made by the minuters to the North of England Association are purely trade payments which they are bound to make under penalty of their insurance being forfeited, besides being liable to be sued therefor. The minuters further submit that the precept issued is *ultra vires* of the Commissioners in respect that there is no warrant or authority for requesting the minuters to produce information such as is called for, and which is not within their possession or control.'

"The Commissioners on consideration of the facts and arguments submitted to them, and of the minute lodged by appellants, were of opinion that in default of full information showing the manner in which the calls or payments in question were expended, and especially in the absence of the particulars called for, they were not in a position to determine whether the whole or any portion of the payments in question

were an admissible deduction in arriving at the appellants' liability for excess profits duty, and they accordingly confirmed the assessments appealed against and dismissed the appeal."

Argued for the appellants—(1) The confirmation should be recalled. The Commissioners had taken the view that in making payments to the Federation the Association was acting as agent of the appellants. This was a wrong view of the relations of the parties *inter se*. The appellants had nothing to do with the Federation except that they were insured by a member of the Federation. (2) The payments were made under an agreement which could be enforced. This distinguished the case from *Lochgelly Iron and Coal Company, Limited*, v. *Crawford*, 1913 S.C. 810, 50 S.L.R. 597, 6 T.C. 267, and from *The Grahamston Iron Company* v. *Crawford*, 1915 S.C. 536, 52 S.L.R. 385, 7 T.C. 25. Such a payment made for a trade purpose was *prima facie* a good charge against gross profits — *Moore* v. *Stewart & Lloyds*, 1906, 8 F. 1129, 43 S.L.R. 811, 6 T.C. 501. There should be no inquiry as to how these payments were expended by a third party. It was not in the appellants' power to supply the particulars required in the precept. (3) In any event the case should be remitted back to the Commissioners to give the appellants a further opportunity of producing evidence.

Argued for the respondent—(1) On the information before them the Commissioners could have come to no other result. The *onus* was on the appellants to prove that they were entitled to make the deductions. They had not done so. The fact that the payments were for insurance did not exclude inquiry by the Commissioners. They were entitled to require evidence that the payments were wholly and exclusively for the purpose stated—*Rhymney Iron Company* v. *Fowler*, 1896, 2 Q.B. 79. The whole facts and circumstances attending the payments had to be considered — *Moore* v. *Stewart & Lloyds*, *supra*. The Commissioners issued the precept to give the defender an opportunity of supplying information. The production of the Federation accounts would probably have ended the matter. (2) There was no proper ground for a remit to the Commissioners. Having had full opportunity of producing evidence to support their claim for a deduction, the appellants were now asking for a remit without stating that they had any further evidence to produce.

At advising—

LORD PRESIDENT—The appellants are a steamship company carrying on business in Aberdeen. Being desirous of insuring their ships they became members of a mutual assurance association known as the North of England Protecting and Indemnity Association. To that Association they are under obligation as members to pay certain sums of money under the name of calls. These are apparently of irregular amount and irregular incidence, but are measured upon the tonnage owned by the Steamship Company. The Association has a number of objects or purposes. One of its objects is to afford the benefits of insurance to its members, another is that of promoting the general interests of shipowners by supporting the funds of the Shipping Federation Limited. The Association has power to become a member of the Federation and to contribute to its funds, and in virtue of that power it is a member of the Federation. Now the appellant company seek to attribute the calls which they have made to the Association to the benefits of insurance which their membership confers on them, and claim to treat those payments in the same way as ordinary insurance premiums would be treated, namely, as having been made for the purpose of their trade, and therefore as forming proper deductions from their gross returns in arriving at the assessment of their profits for the purposes of excess profits duty.

If it were true that these calls were payments by which the benefits of insurance were obtained and nothing more, then there would be no doubt as to the justice of the appellants' claim, but that is precisely the question at issue. It is contended for the Revenue that the fact that the Association has other objects besides insurance, and that it is entitled to use the calls it collects from its members for those other objects as well as for insurance, makes it necessary for the appellants to prove whether the calls paid by them do, and if so to what extent, really represent the cost of insurance. Further, it is pointed out that the particular form in which some at least of the calls in question were made points strongly to the conclusion that those calls are made on and paid by the members of the Association for objects other than insurance or trade purposes. The appellants admit that the Association has other objects besides that of providing its members with the benefit of insurance. They admit that it is possible that part of the calls paid by them to the Association may have been used in futherance of those other objects, but they found on the fact that it is one of the conditions of their membership, and consequently of their participation in the benefits of insurance, that they pay and that promptly all the calls which the Association makes upon them, no matter what may be the particular object upon which the Association expends the money. They argue that it follows from this that all the payments which they made to the Association do represent consideration for the benefits of insurance which they obtained. Now it is, in a literal sense, true that there is not a single call made upon the appellants which is not part of the consideration paid for their insurance. But then that does not solve the problem, because if all or any of the contributions which the appellants have made to the Association are really and in substance for mixed purposes, then although it is true that they are part of a total consideration which procures insurance for their ships they are nevertheless consideration paid partly for something else. I do not think it is necessarily con-

clusive against the appellants to say that some of the calls were made specifically under article 62 of the Association's articles of association, because the making of such calls and the payment of them is, as the appellants point out, part and parcel of the consideration for which they get their ships insured. But as the Association has more objects besides that of insuring its members, the question still remains—even though the Association makes payment of all calls a condition of holding its members insured—how much of what was paid truly is a consideration for insurance and not for something else which may not be a trade purpose at all. That is a question of fact, and it is possible that it may turn out to be one of difficulty.

I am not prepared therefore to sustain the broad argument which was maintained by the appellants here and before the Commissioners. The result of this would be of course to dismiss the appeal. But I have been impressed all through the case with the circumstance that what seems to be the true question was allowed to become somewhat obscured by the course which the proceedings took. That obscurity is exhibited if one looks at the opening words of the case where it is stated—"The point on which the decision of the Court is sought is whether the General Commissioners were entitled to require the appellants to produce or cause to be produced particulars of the purposes for which the amounts of the calls after referred to were expended by the Shipping Federation, Limited, and in default of such production by or through the appellants, to dismiss the appeal, or were bound to decide on the evidence produced whether the amounts of the said calls were proper deductions for the purpose of excess profits duty." The first alternative stated in that description of the point which the case is said to raise shows the stage at which, I think, the procedure went amiss. The question was not primarily, and may never be at all, what the Shipping Federation did with the money received by it from the Association, nor even perhaps what the Association did with a particular call or calls exacted from its members. The question was, how much of the money paid by the appellants as members of the Association was really for insurance purposes. But it appears that when the appellants had stated to the Commissioners their general argument—the same argument as they maintained here—and after the Surveyor in reply had pointed out, quite rightly I think, that the onus of proof was on the appellants, and that the Association's payments to the Shipping Federation raised serious doubt as to the admissibility of corresponding or apparently corresponding calls by the Association on the appellants, as deductions from their profits for purposes of excess profits duty, and that in default of further evidence the appeal ought to fail, the Commissioners, instead of giving the appellants an opportunity of tendering further evidence, if they had any, issued a precept requiring the appellants to produce the accounts of the Shipping Federation and other papers relative to that body. The appellants protested, and the result was a useless discussion about procedure in which the main question seems to have dropped out of sight. As to whether the precept was within the powers of the Commissioners or went beyond them I wish to say nothing. But I cannot help thinking that if the appellants had simply been put to it to furnish any evidence they had upon the true question, namely, how much, if any, of the calls paid by them in the year in question were for insurance or other trade purposes, it is possible that the case might have taken end. As it is, I am not satisfied that the appellants had a proper opportunity of presenting such evidence. I therefore propose to your Lordships to recal the confirmation of the assessment by the Commissioners, leaving the assessment standing meanwhile, and to remit to the Commissioners to give the appellants an opportunity of presenting any such evidence as they may have on the true question formulated above.

LORD MACKENZIE—I think the attack upon the assessment, as the case is stated, fails. The question is what consideration passed to the taxpayers in return for the payments they made. We were asked upon the papers presented to us to come to the conclusion that the only consideration that passed to the taxpayer for his payment was indemnity. I have not been able from the start to see how we could come to that conclusion upon the information in this case, and therefore I think that the attack on the assessment entirely fails. But a motion has been made by the appellants that they should now have an opportunity of tendering such evidence as they think proper for the purpose of convincing the Commissioners that a certain part of the payments was made for the purposes of trade, and of showing how much that amounts to. I think it is quite evident that there is a question to try, and if it were not tried this year it would require to be tried next year, and that therefore the more convenient course would be that the case should go back to the Commissioners, leaving the assessment standing in the meantime, in order that they may reconsider the matter with the assistance of such information as the present appellants lay before them, bearing in mind always that the onus in the case is upon the appellants and not upon the Crown.

LORD SKERRINGTON—The appellants are shipowners, and they combined with other persons or corporations in the same position in order to effect two objects. The one was to obtain the benefit of mutual insurance and the other was to give financial support to a Shipping Federation. For these purposes the parties took advantage of the machinery of the Companies Acts and joined what has been described as an Indemnity Association. I do not think that the method or machinery so adopted in any way alters or obscures the truth of the situation, which was that a number of per-

sons combined together to apply their money to two distinct purposes. One of these purposes is admittedly a trade purpose which would constitute a good deduction in a question of excess profits duty, namely, the payment of what was necessary to obtain insurance of the appellants' vessels under a mutual insurance scheme. The other purpose stands upon an entirely different footing. We know nothing about the Shipping Federation or whether the subscriptions paid to it do or do not constitute a proper trade deduction. *Prima facie* they do not, but we really have no information. Further, I should have thought that having regard to the form of the calls there could be no doubt how much of the appellants' contributions was applied to the one purpose and how much to the other. I think it fair, however, that the appellants should have the opportunity of showing, if they can, that the allocation was really different. The practical result is that we negative the main contention of the appellants, but that we allow them to prove, if they can, that the assessment was wrong. In the meantime the assessment stands and the case goes back to the Commissioners to dispose of the appeal upon such new materials, if any, as the appellants lay before them.

LORD CULLEN—The North of England Protecting and Indemnity Association is an association that appears to exist for different and separable objects. One of those is the mutual insurance of its members; another is that of furthering by a particular method the general interests of shipowners, the particular method being membership of a central organisation having for its object the defence or promotion of such interests. The payments which the appellants make from time to time to the Association are made partly for the first of these objects and partly for the second. It seems to me quite clear that in as far as the payments are made for the second object they do not form allowable deductions under Schedule D. Now the payments referred to in the case *prima facie* are of that kind, because they are the amounts of calls made by the Association under the powers of section 62 of its articles of association expressly to enable the Association to contribute to the funds of the Shipping Federation as a central organisation which has for its object the defence and promotion of the interests of shipowners as a body. The Shipping Federation, it may be pointed out, does not in any way insure the appellants. Even, however, if these payments are in some way or other to be regarded as made for both objects of the Association they do not form allowable deductions under Schedule D as long as they are not split up. The appellants, however, have not so far been able to show that any particular portion of the sums paid by them to the Association were payments for insurance. I cannot for my part see any evidence in the case of the appellants not having had a sufficient opportunity, before the Commissioners, of producing such information as might verify the deductions which they claimed. But as the case appears to be a test case I think that as a matter of indulgence the appellants may be given a renewed opportunity of producing such information by a remit.

The Court pronounced this interlocutor—

"Recal the confirmation of the assessments by the Commissioners, and remit to them to give the appellants an opportunity of presenting, if so advised, any evidence upon the question of how much, if any, of the calls referred to in the case properly represent insurance expenditure or a proper trade purpose within the definition of the first rule annexed to the First and Second Cases under Schedule D of the Income Tax Act 1842, and are therefore a proper subject of deduction."

Counsel for the Appellants—Moncrieff, K.C.—Graham Robertson. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Respondent—Lord Advocate (Morison, K.C.)—Candlish Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Wednesday, December 15.

SECOND DIVISION.

[Lord Cullen, Lord Ordinary on the Bills.

CARLTON (EDINBURGH) HOTEL COMPANY, LIMITED *v.* LORD ADVOCATE AND SECRETARY OF STATE FOR WAR AND AIR.

Process — Emergency Legislation — Summary Petition for Order on Ministers of Crown to Perform Statutory Duty—Duty of Summoning a Jury to Fix Compensation for Premises Temporarily Occupied by War Department—Defence Act 1842 (5 *and* 6 *Vict. cap.* 94), *sec.* 19 — *Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 91.

The owners of an hotel which had been temporarily taken possession of by the War Department under the Defence of the Realm Regulations 1914, having been found entitled to such compensation as might be determined under the Defence of the Realm Acts and relative Acts of Parliament, presented a petition, under section 91 of the Court of Session Act 1868, for an order on the Lord Advocate as representing the Secretary of State for War, and also (as the petition was afterwards amended) on the Secretary of State for War, to take steps to cause a jury to be summoned to fix the compensation in terms of section 19 of the Defence Act 1842. *Held* that the petitioners had failed to set forth any statutory duty incumbent on the Ministers in question or either of them which they had refused or unduly delayed to perform, and petition *dismissed* as irrelevant.