

seems to me that *prima facie* that is the best test of their value which is available, and the Magistrates having stated no reason to the contrary, it appears to me that we are bound to hold that they are wrong, and to find that the value should be the sum of £16.

LORD STORMONTH DARLING—I entirely agree, and I only desire to add this with regard to the entry No. 4. It differs from the entries Nos. 1 and 2 in this respect, that the Magistrates have adopted the valuation of the Assessor with regard to No. 4, whereas in Nos. 1 and 2 they have taken figures of their own, and we must assume that they arrived at these figures as representing a hypothetical rent. With regard to No. 4, we know exactly how the Assessor arrived at his figures, because he states how he did so. He says—“The Burgh Assessor’s valuation is simply five per cent. of what he understands was paid for the ground when the appellants originally acquired it from the superior.” Now, in adopting that figure it is perfectly plain that the Magistrates did not apply their minds to the true question, which was, what the ground would probably fetch if let in its actual state on a yearly lease, but that they accepted a wholly fallacious method of arriving at its value. Accordingly, I think No. 4 stands in marked contrast to Nos. 1 and 2. I have nothing to add to what your Lordship has said in other respects.

The Court pronounced the following interlocutor:—

“We are of opinion that the determination of the Magistrates is, as regards the subjects entry No. 1, right; as regards the subjects entry No. 2 that it is right; as regards the subjects entry No. 3, we find of consent that it is wrong, and that the value falls to be entered at *nil*; and as regards the subjects entry No. 4, that it is wrong, and that the value should be entered at £16.”

Counsel for the Appellant—Balfour, Q.C.—Clyde. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondent—Burnet. Agents—Cumming & Duff, S.S.C.

COURT OF SESSION.

Tuesday, July 5.

FIRST DIVISION.

PAISLEY CEMETERY COMPANY,
 LIMITED v. REITH (SURVEYOR
 OF TAXES).

Revenue—Income-Tax—Cemetery—Payment for Perpetual Upkeep of Lairs—Income-Tax Act 1842 (5 and 6 Vict. c. 35), sec. 60, Sched. A, No. 3, Rule 3.

A cemetery company received payments from the proprietors of lairs in

the cemetery in return for which they undertook to keep the lairs in order in all time coming. The directors of the company had by a minute of meeting resolved that the sums so received should be set aside, and the interest only applied to the upkeep of the lairs, but this was not made part of the contract under which the money was received. *Held*, in a question with the Revenue, that income-tax was payable on the capital sums received, and not on the annual interest only.

At a meeting of the Commissioners for the general purposes of the Property and Income-Tax Acts for the Upper Ward of the County of Renfrew held at Paisley on 7th December 1897, the Paisley Cemetery Company, Limited, appealed against an assessment under No. 3 of Schedule A, Rule 3, of the Act 5 and 6 Vict. c. 35, on the sum of £503, and craved that the amount of assessment should be reduced to £467 in respect of a sum of £36 received by them for upkeep of lairs in perpetuity, which they claimed did not fall to be included in the amount of assessment.

The Commissioners having by a majority refused the appeal, the appellants called upon them to state a case.

The case as stated contained, *inter alia*, the following statements:—“(2) The Paisley Cemetery was originally an unincorporated joint-stock company, formed in 1846 under a contract of copartnership, executed in that year on various dates, produced herewith and made part of the case. It was registered as a limited liability company in 1883 under the Companies Acts 1862 to 1880. The object of the company was to acquire lands, and lay these out as a place for interment, the erection of monuments, and the resort of shareholders and certain other persons. (3) The twenty-sixth article of the said contract provides that the committee of management are hereby empowered to sell pieces of the ground acquired or to be acquired by the company for a cemetery as aforesaid for burial places, lairs, tombs, and graves, and for sites for monuments, tablets, mausoleums, sarcophagi, cenotaphs, vaults, and catacombs at such places as they may think proper, and that either in perpetuity or for a limited period or for single interments. (5) The thirty-second article provides—‘The directors shall cause to be kept in their books separate accounts of the fees received, an account of burials in ground sold, and fees for single interments, and shall cause such books and accounts to be balanced annually, and against the said fees shall be set the whole charges of management, servants’ salaries, and other charges and expenses, and as the operations of the company advance, on a balance coming to be realised on such account, the same shall be divided among the shareholders in proportion to the number of shares held by them.’ (7) There is no provision either in the contract of copartnership or in any rules, regulations, and bye-laws framed under the powers conferred on the committee of management by the twentieth article,

which deals with payments received for the upkeep of lairs in perpetuity. This matter was, however, considered by the directors, and the minutes of their meeting held on 14th June 1858 bear that 'the proposal of accepting a sum from proprietors of lairs to be set aside and the interest to be applied towards the keep of the same in perpetuity was again under consideration, when it was resolved that upon payment by the proprietors of lairs of the sum of £2 for each breadth of 3 feet, the company shall undertake to keep, maintain, and dress such lairs in good order and condition from time to time during each year in all time coming.' (9) The slump payments received during the year ended 2nd February 1897 amounted to £36, and this sum was credited direct to the capital account, and formed part of the accumulated fund as at that date of £1211, 12s. 11d. for keep of lairs in perpetuity. (10) The above accumulated fund was not separately invested, but was included in and formed part of the invested fund of £1290, mentioned in the balance-sheet as on loan to the Paisley Water Commissioners, and the income derived therefrom was credited in the revenue account, and was assessed to income-tax, duty at the current rate being retained on payment of the interest by the Paisley Water Commissioners. (11) The appellants claimed to be relieved of the tax on this sum of £36, and contended that these slump payments were regarded as trust funds, devoted by them to a specific purpose, incapable of being appropriated for the ordinary purposes of the company, and were properly treated as capital; that they were not in any sense profits divisible among the members of the company, and that the annual interest derived therefrom was alone subject to assessment. (12) Mr James Reith, surveyor of taxes, on behalf of the Crown, maintained that the sum of £36 was profits and chargeable with income-tax, in respect that it consisted of payments for services rendered, and to be rendered, the whole of the expenses of the keeping and dressing of the lairs in perpetuity being allowed as a deduction. He referred to the decision of the Judges in the case of the *Edinburgh Southern Cemetery Company, Limited v. Kinmont* (17 Sess. Cas. 4th Series, p. 154), where it was held that the whole amount received for ground or lairs sold (i.e., right of burial in perpetuity) was assessable without deduction for part thereof carried to capital account for redemption of capital. He contended that if a sum received for right of burial in perpetuity in a certain space was held to be assessable, a sum received for dressing in perpetuity the same space must be equally assessable, and that it was impossible to make a distinction in favour of sums received under the latter head. He further contended that the slump sums received for the upkeep of lairs, as well as the annual interest derived therefrom, when invested, were assessable on the same principle as in the case of the sum received for the price of lairs sold, which was taxable both as regards the principal amount, without deduction for the sum

carried to sinking fund, and the annual interest produced."

The Court having called for production of one of the receipts granted by the company in return for these slump payments, the parties put in a joint-note containing a receipt, and they also admitted that the minute of 14th June 1858 had been entered in the minute-book of the company, but had not been published. The receipt was in the following terms:—"Received from _____ the sum of _____, being the amount agreed to be accepted by the directors of the Paisley Cemetery Company, Limited, for keeping in order and dressing lair number _____ compartment _____ in said cemetery from time to time during each year in all time coming. This sum is accepted on the understanding that the company do not undertake to keep up or repair monuments or lair enclosures, or to supply shrubbery or plants where those planted decay or die out, the obligation to do so remaining with the proprietors of said lairs as if the obligation to keep in order and dress the lairs had not been undertaken by the company."

Argued for appellants—The funds in question were really trust funds, which must be put aside in order to enable the company to fulfil their obligations to lairholders. The resolution contained in their minute bound them to this, and accordingly they could not be treated as in any sense profits of the company—*Edinburgh Southern Cemetery Company v. Surveyor of Taxes*, November 29, 1889, 17 R. 154; *Coltness Iron Company v. Black*, 8 R. (H. of L.) 67. Even if the payments were not actually in the position of trust funds, they were bound to lay them aside, having undertaken a perpetual obligation, and their other resources and income being of a precarious nature, these would be the only funds available to meet it. Accordingly they were in a different position from that of the *Edinburgh Southern Cemetery Company*, who had no obligation as with a third party.

Argued for respondents—There was no obligation to set aside or earmark the money, but the appellants were merely bound on receiving the payment to keep the lair in order. The receipt bore no such obligation, and accordingly their argument founded upon the unpublished minute fell to the ground. The money was in no way different from the dues received for interment, as distinguished from the price of the lairs, and was clearly part of the yearly income—*Magistrates of Portobello v. Surveyor of Taxes*, July 10, 1890, 27 S.L.R. 863; 2 Tax Cases 647.

LORD PRESIDENT—Mr Cowan presented with great clearness an argument which originally was founded upon the minute of the directors of 14th June 1858. The minute bears that—[reads]—and there was considerable plausibility in the argument, so long as it was assumed that that represented the contract between the lairholders and the company. I do not say more than that plausibility attached to the idea that here

was an undertaking—I mean in the legal sense of the term—to set aside the money and preserve it intact. But it now turns out that the words which I have quoted do not in any sense of the term constitute the contract between the lairholders and the company; on the contrary, this minute was never published or communicated to the lairholders with whose case we have to deal. The true contract between the company and the lairholders is set forth in the receipt, and the terms of that receipt do not import any undertaking to set aside the money so received and apply only the interest in the way of embellishing the graveyard.

Now, that element being absent, the thing comes to be of the simplest description. The company, for a sum down, undertake a perpetual obligation, and it seems to me that the case being thus entirely deprived of the semblance of trust, it resolves into this question only—Is income-tax chargeable where money is received and a perpetual obligation undertaken? We should be going against the theory of the cases which have already been decided, and against decisions which are well recognised, if we were to give countenance to that idea. The case is exactly the same as the ordinary one of money paid down with an obligation to provide for certain expenses in the future, and it seems to me that the judgment which was pronounced by the Commissioners was right and ought to be affirmed.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court affirmed the determination of the Commissioners, and found the Surveyor of Taxes entitled to expenses,

Counsel for the Appellants—Shaw, Q.C.—Cowan. Agent—F. J. Martin, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—A. J. Young. Agent—P. Hamilton Grierson, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Friday, May 20.

(Before the Lord Chancellor, and Lords Watson, Herschell, and Shand).

GLASGOW CORPORATION v. M'OMISH AND ARTHUR.

(*Ante*, June 26, 1896, 33 S.L.R. p. 675, and 23 R. p. 896).

Police — Burgh — Drainage of Dwelling-Houses — Glasgow Police (Amendment) Act 1890 (53 and 54 Vict. c. 221), sec. 16—When Commissioners Justified in Executing Repairs at Their Own Hand.

By section 16 of the Glasgow Police (Amendment) Act 1890 it is enacted

that if drains in houses have been found defective, the owner of the premises shall be bound immediately, on an "order to that effect being given by the police commissioners, to carry out all necessary operations for removing defects of structure, or doing such acts as may be requisite to prevent risk to health, and failing compliance with such order, the police commissioners may do such work, and recover the expenses as damages from the owner."

The owner of certain tenements having failed to remedy defective drains in terms of an order under the above section, the police commissioners intervened, and executed certain operations to put the drainage into a proper and safe condition. In doing so they disregarded the existing drain, and laid down an entirely new drain in a different site and with a different outflow. They raised an action in the Sheriff Court to recover the expenses of the work from the owner.

In an appeal from the judgment of the Sheriff the Second Division held that the above section applied only to the case of structural repairs in existing drains, and did not authorise the construction of a new drain, and they accordingly assolized the owners.

On appeal the House of Lords, dealing with the question as one purely of fact, upon which the findings of the Court below were conclusive, *remitted* to the Second Division to pronounce a finding upon the question "whether the drainage works executed by the pursuers, or any, and if so, what part of the said works were requisite in the opinion of the pursuers, or in fact," and thereafter *affirmed* the judgment of the Second Division in so far as the work executed was found under the remit not to have been necessary in fact, and in so far as the investigations and inquiries made by the commissioners did not warrant the opinion that it was necessary.

This case is reported, *ante*, *ut supra*.

The pursuers appealed against the interlocutor of the Second Division, dated 26th June, and after counsel had been heard, the House of Lords, on 8th July, remitted the cause to the Second Division to pronounce a finding upon the following question:—"Whether the drainage works executed by the pursuers, or any, and if so, what part of the said works were requisite in the opinion of the pursuers, or in fact?"

On 1st December 1897 the Second Division pronounced the following interlocutor:—"The Lords having heard counsel and reconsidered the cause in conformity with the remit from the House of Lords, dated 8th July 1897, Find as matter of fact (1) that the work charged for in the account sued on, so far as it relates to the sink conductors, was, in the opinion of the pursuers and in fact necessary; (2) that *quoad ultra* the work charged for in said account was not in fact necessary; (3) that as regards the work last mentioned, (a) that it was not proved that the pursuers were of opinion