

nary's interlocutor and assoilzie the defenders.

LORD ADAM—I am of the same opinion. The pursuer and defenders entered into a contract for the purchase of a certain ground annual. When the titles came to be examined an objection appeared on the face of them. It was not incurable, but still it was an objection. Now, parties being willing to complete such a contract may come into Court to have it decided whether the title offered by the seller is a good one or not, with the view of having something further done should it be found insufficient, but that is not the position of parties here. The pursuer, when the objection was pointed out to him, might have come forward and said, "I propose to do so and so, but if the Court find that it is not sufficient, I will do what may be found necessary." The pursuer's position was quite different. He was not in a position to rectify the title, because the heir was amissing. He said what he was prepared to do, and that that was the only thing he would do, and then matters came to an issue. The purchasers pointed out the mistake and what would satisfy them, but they said that failing this being done they would cancel the bargain. This was on 3rd May. The seller's agents replied on 9th May that they would not do what was asked, and that the only thing they would do was to give a letter from the agent of Mr Henry's representatives, but that beyond that they could not go.

The parties accordingly came to an issue upon whether the position taken up by the seller was or was not defensible, and upon nothing else. The correspondence shows that the seller had stated an ultimatum, and I think the purchaser was right in refusing that final offer, and was entitled to resile from the bargain.

LORD KINNEAR—I am of the same opinion. I think that there is no question in this case as to whether time was of the essence of the contract or not, or whether the pursuer had lost his bargain by delay in performance of his part of the contract. That is not the true nature of the question between the parties.

When a contract of purchase and sale is to be carried into effect, if the purchaser objects to the title as defective, and it turns out that although defective it may be made good at some expense of time and money, then it may be that any delay in performing the contract which may be caused by the controversy will not dissolve the contract or deprive the seller of his bargain.

But that is not the nature of the objection. The objection, although it has since turned out to be curable, was not known to the seller to be curable when the time for performance of the contract arrived, and therefore he raised no question as to the expense of making good the title. He intimated to the purchaser in perfectly plain and peremptory language that he proposed to enforce the contract although the title was defective; he intimated that

the only thing he would do towards clearing it would be to give the purchaser a letter on certain terms. There can be no question that the title so offered was insufficient. But at the same time it is clear that the position of the seller's agents was not adopted from an unreasonable or erroneous view of their client's obligation, but simply because they could not do more. They did not then know of the existence of the representative of Mr Henry, and accordingly declined to bring an action against him. But then it was candidly admitted by Mr Johnston that he could not maintain that the offer in the seller's letter of 9th May was an offer which the buyer was bound to accept. That being so, there was plain intimation by the seller that he was not ready or able to perform the contract. By his own writing he put himself in breach of his contract, and gave the buyer a right to say, "If that is all you will do, I cannot accept your terms and the contract is off."

I am of opinion that the bargain was at an end, and that it is too late to set up an answer to the purchasers' objection that the seller has now discovered that the defect may be remedied.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor, sustained the second plea for the defenders, and assoilzied them from the conclusions of the summons.

Counsel for the Pursuer and Respondent—H. Johnston—G. W. Burnet. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Reclaimers—Dean of Faculty, Sir Charles Pearson, Q.C.—Constable. Agents—Party.

Tuesday, December 12.

FIRST DIVISION.

[Court of Exchequer.

SCOTTISH INVESTMENT TRUST COMPANY, LIMITED v. INLAND REVENUE.

Revenue—Income-Tax—Profits—Capital and Income—Profits on Realisation of Investments applied to Write Down Depreciation in Book Value of Capital.

An investment company, one of whose objects was "to vary the investments of the company," wrote a sum, being "net profits on sales of securities during the year," against depreciation in the book value of their other investments, and claimed that this sum was not liable to assessment for income-tax as being truly capital. They maintained that varying their investments was incidental to but not one of the real objects of the company, and that any profit derived therefrom was not divisible among the shareholders, but

went to equalise any loss on the capital, which was to be treated as a whole.

Held that the case was ruled by that of *The Northern Assurance Company v. Inland Revenue*, February 8, 1889, 16 R. 461; that the sum in question was truly profits, and as such subject to assessment for income-tax, and that its application by the company was immaterial.

The Scottish Investment Trust Company, Limited, was established in 1887 with the object, as stated in the prospectus, of applying the principle of co-operation to the investment of money, so that investors may, by uniting their means, spread their investments over a wide field. The objects of the company, as stated in the 3rd article of the memorandum of association were, *inter alia*—(a) To raise money by share capital, on such terms and conditions as may be thought desirable, and invest the amount thereof in any of the investments following. . . . (b) To borrow or raise money by the issue or sale of any bonds, mortgages, debentures, or debenture stock of the company, . . . and to invest any money so raised. . . . (c) To acquire any such investments as aforesaid by original subscription, tender, or otherwise. . . . and to vary the investments of the company, and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the company. . . . (k) To do all such other things as are incidental or conducive to the attainment of the above objects.

In the 5th annual report to the shareholders for the year ending 1st November 1892, it was stated that

“The book value of the investments has been written down by the sum of £42,138 17 3
Thus: As resolved at last annual general meeting, £40,000 0 0
Net profits on sales of securities during the year, 2,138 17 3
————— 42,138 17 3”

The Commissioners for the General Purposes of the Income-Tax Acts for the county of Edinburgh made an assessment on the company under Schedule D of said Acts on the above sum of £2138, 17s. 3d., but at the request of the company, who objected to the assessment, stated a case for the Court of Exchequer, in which, after setting forth the establishment and objects of the company, they went on to say—“On behalf of the company it was contended (1) that the profits on sales having been properly charged to capital account, and not having entered the income account of the company, are not liable to income-tax. (2) That the business of this company is to invest the capital of the company in different bonds and stocks with the object of averaging risks, and to divide the dividends and interest received. The income of the company is derived from the dividends and interests of the company's investments. The company does not consider it part of its business to buy and sell stocks and shares with the view of making a profit, and has never divided such profits among

its shareholders. (3) In the year in which the tax is charged, the capital account of the company has had greater losses than profits, and the permanent loss on the capital account during the year has been considerable. (4) The directors of a limited company are entitled where there has in their opinion been a permanent depreciation in value of the capital of the company to treat the increment of value on some of their capital as a set-off against the depreciation in value of other capital assets, so as to keep the capital value of their whole assets up to its proper standard, by retaining such profits in the capital account and not carrying them to revenue account. (5) In the case of the *Northern Assurance Company v. Russell*, cited for the *Inland Revenue*, the facts were entirely different from the present case. In that case the profits on sales were credited to revenue and divided as dividend. In the present case it has been necessary to retain such profits in the capital account to meet permanent depreciation of investments.

“The Surveyor of Taxes, Mr R. S. Forbes, on the other hand, contended that (as appears from the annual reports) the company made a practice of realising securities, and such sales were obviously part of its business, and the balance of gain made fell to be reckoned among its profit. He referred to the decision of the Judges in the case of the *Northern Assurance Company v. Russell*, February 8, 1889 (No. 122 of Tax Cases), that ‘Where the gain is made by the company (within the year of assessment, or the three years prescribed by the Income-Tax Act, Schedule D), by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the company.’ He did not dispute that loss on sales would have been a deduction from profit, but he pointed out that the sum now in question was ‘net profits.’ He maintained that, it having been admitted that as a matter of fact the profits were made, the mere mode of informing the shareholders of it—whether by putting the amount into the revenue account (as was done for year to 1st November 1891), or by mentioning it only in the report, was immaterial to assessment; further, that the application of realised profits to compensate for writing down ‘book value’ of investments of the capital of the company did not exempt such profits from assessment under the Income-Tax Acts.

“We, the Commissioners, being of opinion (1) that the net profits on sales of securities during the year fell to be reckoned among the profits and gains of the company, irrespective of the manner of book-keeping, and (2) that writing such profits against reduction of ‘book value’ of securities held by the company did not afford a ground of relief, refused the appeal.

“Whereupon the appellant expressed dissatisfaction with our decision as being erroneous in point of law, and craved that a case might be stated for the opinion of the Court of Exchequer, according to

Statute 43 and 44 Vict. cap. 19, and which we have stated and signed accordingly.”

The questions for the opinion of the Court are—“(1) Whether the net gain made by the company during the year, by realising investments at larger prices than were paid for them, falls to be reckoned among the profits and gains of the company for assessment under the Income-Tax Acts? (2) Whether the fact that such profits and gains have been written against depreciation in book value of investments held by the company, as part of its capital, is a ground for relief from such assessment?”

Argued for the company—The Commissioners of Inland Revenue had gone beyond their sphere, and had encroached upon capital. The sum in question was capital not income. The cases relied on by the Inland Revenue only applied if it was found to be income. In the case of the *Northern Assurance* the directors had put themselves out of Court by treating the sum in question as income. In the *Edinburgh Cemetery Company's* case two considerations were present, neither of which was here—the profits in question were the ordinary profits of the company, and they had been devoted to income purposes. The sum here was not available for income purposes such as payment of dividend. The power of varying investments was auxiliary to the objects of the company, but was not itself an object. Speculating on the rise and fall of stocks was no part of the company's business. The inducement to join the company was that there was a large capital spread over various investments. They were entitled to put a profit accruing from a realisation of part of their capital against depreciation in the rest of their capital, and that was all that had been done here.

Argued for the Inland Revenue — The company's own words were fatal to their case. The sum in question was “net profits,” and was subject to assessment for income-tax. The destination or application of that sum was immaterial. It was only made capital artificially by the company to set off against a merely presumed depreciation. By the memorandum of association varying investments was one of the ways, whether a principal way or not, by which this company proposed to make profits. The case was ruled by the *Northern Assurance Company, &c. v. Inland Revenue*, February 8, 1889, 16 R. 461 (see p. 475); *Coltness Iron Company v. Inland Revenue*, January 7, 1881, 8 R. 351 (Lord President Inglis' observations), and April 7, 1881, 8 R. (H.L.) 67; *Edinburgh Southern Cemetery Company v. Surveyor of Taxes*, November 14, 1889, 17 R. 154; *Gillatt & Watts v. Colquhoun*, December 1884, 2 Tax Cases 76 (see p. 83); *Forder v. Handyside*, 1876, 1 Exch. Div. 233.

At advising—

LORD PRESIDENT—The Commissioners have amended the case in terms of our remit, and we have now before us the memorandum of association of the ap-

pellant company. I observe that the articles of association are not made part of the case, but the memorandum affords information as to the business and objects of the company which is of the highest importance for the decision of the questions submitted to us.

As its name indicates, this is an investment company, and the memorandum makes it plain that its profits are to be derived from various operations relating to investments. The third head of the memorandum professes to state the objects of the company, and in head (c) of this enumeration occur the words—“To vary the investments of the company, and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any of the assets of the company.”

It is true that the doing of any of these things might be incidentally necessary in the conduct of the business of any company. It is also true that this memorandum states in the latter heads of the same article several things which are less properly described as objects of a company than as incidental acts of administration. But from the structure of the memorandum it appears that the varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary, for they take their place among what are the essential features of the business. In my view, such speculations are among the appointed means of this company's gains. Accordingly I should consider it legitimate for the directors to divide profits so made, although in determining the amount divisible they would necessarily have regard not alone to the individual transaction yielding profit, but to the general results of their changes of investments. It would be right that they should maintain as strictly as possible the relative rights of separation between capital and income, and make all apportionments necessary in that behalf.

My view of this company is therefore that its position in the present question is entirely distinguished from that of a private individual or an ordinary trader. Accordingly I think that it is wrong in its contention that increases on realisation of stocks of the company are capital sums, and therefore not liable to assessment for income-tax. As regards the sums in question, they are stated in the report of the company to be net profits on sales of securities during the year. There is nothing before us to show that a wider view of the operations of the company would prove this statement to be misleading, and if the appellant company point to their third contention, I must observe that there is no finding to instruct it, and this remark applies with the more force now that after the various points had been mooted in debate, the case has been reconsidered and amended by the Commissioners.

In determining this question I own to being influenced by the decision of this Division in *The Northern Assurance Company v. Russell*, which is cited in the case. The words quoted from it in the present

case are evidently well considered; they form part of the judgment of the Court; they are laid down as forming a rule for subsequent practice, and they in terms apply to the case before us. I should be slow to depart from so authoritative an expression of opinion, and the argument has failed to satisfy me that it is erroneous,

I am for answering the first query in the affirmative, and the second in the negative.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the Company—Ure—Peddie. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for the Inland Revenue—Dean of Faculty Sir Charles Pearson, Q.C.—Young, Agent—Solicitor for Inland Revenue.

Tuesday, December 12.

FIRST DIVISION.

THE INCORPORATED SOCIETY OF LAW AGENTS IN SCOTLAND v. STEVENSON AND LAING.

Notary-Public—Misconduct—Striking off the Roll—Jurisdiction of the Court.

On a petition being presented to the Court by the Incorporated Society of Law Agents, craving that two individuals should be struck off the roll of notaries-public, answers were lodged by one of the respondents objecting to the title of the petitioners to raise the petition, and to its competency, and also pleading *mora*.

Held that the petitioners had a good title, and that the Court had jurisdiction over notaries-public to the effect of striking them off the roll for misconduct. The petition was granted.

John Stevenson, a writer and notary-public in Kilmarnock, was on the 14th January 1891 sentenced to five years' penal servitude for embezzlement. Richard Laing, writer and notary-public in Alloa, was on 12th January 1891 sentenced to twelve months' imprisonment for breach of trust and embezzlement, and in May 1891 was, on the petition of the present petitioners, struck off the roll of law-agents. The former of the two was at the date of the present petition still undergoing his sentence, while the latter having served his time in prison had resumed business as a writer in Alloa.

A petition was presented to the Court by the Incorporated Society of Law Agents in Scotland narrating the above facts, and craving that the respondents should be deprived of the office of notary-public, and

that their names should be struck off the roll.

The respondent Laing lodged answers to the petition, and pleaded (1) incompetency, (2) *mora*.

Argued for respondent—(1) The petitioners had no title to present this petition, being an incorporated society of law-agents with no special connection with or control over notaries-public, and were exceeding their powers. In the case of *Mitchell*, quoted for the petitioners, the objectors were notaries-public. (2) The petition was incompetent. There was no precedent for asking the Court to interfere with notaries-public, and no principle for doing so, for a notary-public was not a servant of the Court, the office being a Crown appointment just as much as that of a judge. The form of presentation to the Court showed this, the document being superscribed by the Royal sign-manual. The next procedure was to present a petition to the Court, who would then make a remit to see if the petitioner was duly qualified for the office, and on this being shown would admit him as a matter of course. The function of the Court was solely to inquire into a petitioner's qualifications for office, and they had no power to deprive him subsequently of it. The form of commission ran—"I, —, Notary-Public, appointed by Royal Warrant, and duly admitted by the Court." . . . The office therefore being *inter regalia*, the Court could not interfere with it—Stat. 1563, chap. 79. (3) There had been *mora* in presenting the petition. It should have been presented when the respondent was struck off the roll of law-agents in 1891.

Argued for petitioners—The Court had jurisdiction over notaries-public. They could obtain a Crown warrant as a matter of course, like any other Crown writ, but their admission was absolutely conditional upon obtaining the sanction of the Court. The Court was charged by the Crown with the duty of superintending the admission of notaries-public, and also their conduct during office. The form of writ showed this—"Provided that you find him duly qualified," . . . referred to his moral character as well as to his legal qualifications, and showed that the Court must superintend his administration of office as well as his admission. The various Acts as to notaries-public pointed to this, viz.—1503, cap. 64; Sir G. Mackenzie on this Act, i. p. 232; 1551, cap. 24; 1551, cap. 22; 1563, cap. 79 (still in force); 1587, cap. 45; Act of Sederunt, July 30, 1691; 1888, Commission upon Notaries-Public. There was a precedent for the Court depriving them of office—*Stuart v. Smith*, November 20, 1680, M. 15,928, where this was done (also reported in *Stair's Decisions*, ii. p. 804); *Hope v. Drummond*, February 28, 1749; Acts of Sederunt, Folio Coll. p. 448. In a "Caution to Notaries," Acts of Sederunt, Folio Coll., December 1, 1812, the Court considered the question, but did not deprive the notary of office. As to objections to appointment of notaries-public, these had been raised in *Macaulay v. Angus*, February 13, 1783;