

separately let, while by far the larger portion of the tenement thus structurally divided was used solely for business purposes. The decision of the Commissioners ought, accordingly, under sub-sections 1 or 2 of section 13 of the Revenue Act of 1878, to be reversed.

Authorities—*Scottish Widows Fund v. Solicitor of Inland Revenue*, Jan. 22, 1880, 7 R. 491; *Russell v. Couitts*, Dec. 14, 1881, 9 R. 261; *Corke v. Brims*, July 7, 1883, 10 R. 1128; *Nisbet v. M'Innes*, July 15, 1884, 11 R. 1095; *Allan v. Thomson*, July 15, 1884, 21 S.L.R. 741.

Replied for the Surveyor of Taxes.—The case did not fall under the exempting clauses. (1) It did not fall under sub-section 1, because the building was not let out in separate tenements; (2) and it did not fall under the second sub-section, because the house which the appellant occupied himself was not occupied solely for business purposes, but partly as a dwelling-house.

Authority—*Union Bank v. Solicitor of Inland Revenue*, Feb. 2, 1878, 5 R. 598.

At advising—

LORD PRESIDENT.—The Commissioners tell us that the subject of assessment here is the annual value of the shop and store and dwelling-house situated at No. 15 Rue-End Street, of which Mr M'Innes, the appellant, is proprietor and occupant. They say, further, that the premises consist of a building of two storeys and attics fronting Rue-End Street, and a back building of one storey. And they say further, that between the front and back buildings there is a court opening from a close or passage, a portion of which at the inner end has been covered. The ground floor of the front building is occupied by the appellant as a shop with a front entrance from Rue-End Street, and a back entrance from the court through the portion of the court that is covered. This back entrance not only gives access to the shop, but also affords access by a back door to another shop, also occupied by the appellant in the property in Arthur Street belonging to him, separately entered in the valuation-roll at a rental of £16, but not included in the present assessment. Both shops have a common entrance from the court, and have internal communication with each other. The first floor and attics of the premises assessed are occupied by the appellant as a dwelling-house.

Now, upon these facts I cannot entertain the smallest doubt that the Commissioners were right in their determination, because they are precisely the same kind of facts which were before the Court in the two cases of *The Union Bank* and *The Scottish Widows Fund*—that is to say, the person who is assessed, and who is in the position of the appellant, is the proprietor and occupant of the entire house which forms the subject of the assessment. It is plain, therefore, that he cannot be within the meaning of the first sub-section of section 13 of the Act 41 and 42 Vict. cap. 15, because the house is not let out in separate tenements; on the contrary, it is all in the personal occupation of the proprietor. And he cannot be under the exemption of the second sub-section, because his house which he occupies himself is not occupied solely for business purposes, but partly as a dwelling-house. We have nothing to do with the internal communications or questions of that kind here at all. The whole house which is assessed is occupied by

one person, and occupied partly as a dwelling-house, and therefore the assessment is good.

LORD MURE—I am of the same opinion. It appears to me from the facts of the case as stated that this case does not come within either of the exempting sections in section 13 of the Act of 1878.

LORD SHAND—I am of the same opinion. The first sub-section I think does not apply, because we have not a statement by the Commissioners that any part of this tenement is let, and the second sub-section has not the effect contended for, because the case is directly ruled by the case of *The Scottish Widows Fund*. Whether the appellant could get a different case another year on these tenements or not I cannot tell. I have been looking at the plan, and I rather think the Commissioners must have deliberately intended to fix this as a tenement by itself, because when I look at the parts coloured yellow they are really blocked off from the rest of the building by very thick walls and by quite separate entrances, and I am rather disposed to think the Commissioners have done that deliberately. But if that is not so, the appellant will have an opportunity of raising that in another Case.

LORD ADAM—I am of the same opinion.

The Court upheld the determination of the Commissioners.

Counsel for M'Innes—Kennedy. Agent—John Macpherson, W.S.

Counsel for Surveyor of Taxes—Lorimer. Agent—D. Crole, Solicitor of Inland Revenue.

Thursday, November 12.

FIRST DIVISION.

[Exchequer Cause—Lord Fraser,
Ordinary.]

THE COMMISSIONERS OF INCOME TAX v.
THE HIGHLAND RAILWAY COMPANY.

Revenue—Income Tax—Income Tax Act 1842 (5 and 6 Vict. cap. 100), Sched. A, Rule 3—Profits—Deductions.

A railway company under powers conferred upon them by statute to act as carriers both by sea and land, for some years worked their own sea traffic by means of steamers belonging to themselves. Thereafter they sold these vessels and entered into an agreement with a steamboat owner, whereby he was to receive a certain proportion of the passenger and traffic receipts, and was on his part to provide the steamers and to run them on certain stated routes. In assessing the income tax payable by the company for the year subsequent to this arrangement coming into force, the Commissioners proceeded (under rule 3 of Schedule A of the Income Tax Act of 1842) by computation based on the profits of the year preceding that of assessment. In doing so they maintained that no profit or loss on steamers ought to be included since the

company had ceased to carry on the sea traffic during the whole year to which the assessment applied. *Held* that as the principle of assessment was that of taking the income of the preceding year, the loss on sea traffic then incurred ought to be taken into account, and *separatim*, that the same result followed because the company had not abandoned sea traffic as part of their undertaking by having entered into a contract for the working of it.

This was a Case stated for the opinion of the Court by the Special Commissioners of Income Tax under the Act 43 and 44 Vict. cap. 19, sec. 59, at the request of the Highland Railway Company.

The Highland Railway Company had been assessed for Income Tax for the year ending 5th April 1884, on £160,251 as the profits of the concern (5 and 6 Vict. cap. 35, Schedule A, rule 3). The Case stated that this assessment was for the profits of the undertaking for the year ended 5th April 1884, but was made by computation on the income of the previous year.

The company returned as their profits £158,644. In making this return, which was based on the profits of the year preceding that of assessment, they deducted two sums of £1167 and £440 for loss on working off a depreciation of steamers in the half-year to August 1882.

The Special Commissioners disallowed the deduction claimed, on the ground that in the year for which the assessment was laid on the company were not engaged in sea carriage, as they had put that part of their undertaking into other hands, and were therefore carriers by land only, that it was in this capacity that they were to be taxed, and that neither profit nor loss on the abandoned part of the business could be taken into account. They therefore fixed the assessment to be on £160,251 as above stated.

It appeared that the railway company, by Special Act of 1877, were authorised to act as carriers by sea.

By agreement dated 16th March 1880 it was arranged that the railway company were to retire from the steamboat traffic at 17th April 1880, and that Mr David MacBrayne of Glasgow was to take up the traffic in connection with the railway and to carry goods and passengers at certain rates set forth in a schedule appended to the agreement.

The contentions of the railway company before the Special Commissioners were these:—“(1) That they were carriers by land and sea, and that the assessment for the year 1883-84 fell to be made as formerly upon the net profits of their *whole* undertaking, as the same were instructed by the previous year's accounts. (2) That they were carriers by sea during the year for which the assessment now made applied, and that the loss arising upon the steamers referred to during the year 1882-83, and the depreciation, ought not to be eliminated from the accounts of that year in computing the profits of the appellants' whole undertaking for the year 1883-84. (3) Further, that the appellants had been owners of the said steamers during six financial years commencing 1877-78, and that if the entries relating to them were excised from the accounts of the year 1882-83, in computing the income of 1883-84, these steamers would only have been dealt with in five years' assessments of the appellants' undertaking instead of six. And

(4) That the assessment of the year 1882-83, during which the appellants incurred the loss of £1167 referred to, was as usual made upon the basis of the previous year's accounts, and was laid upon a computed profit of £910 in respect of said steamers, so that for the year 1882-83 there was an over assessment in respect of these steamers of £2077.”

The Special Commissioners having after considering the foregoing contentions confirmed the assessment, the railway company thereupon asked that the present Case should be stated for the opinion of the Court.

Argued for the railway company—The steamboat traffic was part of the company's undertaking as far as assessment was concerned. They were not giving up any part of their undertaking by their arrangement with Mr MacBrayne. He was their deputy, and they might resume the sea traffic if at any future time it appeared to be for their advantage to do so. The company were not bound to run their own steamers, as they were empowered by their private Act to charter if they desired.

Authority—*Caledonian Railway v. Greenock and Wemyss Bay Railway Company*, 28th June 1878, 5 R. 995.

Replied for the Commissioners—This was a question of trade, not of property; the Commissioners had to compute the profits of a trade. It was a trade of land carriage alone during the year of assessment, and as regarded the steamers, the question of profit or loss upon them was not one which could be taken into account for the purposes of assessment.—Act 5 and 6 Vict. c. 35, sec. 188; Act 29 Vict. c. 36, sec. 8, Sch. D; *Müller v. Farie*, Nov. 29, 1878, 6 R. 270; *Colt-ness Company v. Solicitor of Inland Revenue*, Feb. 6, 1879, 6 R. 617.

At advising—

LORD PRESIDENT—The assessment in this case is laid upon the Highland Railway Company for the year ending 5th April 1884. But the manner in which the profits are calculated for the year with reference to which the assessment was made was by computation on the income of the previous year. This is the statement of the Commissioners in the case before us. In other words, the Commissioners proceed upon the third rule of No. 3 of Schedule A of the Income Tax Act, 5 and 6 Victoria. And therefore, as they themselves state, they laid on the tax on the profits of the year preceding, taking the words of the statute; or, as they express it, “by computation on the income of the previous year.” Now, that being so, we have no case before us under the more recent statute of 1866, the 29th of Victoria. We have no case under the eighth section of that Act; and this case seems to show that the Commissioners themselves acted as if that statute had never been passed. We are therefore to determine what is the proper amount to be stated as profit on the year preceding the year of assessment.

Now, the way in which the Highland Railway Company return the amount for assessment is this—they return the whole of the profits of the year preceding the year of assessment at £160,251. But from that they deduct loss on steamers—expenses £2673, less receipts £1506, leaving £1167 as a deduction. They also deduct depreciation on

steamers which were engaged in another part of their undertaking for the half-year to August 1882, but which after that were discontinued, and that depreciation they state at £440. So that they bring out in that way, by deducting these sums from the gross amount of their profits of £160,251, the amount of £158,644, which they return to the Commissioners as the profits of the year. The Special Commissioners contend that these deductions cannot be allowed, for this reason, that in the year for which the assessment is laid on—the year ending 5th April 1884—the company were not engaged in sea-carriage at all; in other words, they say the company had given up their business of carriers by sea and had left that in other hands. Accordingly it was contended that the undertaking for the proper year of assessment was no longer an undertaking consisting partly of sea-carriage and partly of land-carriage, and therefore that it is the profits of that limited undertaking, abstracting the sea-carriage altogether, that is to form the subject of assessment, and consequently that neither profit nor loss on the abandoned part of the business can be taken into account.

I think that proceeds upon a misunderstanding of the position of the Highland Railway Company. They were authorised by statute to engage in their business of sea-carrying, and although that power was not contained in their Act of Incorporation it was conferred upon them by a subsequent statute in 1877. And if it had not been conferred by that statute the railway company could not lawfully have pursued the business of carriers by sea at all. But from the time that under the powers of that statute they engaged in that business, it became a proper part of their undertaking, to use the language of the Railway Statutes. It was part of the business of the company, and their property was embarked in that business and their shareholders bore the profit and the loss of that business just as much as of any other part. Therefore, if a portion of the company's business becomes unprofitable, and is dropped either permanently or for a time, the effect of that is not to make the undertaking of the company something different from what it was. They may resume that traffic if they think fit; they may discontinue it if they do not find it paying; but the undertaking of the company—the business of the company—remains exactly what it was. Mr Lorimer argued as if this was like the case of a private trading company who abandoned another part of their business and resolved for the future to continue only in one line of trade. Well, if the partners of such a company enter into a deed of agreement with one another that their business is for the future to be limited to one branch of trade, that no doubt would change the nature of the undertaking. But we have nothing of the kind here. The company exists for the purpose of exercising as far as they think fit all the powers conferred by their special Acts just as much after the year 1884 as it did before. But it seems to me also an entire mistake to suppose that the company have really abandoned this branch of their business. I do not think they have. I think that under that agreement with Mr MacBrayne he is doing that part of their business for them as their deputy under certain conditions; and I have not the smallest doubt that the conditions imposed upon the company in

carrying on this business by the Special Act of 1877 are just as applicable to the steamboat traffic now carried on as to the steamboat traffic that was formerly carried on. I think if passengers or owners of goods which are transmitted by that means of communication were to complain of any of the conditions of the statute being violated, they would have a perfectly good case against the company. They would have nothing to say to Mr MacBrayne, because he was a mere deputy; but against the company they would have a very good ground of complaint if after being booked by the company to perform a journey, or to send goods from a point—it may be from the terminus at Perth—to some place which can be reached only by steamboat, the conditions of the statute should be neglected or violated. And it must be observed that the conditions of this Special Act are not confined to the conditions expressed in the Act itself, because part 4 of the Railway Clauses Act of 1863 is incorporated with and forms part of that Special Act; and there are a great many clauses and conditions in part 4 of the Act of 1863 for the protection of the public and public interests in regard to the carriage by railway companies of passengers and goods by means of steamboats. I think therefore that the year preceding the year of assessment having been taken as that upon the profits of which the assessment is to be made, the Commissioners were bound to take the profits of that year just as they actually stood in point of fact, whether any part of the business of that year has been discontinued in the subsequent year or not. I am therefore for altering the deliverance of the Commissioners and finding that the assessable amount of profit was £158,644.

LORD MURE—I am of the same opinion. In considering the words "computation of profits of the preceding year," these parties being, as your Lordship has explained, sea carriers under the Special Act of Parliament giving them power so to act, as well as a railway company, I think they have taken into computation the whole of their dealings by which profit and loss is brought out in the year immediately preceding that for which the assessment is to be laid on. The company framed their profit and loss account which they submitted to the surveyor on that footing, and I think they did so rightly.

LORD SHAND—The decision of this case I think turns on the question, whether in fact the running of steamers, or steam traffic, as it was carried on in the year of assessment, is to be regarded as part of the undertaking of the company. There are two questions to be determined. The first is to ascertain what was the undertaking or business of the company in the year of assessment, so as to see whether the running of steamers or steamer traffic really was within the undertaking. If it was not within the undertaking during that year, then the determination of the Commissioners was right. If, however, it was fairly within the undertaking, then I think it follows that the decision of the Commissioners must be reversed. I have come to be of opinion with your Lordship that the running of these steamers—the arrangements in connection with the steamer traffic in short—was within the undertaking. A clause of the Special Act of Parliament of this

company authorised them to purchase, hire, provide, charter, or employ steam and other vessels of every description, and to navigate and make use of the same, and convey and carry passengers, and so on. And it rather appears to me that, taking the broad meaning of the words of the special statute, it covers and includes the case in which the railway company makes an arrangement, as I think was done here with Mr MacBrayne, to carry on this traffic. Whether Mr MacBrayne is to be regarded as merely a deputy of the railway company in what he does, I think it fairly a question; at least I should carry it this length, that it is a joint arrangement by which he is to carry on the same traffic in connection with the working of the railway. But it really is the railway company making an arrangement for carrying on the same traffic. And when we turn to the general Act to which your Lordship has referred, very important consequences follow from that—I mean the Act of 1863. The words which introduce what is called equality of treatment among passengers and traders sending goods, in section 30 of the Act of 1863 are these—[*His Lordship here read sec. 30 of the Railway Clauses Act (26 and 27 Vict. cap. 92)*]—and I can scarcely doubt that these provisions of this General Act would apply in the case of an arrangement of this kind, made between the Highland Railway Company and another company or individual for the supply of steamer traffic in terms of the agreement we have before us. That being so, it results, in my opinion, that the steamer traffic or arrangement for supplying steamers is part of the undertaking of this company during the year of assessment, and if so, I see no reason, and indeed it is not maintained, that the profit or loss is not to be computed on the steamer traffic of the previous year. I am therefore of opinion with your Lordship that we ought not to adhere to the decision of the Commissioners, but should find that the company are entitled to the deductions which they claim in this case.

LORD ADAM—There is no doubt at all what the amount of the profits of the Highland Railway Company was in the year preceding the year of assessment; that is a matter about which there is no dispute. There is equally no doubt that the directions given by the Act of Parliament in this clause is to assess for the year of assessment on the profits of the concern for the year preceding. These two things would appear to be quite simple. But that is not what the Commissioners propose to do here. They propose to say, “We shall not assess on the profits of the preceding year, but we shall assess on something different from the profits of the preceding year, because we shall refuse to allow the sum of £1167, although that destroys the scale to which we are referred.” The ground on which they maintain that, as I understand it, is this, that the concern which earned the profits in the preceding year is not the same concern or undertaking which earned the profits in the year of assessment. If that is so, the first thing that suggests itself is that that would not entitle them to go back on a different scale of profits which the Act does not entitle them to take. But apart from that question, I am of opinion that it is not a different concern, and that the railway company is not a different

concern or undertaking this year. All they have done, assuming they have given up the steamboats altogether, is that they have ceased to draw profits, or to exercise certain powers which they might have exercised, but the concern or undertaking is the same in my humble opinion. But I further agree with your Lordship and Lord Shand that they have not retired from their business of steamboat traffic, because I think by that agreement they are exercising the powers given them by the Legislature by hiring steamers and still running traffic through the medium of MacBrayne. Therefore I have no hesitation in agreeing with your Lordship that the resolution of the Commissioners here ought to be reversed.

The Court reversed the decision of the Commissioners, and found that the amount of assessable profits of the appellants' company, being the profits of the year preceding the year of assessment, was £158,644.

Counsel for Highland Railway Company—Low—Patten. Agent—J. K. Lindsay, S.S.C.

Counsel for Income Tax Commissioners—Moncreiff—Lorimer. Agent—D. Crole, Solicitor for Inland Revenue.

Friday, November 13.

FIRST DIVISION.

[Lord Trayner, Ordinary.

HALDANE (WALLACE'S CURATOR) AND
ANOTHER *v.* WALLACE'S TRUSTEES.

Parent and Child—Marriage-Contract—Second Marriage, Reasonable Provision to Children of.

A father by his marriage-contract conveyed the fee of his whole estate to the children of the marriage. His wife having predeceased him, leaving children, he married again, having, in contemplation of the second marriage, bound himself by antenuptial contract to pay to “child or children of the said intended marriage, and their lawful issue, such a sum or capital amount as the means at his disposal shall enable him to provide or pay as aforesaid, regard being had always to the rights and interests of his children by his former marriage, and to the obligations incumbent on him by the contract of marriage entered into betwixt him and his former wife.” He died survived by issue of both marriages, and leaving a trust-disposition, the effect of which was that, after certain special legacies to the children of the first family, he divided his estate so that, taking into account funds coming to the children from other sources, the children of the first marriage, of whom there were three, would have in all about the same funds as the children of the second, of whom there were five. The children of the first marriage sought to have it found that they were entitled under the first contract of marriage to the whole funds he left at his death. *Held* that he was entitled, notwithstanding the obligation therein contained, to make