

For my part, I do not think it has been established that in a general and unlimited guarantee the usage of trade can be introduced for the purpose of interpreting its terms. Although a usage may exist in connection with a particular trade, such a general guarantee as we have in the present case cannot incorporate it. The guarantee does not bear that the goods are to be sold upon the usual credit. It does not express that, but it guarantees the price of all goods sold without reference to the period of credit. Most traders who carry on business must have many different dealings to which they assign different terms of credit. What would such a dealer's duty be in reference to a guarantee like the the present? Only this, that there should be nothing unreasonable in the terms which he allows to his customers in such transactions. That would be the only limit to be put upon such a guarantee as the present. If credit had been given for two years or for some such excessive period, I should probably have said that that was not within the contemplation of parties. But none of the bills are in that position. This dealer has been acting just as he was in use to do in the ordinary conduct of his business. It accordingly appears to me that such dealings fall within the terms of this limited guarantee.

If a person wishes to make particular terms when he grants a letter of guarantee, I think it his duty to make inquiry as to the course of dealing pursued, and if he is not satisfied with it after inquiry—if, for instance, he finds that more credit than he cares for is being given—then I think he ought to stipulate for such terms as he thinks requisite. But, so far as regards the bills for goods sold in the present case, I think they all fall within the letter of guarantee.

In regard to the bills for the money advances, I think there is no difference. If the guarantee had been granted to a dealer in money or to a banker or the like, I think there might have been a question whether it was not a condition that the money should have been advanced at call. But looking to the nature of the transaction and of the trade in question, it is idle to say that it could have been in the contemplation of the parties that credit for a reasonable time was not to be given. I am therefore clearly of opinion that the bills for cash advances fall equally within the guarantee, and that the interlocutor of the Lord Ordinary should be adhered to.

The Court adhered.

Counsel for the Reclaimer—The Lord Advocate—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondents—Sir C. Pearson—Dickson. Agent—Alexander Morison, S.S.C.

Wednesday, November 13.

FIRST DIVISION.

[Exchequer Cause.

THE EDINBURGH SOUTHERN CEMETERY COMPANY v. THE SOLICITOR OF INLAND REVENUE.

Revenue—Income-Tax—Receipts Applied to Redemption of Capital—Profits—Income-Tax Act (5 and 6 Vict. c. 35), Sched. A, No. 3, Rule 3.

As the land of a cemetery company became exhausted, they set aside a proportion of their receipts for rights of burial in the grounds, and applied it to the redemption of the capital expended in acquiring and preparing the ground. Held that such disposal of the fund did not alter its character as income, and being profits within the meaning of the Income-Tax Acts, it fell to be assessed under Schedule A, No. 3, rule 3, of 5 and 6 Vict. c. 35.

The Coltness Iron Company v. Black, 8 R. (H. of L.) 67, followed.

At a meeting of the Commissioners for General Purposes, acting under the Property and Income-Tax Acts for the county of Edinburgh held on 25th April 1888, The Edinburgh Southern Cemetery Company appealed against an assessment made on them on the sum of £2731, at 7d. in the pound, duty £79, 14s. 10d., being the amount of the profits from the cemetery estimated for the year ending 5th April 1888 under rule 6, No. 2, Schedule A, of the Act 5 and 6 Vict. cap. 35, and the rules applicable to the first and second cases of Schedule D, applied under authority of section 188 of the said Act, on the ground that a "portion of the balance shown on the profit and loss account upon which this company is assessed consists of realisation of stock or assets, and not divided or treated as profits, but applied in paying off a corresponding amount of the subscribed capital. The sum so set aside this year is £1202, 17s. 6d., and this forms the amount of the overcharge."

The Commissioners refused the appeal, and stated a case for the opinion of the Court of Exchequer, from which the following narrative is taken:—The Edinburgh Southern Cemetery Company, an incorporated joint-stock company, was formed in 1845 under a contract of copartnership. The 18th article of the contract provided—"That . . . it shall be in the power of the directors to sell and dispose of the use of pieces of ground for burial places, tombs, or graves therein to any person or persons who may desire to purchase the same at such prices as the directors may think proper to fix, and that either in perpetuity or with the exclusive use of burial or interment therein for a limited period." Article 19 provided—"The expenses of the original conveyances or grants by the company of the use of such pieces of ground for burial places, . . . as may be sold by

the directors, shall be paid for by the purchaser, . . . and every such conveyance . . . shall be good to vest in the person or persons in whose favour the same is granted, and his or their representatives, a right to the exclusive use of the piece of ground for a burial place, tomb, or grave therein described, either in perpetuity or for a limited period, as the case may be, and shall give and confer on him or them an interest to that extent in the trust created in the persons in whom the property of the cemetery shall be vested, but the said trustees shall not denude in their favour, nor confer upon them a feudal or real right by infeftment in the said pieces of ground, and the real or feudal right to the whole of the ground acquired or to be acquired by the company shall remain always vested in the said trustees or their successors in office for behoof of all concerned." Article 24 provided—"That the profits arising from fees for burials in pieces of ground which may have been sold for burial places or tombs, or for single interments in the unsold part of the cemetery or cemeteries, after deducting therefrom the charges for management, officers' salaries, and other expenses, shall be annually divided among the partners in proportion to their several shares, and the prices or sums received in consideration of the sale of ground for burial places, tombs, or graves shall be deposited in the bank on a separate account, and these prices, after paying therefrom any balance which may be due by the company for the purchase of the grounds acquired by them, or for the enclosing or laying out of the same, or for redeeming any feu-duty or ground-annual payable for the same, shall be either divided among the partners according to their interest in the company's stock as a bonus, or applied in extension of the company's grounds, or in opening a new cemetery or cemeteries."

In June 1845 ten acres of the estate of Grange were feued from Sir John Dick Lauder at a annual feu-duty of £30 per acre. The nominal capital of the company was £2000 divided into shares of £1 each, of which only £15,491 was issued, the whole of which was expended in the laying out of the ground, and in the erection of the necessary buildings and enclosing walls.

In 1852 the company purchased from the proprietor the superiority of 5½ acres of the ground feued for the sum of £4950, and in 1866 they purchased the superiority of the remaining 4½ acres for the sum of £4050. These purchases were made from the fund accumulated from the sale of the lairs in the cemetery. The company continued to maintain this fund by a yearly addition of a portion of the price of lairs, and after the addition of £1202, 17s. 6d. for the year ending Whitsunday 1887 it stood at £3810. By article 25 of the articles of contract the company was authorised to deal in its own shares, and by so doing the capital had been from time to time reduced, until at Whitsunday 1887 the reduced capital of the company amounted only to 9732 shares at £1. In July 1887 there was paid back

to the shareholders from the above-mentioned fund of £3810, by way of reduction of capital, 6s. 8d. per share on the 9732 shares, amounting to £3244, and so reducing the par value of each share from £1 to 13s. 4d. About 1½ acres of ground remained at the date of the present case to be disposed of for lairs.

The company's profit and loss account for the year ending 15th May 1887, on which the assessment of £2734 was based, showed "profit for 1886-87," £2734, 9s. 8d. :—

1.—Receipts.

Ground sold (<i>i.e.</i> , rights of burial sold)	£2,071	0	0
Fees for funerals	912	7	6
Fees for certificates, dressing grounds, &c.	365	18	7
Interest on invested money	207	10	11
Total,	£3,556	17	0

2.—Expenditure.

Management	£244	5	0
Wages	354	18	8
Repairs, &c	117	8	8
Public burdens, &c.	105	15	0
	822	7	4

Balance profits, £2,734 9 8

Applied thus—

1. To payment of dividends	£1,216	10	0
2. To fund for redemption of capital	1,202	17	6
3. To next year's account	315	2	2
	£2,734	9	8

Before the Commissioners the appellants claimed to be relieved of the tax on £1202, 17s. 6d., set apart for the redemption of capital, because to that extent, according to the best estimate they could make (counting the number of years they would have any ground to sell), the sums received for sales of lairs were the re-conversion of the capital originally invested in acquiring the ground back into its first form of cash capital, and could not in any sense be termed profits; and they argued that if no such allowance was granted they would be charged tax on realisation at cost price of their stock-in-trade.

The appellants explained that the use of the word "profit" in the profit and loss account, instead of the word "balance," was a verbal mistake arising from the use of a stereotyped form of balance-sheet; but maintained that the mode of disposing of said balance showed that they did not look upon the whole of it as profit. They also stated that they did not rest their case on the special sum of £1202, 17s. 6d., but desired the principle to be decided, and left the precise sum which was to be treated as realisation of capital to be afterwards adjusted.

The appellants further maintained (1) that they were not liable to be assessed under Schedule A, No. 2, rule 6 of 5

and 6 Vict. cap. 35, sec. 60, because that rule applied only "to profits arising from lands, tenements, hereditaments, or heritages not in the actual possession or occupation of the party to be charged," whereas the cemetery in question was in the actual possession or occupation of the appellants' company, the party to be charged. (2) That the price of lairs (i.e., exclusive right of burial in lairs) sold during the year was not profit arising from land, or received therefrom, within the meaning of said Schedule A, No. 2. Nor was it the annual value of lands, but, on the contrary, represented the capital value of certain rights therein sold to third parties, and did not fall to be assessed as profits or gains. (3) That the amount of:—

1. Fees for funerals, . . .	£912 7 6
and 2. Fees for dressing grounds, &c., . . .	365 18 7

Together, . . . £1,278 6 1

After deducting therefrom the necessary expenditure in earning the same, viz., expenses of management, wages, repairs, and public burdens, as above detailed, amounting to . . . 822 7 4

Leaving . . . £455 18 9

represented the annual value of the cemetery, being the profits received by the company from the occupation thereof. To this sum fell to be added, as assessable to income-tax, but properly under Schedule D, the interest or income from invested funds, styled "interest account, £207, 10s. 11d.," in the company's profit and loss account, making the full amount for the year liable to income-tax, £663, 9s. 8d. (4) If it should be held that the price of lairs sold during the year ought to be taken into account in ascertaining the annual value of the cemetery or the profits of the company, then it was maintained that the sum set apart for "redemption of capital," viz., £1202, 7s. 6d., fell to be deducted from the said price as representing on a reasonable computation the portion of the company's capital thereby converted from lands or rights therein into cash.

The Surveyor of Taxes stated that the printed accounts of the company as at May 1887 showed a net profit of £2734, 9s. 8d., whereof £1202, 17s. 6d. had been treated by the company not as profits, but had been applied by them to the paying off of a corresponding amount of the subscribed capital. He contended that for income-tax purposes he had no concern with the application of the profits but only with the amount earned, and that the circumstance that the sums received from the sales of right of burial in the cemetery was put aside to form a fund for the purchase of ground or the redemption of feu-duties, as the payment of a bonus did not exempt it from income-tax. He further contended that all that the company could sell was the right of burial, and that from such sales they had derived great profit, and had been able materially to reduce their

capital. The account showed from ground sold £2071, and the statements showed that the company had expended £9000 more than the subscribed capital of £15,491, in all £24,491, which sum had been reduced to £9732, with assets consisting of money invested and the cemetery itself, of value in all equal to if not in excess of the original subscribed capital of £15,491, still capable of yielding a fair dividend. He referred to case No. 49, *Coltness Iron Company v. Black*, February 6, 1879, 6 R. 617, 6 R. (H. of L.) 123, and January 7, 1881, 8 R. 351, 8 R. (H. of L.) 67, as to capital expended and exhausted in the conduct of the business, and as to the exhaustion of capital in the purchase of annuities, and he argued that the statute takes no heed of exhausted capital, but requires the full balance without any deduction except for working expenses. He referred also to case No. 87, *Sowerby v. The Harbour Commissioners of King's Lynn*, and to case No. 66, *Paddington Burial Board v. Commissioners of Inland Revenue*. The appellants were charged under the proper rule, because having sold the right of use of the ground they were "not in the actual occupation thereof."

Schedule A, rule 1, of 5 and 6 Vict. cap. 35 (Property and Income-Tax Act 1842), provides that the annual value of land . . . charged under Schedule A . . . if they are not let at rack-rent, shall be understood to be the rack-rent at which the same are worth to be let by the year, which rule shall be construed to extend to all lands . . . capable of actual occupation of whatever nature. . . .

Schedule A, No. 2, rule 6, provides—"Of all other profits arising from lands . . . not in the actual possession or occupation of the party to be charged, and not before enumerated on a fair and just average of such number of years as the said Commissioners shall judge proper."

Schedule A, No. 3, rule 3,—“Of ironworks, gasworks, and salt springs, . . . and other concerns of the like nature from or arising out of any lands, . . . on the profits of the year preceding.”

Argued for the Cemetery Company—The assessment had been laid on under the wrong section of the statute; the company was the party liable to be charged, and the assessment should have been made under Schedule A, rule 1. The annual value of the cemetery was just the rent which a hypothetical tenant might be supposed to give for the ground, and this was the proper mode of taxation, whereas the charge complained of was made on the full turn-over of the company—*Middleton v. Lord Advocate*, March 16, 1876, 3 R. 599. The true position of the company was that of "occupiers;" they were in occupation of the land—*Rev. v. St Mary Abbots*, 1840, 12 Adolph. & Ellis, 824—and in estimating profits liable to taxation the prime cost of the land, along with any sums expended on improvements, must be set aside, as it required these too to equip the subjects which made the profit. What the company parted with to the public was a more or less limited right of

interment, and the price given therefor resembled a *grassum*—*Gillot & Watt v. Colquhoun*, 2 Tax Cases, 76. A cemetery differed from a mine in this respect, that in the latter the subject was consumed in the use, whereas in the former the subject remained and continued to yield a small profit in dressing and burial fees. In any event, the assessment was bad under rule 6, Schedule A, which only applied in cases where the profits arose from lands not in the occupation of the party to be charged.

Argued for the Surveyor of Taxes—If the assessment had been improperly laid under Schedule A, No. 2, rule 6, in consequence of its being held that the company was in the occupation of the ground, then it fell to be made under No. 3, rule 3, as a cemetery company was an undertaking “of the like nature” of “ironworks, gasworks, mines,” &c., the assessment on which fell to be made on the profits of the year preceding. This company earned its profits in various ways, (1) by the sale of the lairs, (2) by the dressing of the ground, and (3) by fees for funerals. In its accounts these were all slumped together and called profits. With the mode in which these profits were distributed the Surveyor had nothing to do; all he had to deal with was the total profit, and the assessment which had to be imposed thereon. The assessment was good though it might have been imposed under a wrong sub-section—*The Coltness Iron Company v. Black*, *supra*; *Miller v. Farie*, November 29, 1878, 6 R. 270.

At advising—

LORD PRESIDENT—The appellants are an unincorporated joint-stock company which was formed about the year 1845 under a contract of copartnership. The object is sufficiently indicated by the name of the company itself, and for the purpose of creating a cemetery they had feued some 10 acres of ground. They do not appear to have paid any price down for the ground, but the value of the ground was in the shape of a feu-duty only. The object of the company is expressed to be to enclose and lay out the ground, and, if thought expedient, to feu or purchase additional ground, to enclose and lay out the ground acquired and to be acquired in a superior and ornamental manner as places for interment; to dispose of the ground for burial-places, tombs, or graves to individuals or families at proper and moderate prices, and to provide chapels and vaults or other buildings. The ground was vested in trustees in trust for the whole partners of the company present or to come, and also for those who are or may become proprietors of burial-places, tombs, or graves in the cemetery.

The sort of right which the parties purchasing rights of burial from the company were to have is expressed in the 18th article of the contract—“That . . . it shall be in the power of the directors to sell and dispose of the use of pieces of ground for burial-places, tombs, or graves therein to any person or persons who may desire to purchase the same at such prices as the directors may think proper to fix,

and that either in perpetuity or with the exclusive use of burial or interment therein for a limited period.” The conveyances of portions of ground the use of which was to be so conveyed were declared to vest in the person or persons in whose favour the same is granted, and his or their representatives—“a right to the exclusive use of the piece of ground for a burial-place, tomb, or grave therein described either in perpetuity or for a limited period, as the case may be, and shall give and confer on him or them an interest to that extent in the trust created in the persons in whom the property of the Cemetery shall be vested, but the said trustees shall not denude in their favour nor confer upon them a feudal or real right by infestment in the said pieces of ground, and the real or feudal right to the whole of the ground acquired or to be acquired by the company shall remain always vested in the said trustees or their successors in office for behoof of all concerned.” Then the 24th article provides—“That the profits arising from fees for burials in pieces of ground which may have been sold for burial places or tombs, or for single interments in the unsold part of the cemetery or cemeteries after deducting therefrom the charges for management, officers’ salaries, and other expenses, shall be annually divided among the partners in proportion to their several shares, and the prices or sums received in consideration of the sale of ground for burial places, tombs, or graves shall be deposited in the bank, on a separate account, and these prices after paying therefrom any balance which may be due by the company for the purchase of grounds acquired by them, or for the enclosing or laying-out of the same, or for redeeming any feu-duty or ground annual payable for the same, shall be either divided among the partners according to their interest in the company’s stock, as a bonus, or applied in extension of the company’s grounds, or in opening a new cemetery or cemeteries,” and so on.

The capital stock of the company as issued was £15,491, and that was paid up and was expended in laying-out of the grounds, in building of walls enclosing the cemetery, also the superintendent’s house, vaults, and a number of other things of that kind, and so the concern was started. Now, it certainly has turned out to be a very prosperous concern, because the first thing they did—it does not exactly appear when—but that is of no consequence—was that they had so much money derived from their different sources of income, that they were enabled very soon to pay off the feu-duty upon the ground at a price of £9000, and it is stated in the case that that was taken from a fund accumulated from the sale of lairs in the cemetery. It is stated that the said fund is still kept up by a yearly addition thereto of a certain portion of the sums received during the year from the sales of lairs, and after adding £1202, 17s. 6d. for the year ending Whitsunday 1887, the fund now stands at £3810. It is then stated that the capital

of the company has been from time to time reduced by the company purchasing shares from members in terms of the 25th article of the contract, and at the year ending Whitsunday 1887, the reduced capital, that is to say reduced by these means, amounted to 9732 shares at £1—£1 being paid up—that is, a reduction from the original £15,491 by means of the purchase of shares. Then it is stated that from the said fund of £3810—that is the fund accumulated from the price of lairs given out by the company—the directors paid back to the shareholders by way of reduction of capital 6s. 8d. per share on the 9732 shares, to which the capital is now reduced, amounting to the sum of £3244, leaving £566 at the credit of the fund, and thus reducing the par value of each share from £1 to 13s. 4d. So it thus appears that the accumulation of moneys received for the giving out of lairs has enabled the company first of all to acquire the superiority of the ground which they occupy at a price of £9000, then to buy out a number of shareholders upon favourable terms apparently, and so reduce the capital belonging to the existing shareholders to £9732, and finally to pay back to the shareholders a sum of 6s. 8d., and so reducing the amount of the paid-up capital to 13s. 4d. instead of £1.

All that is perfectly legitimate and proper business under their contract, and that it is very successful nobody can doubt, and as in a question between the shareholders of the company themselves, and anybody interested in the company, nothing could be more satisfactory.

But it becomes necessary for the present purpose to inquire a little into what all these operations mean. The receipts for lairs given out by the company come into the hands of the company periodically. Apparently every year from the formation of the company downward there seems to have been what I shall venture to call income from that source, because the income of the year is really nothing more than what comes in in the year; the two things are convertible. Whether that is income assessable to income-tax I shall presently inquire, but that it is income in the literal sense of the term there can be no doubt, because it comes in year by year as the lairs are given out, and in the year 1887 the amount that came into the hands of the directors from this source was £2071, and the question comes to be whether that £2071 is assessable income within the meaning of the Income-tax Acts. The alternative is that it must be capital. It must be either income or capital. Now, the provision of the contract is that this income may be dealt with in one of two ways. It may be either divided between the shareholders as a bonus, or it may be placed in what we may call a reserve fund for the purpose of increasing the capital of the company and enabling them to extend their adventure, and thus in the progress of the company it may be added to the capital. But that does not affect the question whether it was not in its origin, and when

it came into the hands of the directors, income and not capital.

Now, it appears to me that the way in which the company have kept their books brings this out very clearly. I do not mean to say they are in the least degree bound by anything in their books. Just as little are they bound by that as the Income-tax Commissioners are bound to take the balance-sheet of the company as the true measure of the income. But what they do with their annual receipts is this—They put in a sum of £2071 as for ground sold, so much for fees for funerals, so much for certificates, and so forth, the total receipts being £3556. The expenses of management are £822, and the balance of income over expenditure is thus £2734, and the way in which they dispose of it is this—They pay dividend to the extent of £1216, 10s., they send to the fund for redemption of capital, as it is called, £1202, and they carry to next year's account £315. That is the mode in which they dispose of the income or profits for the year, and it seems to me that there is no possibility of making a distinction in principle between those three heads. The first head is payment of dividend, which is the proper mode of appropriating—at least one proper mode of appropriating—profits or income, and they carry a certain balance to next year's account—that is to say, to the credit of profit and loss for next year. That is a proper mode of disposing of the balance of profits or of income; and the other portion which is sent to the fund for redemption of capital means nothing more than this, that that portion of income not being required for any other purpose, or the company thinking it desirable they should not divide that part of their profits, but rather save it for another purpose, they send it to this reserve fund. But that disposing of it in this way does not alter its character, and the question still recurs, Is not this under the provisions of the Income-tax Acts assessable income?

If this question arose for the first time, or at least if the question of principle which is involved in this case arose for the first time, I should consider it as involving very important considerations indeed, and requiring very deliberate treatment. But it seems to me that the whole matter is settled by authority. There is a series of cases relating to the mode of assessing profits or income derived from mines which, I think, has established a principle that is plainly applicable to the present case. The first of these cases was the case of *Addie & Sons*, to which it is not necessary particularly to refer, but it was the first of a series of cases which has now been fully established as making a rule for the class of cases to which it belongs. The second was the case of *Miller v. Farie*, in which an assessment was made upon output of mines, upon the principle of taking the whole output *minus* the expenses of management without consideration of the gradual exhaustion of the subject, and so in the end the loss of the whole capital invested.

There arose an occasion for making a general rule for such assessments, and I think the case of *Miller v. Farie*, even if it had stood alone, would have been sufficient for the decision of this case. But I do not stop to dwell upon the details of that case, because I pass on to what is a much more important case, and that is the case of the *Coltness Iron Company*, which I think has now finally settled the meaning and intention of the Income-Tax Acts in regard to incomes of this description.

I need not go over the circumstances of that case, for they are very familiar. The great demand which was made upon the part of the Coltness Iron Company was that they should be allowed a deduction in respect of the constantly recurring expense of making new pits as being a proper deduction from their income, and that was disallowed. The judgment of this Court was delivered by myself on the 7th of June 1881, and as embodying the view of the whole Court I take leave to read one passage which I think is of very great importance to the decision of the present case—

The general principle of the property and income tax to which effect is given by the statute is that everything of the nature of income shall be assessed, from what source soever it may be derived, whether from invested capital or from skill and labour, or from a combination of both, and whether temporary or permanent, steady or fluctuating, precarious or secure. Nor does it make any difference on the incidence of the tax that the income has been created by the sinking of the capital, as in the case of the purchase of annuities, instead of being merely the natural annual product of an invested sum which remains unconsumed and undiminished by the consumption of the income which it yields." And in another passage, following after a short interval, there occurs this—"The statute refuses to take an ordinary balance-sheet, or the net profits thereby ascertained, as the measure of the assessment, and requires the full balance of profit without allowing any deduction except for working expenses, and without regard to the state of the capital account or to the amount of the capital employed in the concern, or sunk, or exhausted, or withdrawn." Now, this has been carried to the Court of last resort, and the judgment has been affirmed, and I think therefore the principle announced in that judgment must now be held as settled law, and that that is applicable to the present case I think there can be little difficulty. The circumstance that the payments for the use of these lairs are occasional, and not like rent arising every year the same, is certainly worth noting, and the circumstance that these payments do not belong to capital makes it clear that they are income within the description of the Income-Tax Acts, and therefore I am of opinion that the charge made by the Revenue officer here is a perfectly good charge.

I think, however, that he has made a slight mistake in the part of the Act under which the charge has been made. He makes his charge under Schedule A—rule 6, No. 2, of

Schedule A. Now, in that rule the assessment is to be made on all other profits arising from lands, tenements, hereditaments, or heritages not in the actual possession or occupation of the party to be charged, and it at once occurs to one that that description does not suit the position of the Cemetery Company, because it is impossible to dispute that they through their trustees and directors are in the actual possession and occupation of the cemetery. The objection, therefore, in that respect is unanswerable, and indeed, the counsel for the Crown have not attempted to make an answer. But it is not necessary for that reason absolutely to discharge this assessment altogether and send the parties back to begin *de novo*. It is sufficient, I apprehend, if we instruct the Surveyor and the Income-Tax Commissioners under what rule and what number of Schedule A this case should be brought. Now, No. 3 contains rules for assessing the lands, tenements, hereditaments, and heritages hereinafter mentioned which are not to be charged according to the preceding general rules; and the third rule in No. 3 is—"The assessment of iron-works, gas-works, salt springs," and so forth. I need not read the whole of these details, but it appears to me that the present Cemetery Company falls very fairly within the words "other concerns of the like nature," as occurring in that rule, and therefore the charge should be made under No. 3 of Schedule A, rule 3. If your Lordships agree with me in the judgment I have arrived at, we can give an instruction to the Commissioners to enable them to carry this into effect.

LORD SHAND—I have come to be of the same opinion, and without any difficulty. As your Lordship has in the latter part of your opinion pointed out, the charge which was originally made here in levying the income-tax was based upon rule 6 of No. 2, Schedule A, of the Act 5 and 6 Vict., and when the objection was taken that that rule had no application to cases where the person charged was in the occupation of the heritable subject, the Surveyor's reply was—"That they were so liable, because having sold the right of use of the grounds for burials, they were 'not in the actual occupation thereof.'" In that view as so presented I cannot agree, and as your Lordship has explained, the counsel for the respondents in this case have practically abandoned it. It is quite true that the Cemetery Company have given over the use—which perhaps formed an exclusive use—of each of the different lairs with which they parted to other persons, who have a right to the use of the lairs so given over; but nothing has occurred to take the Cemetery Company as a company out of the occupation of their cemetery as a whole, including the ground of these lairs. They are in the occupation of it, with a right to others to use the different lairs that have been given off. As they are in the occupation of the cemetery as a whole it appears to me that the particular head of Schedule A, under which the assessment was laid on,

and the 6th rule of that head, has no application. But I agree with your Lordship that the assessment is right, and that it can be sustained under the immediately succeeding number—I mean No. 3—and under the rule to which your Lordship has referred, rule 3 of that head, applying to various works carried on upon the property belonging to the person assessed, and other concerns of the like nature from and arising out of any lands, tenements, hereditaments, or heritages, and so on. At first sight, of course, the notion that a cemetery company is a concern of the like nature with any of the others mentioned is a little startling, but the true solution of that question is to be found in this, that all of these different concerns relate to companies which, having purchased or acquired land, remain in the occupation and use of that land themselves, and are using it for the purpose of some trade or business whereby they acquire profits. If any company has that feature in common with the ironworks and other works that are enumerated under rule 3 of No. 3 of the statute, then I think it falls to be assessed in terms of that rule.

Taking that to be so, we find that this company in its origin paid a considerable sum for the ground which they occupied, and also a large sum in laying-out that ground for the purpose of making a cemetery, and so earning their profit. The price paid may be stated at £9000 odds. The ground was not bought as for a capital sum, but there was an obligation undertaken to pay large feu-duties, and these have been redeemed at £9000, and it may be taken practically that they therefore paid £9000 for the ground. In addition to that they laid out £15,490 in preparing it for the use to which it was ultimately put, so that in all there has been a capital expended of £24,490.

Now, I think it may be quite right that as the years have been going on, and the land which was the source of profit of this company was getting gradually exhausted, as a mercantile concern they should be applying portions of the money which they were receiving for the exclusive use of that ground to the redemption of their capital. Their original stock of ground, which was to be the source of their profit, was gradually disappearing, and they were eating into what may be called their capital year by year, and it may be quite reasonable and proper that income-tax should not be levied upon money which is being laid aside by a company or applied by a company to redeem the capital in such a situation. The balance-sheet is quite in accordance with what a trader in such circumstances would do. But it is a very different question that is raised here, as to whether—though that may be a very proper operation in a trader's balance-sheet—the sums which are received, and which are proposed to be applied to redemption of capital, can be properly regarded as profits under the Income-tax Acts. Upon that question I think the case of the *Coltness Iron Company* is perfectly distinct, and has settled the very point we are now dealing with.

The profits in a proper trader's balance are a very different thing from profits as these have been defined under the provisions of the statute. As your Lordship pointed out in the case of the *Coltness Iron Company*, there are many sums which are chargeable with income-tax, though I think they are not strictly profits in a trader's sense, and the quotation your Lordship has made from your own opinion in the case of the *Coltness Company* gives perhaps the best illustration of that. I see that in the House of Lords Lord Penzance puts the matter in this way. After having first said, as I have now said, that there is much which a trader may treat as profits which is not to be so treated under the Income-tax Acts, he says—"If a man spends £100 in the purchase of goods, and sells them for £140, his profit is not £140, but only £40;" and then he goes on to say—"But when such a matter as that is brought under the provisions of this Act for taxation a wide difference between it and the present case is at once apparent, for the merchant or trader is taxed in such a case not in respect of any property which he possesses and of which he enjoys the fruits, but only upon the profits which he realises annually in his trade, whereas the owner of a mine is taxed in respect of that mine as a fixed and realised property which belongs to him and from which he reaps an annual benefit, and the words 'annual value or profit received from that property' are introduced into the statute not as a subject of taxation but only as the measure of the taxation to which the property shall be subjected."

And so I think that passage of his Lordship's opinion applied directly to the case with which we are here dealing, of the annual receipts by this company from its own heritable property. These annual receipts may not be in every sense profits which the company can look to as such, but they are certainly profits within the meaning of the schedule and rule of the Income-Tax Act to which your Lordship has referred, and I am therefore of opinion that although this assessment has not been laid on under the proper rule, it has been properly imposed under the subsequent rule.

LORD ADAM concurred.

LORD M'LAREN—I agree that the income tax payable by the *Edinburgh Cemetery Company* is to be ascertained by means of the 3rd rule of head 3 in the rules applicable to Schedule A.

Rule 3 enumerates a considerable number of uses of land or of works connected with land, which are recognised as subjecting the heritable estate to taxation on the basis of profits instead of on rental; and the enumeration concludes with general words descriptive of things *ejusdem generis*. We must be careful not to give too wide an extension to general words accompanying an enumeration; and in this case I should not be disposed to hold that any unnamed business or trade carried on by the use of land would fall under rule 3, if it were

possible by fair construction to bring it within rules 1 or 2, which relate to heritable estate which is either let or is occupied for purposes for which a rent would be a proper equivalent.

It is certainly not sufficient to bring a particular use of land within the scope of rule 3 that the proprietor of the land is using it in connection with his trade or for purposes of trade, because in such cases it is generally possible to separate the income into two parts, the one representing the rent or annual value of the heritable property, and the other representing the commercial profit. Where this can be done, the proper mode of assessing seems to me to assess under Schedule A in respect of annual value, and also under Schedule D for the commercial profits of the business or manufacture carried on within the heritable subjects.

But there are cases where it is very difficult to separate the income of a proprietor into rental and commercial profits. Rule 3 appears to have been devised to meet such cases, though it is proper to observe that the enumeration also includes words of a description in which it seems to be quite possible to make such a separation into income assessable under Schedule D. Thus, in the case of canals, it does not seem practicable to divide the rates or tolls levied from passing vessels into two parts, or to determine how much of these is to be taken as representing the commercial profits of the undertaking, and how much is the equivalent of the use of the soil. This in the case of canals would be nearly as difficult a problem as that of separating the "unearned increment" in the value of land from the increment which is the result of the application of capital to its improvement.

In the case of gasworks, which is another of the enumerated cases, it would not be so difficult to separate rent from commercial profits; and for other purposes such a separation has been made. I shall however not dwell further on these specialities, but state at once my opinion that according to the constitution of the Cemetery Company there is no separable part of its income which is capable of being represented as rental. The income of the company (unless to an inconsiderable extent) is neither derived from the location nor from the occupation of the land; but from the sales of the perpetual right of sepulture in specified portions of the ground of the cemetery. The ground is however in the occupation of the company through its trustees. That the income derived by the company from the conversion of the land to the purposes of sepulture is assessable has not been questioned; the only question is whether it is assessable under rule 3 (rules 1 and 2 being inapplicable), or whether it should be regarded as of the nature of ordinary commercial profit, and therefore assessable under Schedule D. The question is of no pecuniary consequence, because whichever view be taken the criterion of assessable income will be the same, and there is only the element of a three years' average which

might to some small extent affect the result. It is necessary however that we should find under which of the schedules the assessment falls to be made. I conceive that the assessment falls under Schedule A, because the profit of the shareholders is derived almost entirely from the sale of the use of land, and not from a complex undertaking in which the capital consists to a considerable extent of moveable estate.

In the present case the capital of the company (about £15,000) was expended in enclosing and laying out the grounds of a cemetery, building a superintendent's house, &c.; and the savings of the company have also been invested in heritable estate, viz., in purchasing the right of superiority of the property which they had originally feued. Apparently the moveable property or plant of the concern is of no more importance or value than the property of the ploughs and harrows used by a landed proprietor who farms his own land. It appears to me that the income of this company is an income derived from a trade which is carried on by the use of land, and as such falling to be assessed under the third rule of head 3 applicable to Section A.

That being so, it follows from the principles laid down in the cases of *Miller v. Farie*, and the *Coltness Iron Company v. Black*, that the company is not entitled in ascertaining profits to deduct a sum for the replacement of capital expended, or in any other way to found on the expenditure of capital in laying-out its property for the purpose of diminishing the assessable income of the company. That there is a certain equity in the view maintained by the company need not be contested, but the Income-Tax Acts are not based on a strictly equitable view of the incidence of taxation. Their principle rather is that everyone shall contribute to the necessities of the State in proportion to the income of which he has the immediate command, without any consideration of the true character of that income, or whether it is derived from the annual return of the invested capital, or from the expenditure of the capital itself.

In accordance with the previous decisions, I think it must be held that the proceeds of the sales of the right of sepulture during the year are income of that year, and as such are assessable for income-tax, under Schedule A, without any allowance being made for previous expenditure in improving the property and bringing it into the condition of an income-producing subject.

The Court pronounced the following interlocutor:—

"Remit to the Commissioners with this instruction—that the assessment ought to have been made, not under No. 2 of Schedule A, rule 6, but under No. 3 of Schedule A, rule 3."

Counsel for the Appellants—Lorimer. Agents—Watt & Anderson, S.S.C.

Counsel for the Crown—Sol.-Gen. Darling, Q.C.—Young. Agent—D. Crole, Solicitor of Inland Revenue.