

have been strictly limited to the original payee named in the policy. I am, however, unable to see that they had any real interest in that matter, that is to say, any such patrimonial or business interest as would have actuated them to refuse the father's nomination of himself as payee if he had chosen to propose it.

The Act 14 Geo. III, cap. 48, was referred to at the discussion, but we heard no real argument regarding it. The pleadings contain no averments or pleas directed to it. In the absence of averments, pleas, and argument, I am not prepared to hold that the father had no insurable interest in his son's life. As regards section 2 of the Act, if the effect of it were to make the policy null in an absolute sense that result would not advance the claimant's claim to be in right of the fund *in medio*. The Insurance Company, however, is not pleading the Act. The company did not lodge defences, and it is willing to pay over the fund *in medio* to whichever of the two claimants has the better right *inter se*. It has been held both in England and Scotland that these provisions of the Act are pleadable only by the insurers. In the absence of pleadings and argument directed to the matter, I am not prepared to question the soundness of this view.

I am accordingly of opinion that we should adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuers and Nominal Raisers—Strain. Agent—James A. Hope, W.S.

Counsel for the Claimant (Defender and Real Raiser), Hugh Fletcher Carmichael—Constable, K.C.—Dykes. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Claimant (Defender), Miss Catherine M'Coll—Morton, K.C.—J. A. Christie. Agent—G. R. Stewart, S.S.C.

Friday, July 18.

FIRST DIVISION.

JAMES WALDIE & SONS v. INLAND REVENUE.

Revenue—Excess Profits Duty—Capital—Payments by Coal Merchants to Coal Mining Company to Enable Latter to Produce Coal to be Sold by Former—Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), sec. 41 (2) and (3), and Fourth Schedule, Part III, sec. 1 (b).

Coal merchants with a controlling interest in a coal mining company had the sole disposal of its output at a fixed commission on their sales and took the risk of bad debts. The company being in difficulties, the merchants for some years made payments to it in excess of the coal received to enable it to maintain its output. Those payments were without interest, security, or document

of debt, and were wiped off automatically as coal was received. In a question of excess profits duty, *held* that the payments were part of the capital of the merchants' business in the sense of the Finance (No. 2) Act 1915, Fourth Schedule, Part III, sec. 1 (b), and that the capital of the merchants' business had not been diminished by those payments in the post-war period in the sense of sec. 41 (2 and 3), of that Act.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) enacts—Section 41—“(2) Where capital has decreased during the accounting period, an addition shall be made to the profits of the accounting period at the statutory percentage per annum on the amount by which the capital has been so decreased for the whole accounting period, if the capital has been decreased for the whole accounting period, and if the capital has been decreased for part only of the accounting period, for that part of the accounting period. (3) For the purposes of this section capital shall be taken to be . . . decreased . . . where the pre-war standard of profits is a profits standard, if the capital employed in the trade or business . . . is less than the average amount of capital employed during the pre-war trade year or years by reference to which the profits standard has been arrived at, and where the pre-war standard of profits is a percentage standard, if the capital . . . is less than the capital on which the percentage standard has been calculated.”

Fourth Schedule, Part III—“(1) The amount of the capital of a trade or business shall, so far as it does not consist of money, be taken to be . . . (b) so far as it consists of assets being debts due to the trade or business, the nominal amount of those debts subject to any reduction which has been allowed in respect of those debts for income tax purposes.”

James Waldie & Sons, coal merchants, brokers, and exporters, *appellants*, being dissatisfied with assessments of £222 (additional) and £6998 for the periods from 1st June 1915 to 1st June 1916 and 31st May 1916 to 31st May 1917 respectively, in name of excess profits duty made upon them by the Commissioners of Inland Revenue, *respondents*, appealed to the Commissioners for the Special Purposes of the Income Tax Acts, who increased the assessments to £402 and £7203 respectively. Against that decision the appellants took a Case.

The Case stated—“There is no dispute as to figures, the sole question for the decision of the Court of Session being whether for excess profits duty purposes certain moneys due to the appellants by The First Coal Company, Limited (hereinafter referred to as ‘the company’), should be excluded from the capital employed in the appellants' business.

“The following *facts* were admitted or proved:—(a) The appellants practically control the company, as they own £6236 of the company's capital of £10,000 besides holding certain of the company's debentures. (b) The appellants have the sole disposal of the whole of the company's coal

output. (c) The appellants are entitled, under the terms of a minute dated 11th October 1901 passed at a directors' meeting of the company, to a fixed rate of 3d. per ton commission on the sale of the company's coal which is not purchased from the company by the appellants but merely sold by them in their own name to their customers. (d) The company renders monthly accounts to the appellants, and receives from the appellants monthly payments of the prices realised by them less the appellants' commission of 3d. per ton. The appellants take the risk of bad debts. (e) For some years past the company has been doing badly, and in order to provide it with sufficient cash resources to raise the coal the appellants made payments largely in excess of the sums due for coal actually received. The amounts paid in excess amounted to £11,174 and £18,338 at 31st May 1915 and 31st May 1916 respectively. These amounts bear no interest, are advanced without security, and are not constituted by any document. (f) The said sums of £11,174 and £18,338 are about equal in amount to three months' supply of coals. In 1917 the excess payments represented approximately two months' supply of coals. In the years 1916 and 1917 the appellants received from the company coals to the value of £50,541 and £75,724 respectively."

Argued for the appellants—The sums paid to the company bore no interest, were without security, and unvouched by any document. They had no permanency, but were wiped off as coal was supplied and were replaced by other payments. That had been the practice for years before the war. They were in sharp contrast to admitted investments of capital, viz., the shares and debentures held by the appellants in the company. Consequently they were not investments of capital of the appellants—*Reid's Brewery Company, Limited v. Male*, [1891] 2 Q. B. 1—but were current expenditure necessary to earn profits—*Inland Revenue v. Stewarts & Lloyds Limited*, 1906, 8 F. 1129, per Lord McLaren at p. 1132, 43 S. L. R. 811. They were capital employed in the appellants' business as coal merchants. Without those payments the appellants would not have obtained coal and would not have made a profit. To tax the appellants on profits and on those payments would be double taxation. The payments were just the equivalent of giving long credit, and were expenses necessary to earn profits—*Usher's Wiltshire Brewery Company v. Bruce*, [1915] A. C. 433, per Loreburn, L. C., at p. 444. The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), section 41 (2) and (3), did not apply. The payments left the appellants' capital in the sense of the Fourth Schedule, Part III, section 1 (b), of that Act unaffected. Section 8, Fourth Schedule, Part I, and the Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 100, rule 1, were referred to.

Argued for the respondents—The present case raised no question of income tax but solely of excess profits duty. That necessitated a comparison of profits in two periods, and that involved a comparison of capital in the two periods. The powers of the

appellants under their constitution were not in point, for the question was what, preserving the identity of the business, was the capital actually employed in the two periods. The appellants were coal merchants. *Qua* coal merchants they were not employing the payments as capital. They had a controlling interest in the company's business, but that did not identify the two businesses. The payments were used as capital in a coal-mining concern. *Quoad* the appellants they were simple loans or investments in another business. They were not advances against coal to be delivered. No doubt it might be commercially expedient so to use the money, but that was true of all investments of surplus capital. *Stott v. Hoddinott* (N. R.), and *English Crown Spelter Company, Limited v. Baker*, 1908, 99 L. T. 353, 5 Tax. Cas. 327, applied.

At advising—

LORD SALVESEN—The sole question in this case is whether certain sums which were advanced to the Hirst Coal Company by the appellants were employed by them in their business and are to be treated as debts due to the trade or business in which they were engaged, or must be regarded as investments, and consequently excluded from the appellants' capital for the purpose of excess profits duty. This is a mixed question of fact and law, and as such falls to be determined on the facts set forth in the case, which are somewhat special in their nature. They may be summarised as follows—The appellants' own somewhat over six-tenths of the Hirst Coal Company's capital besides some of their debentures. They have the sole disposal of the whole output of the coal of the company, and are entitled to a fixed rate of 3d. per ton commission on the sales which they effect. In respect of this commission they take the risk of bad debts contracted to them by the purchasers of the coal. For some years past (and we were informed this applied to the period before as well as during the war) the company has been doing badly, and required advances to enable it to continue its output of coal. The appellants made such advances in the form of payments largely in excess of the sums due for coal actually received. These amounts bear no interest and were advanced without security. The sums paid in the two years which are in question equal in amount two or three months' supply of coal.

On these facts the Commissioners contended that the sums in question fall to be treated exactly as if they had been investments in War Loan, or at least had lain undisturbed for the period of a year on deposit-receipt with their bankers or even on current account. In their view money so advanced was not required for the appellants' proper business as above described, and was therefore not employed in their business. On the other hand it was contended by the appellants that these advances were necessary in order that they might earn the stipulated commission which in the year 1916 amounted to over £1000. If they had not supplied the funds necessary to enable the coal company to continue its

operations by in effect prepaying the coal which they expected to have the sale of for two or three months in advance of the period when the coals were actually delivered, their agency on behalf of the Hirst Coal Company would have been unprofitable, and indeed might not have yielded any commission at all.

These being the facts and the respective arguments, I am of opinion that the appellants are right. I think in a commercial sense the sums in question were employed in the appellants' business. It was on purely business grounds that they made the advances, and if they had had no other business than that of agents for the Hirst Coal Company there would have been no profits to assess. It is conceded that if they gave their customers long credits for payment of their accounts and so needed a much larger working capital than if they had been able to get cash on delivery of the coal which they sold, the additional capital so used would have been employed in their business. Equally I think they were entitled to use their capital in financing for business reasons the sellers from whom they derived the raw material in which they deal. *Ex hypothesi* they could not have withdrawn these sums from their business and put them on deposit-receipt or invested them in War Loan without materially affecting the profits of their own business. The sums advanced have none of the features that are associated with investments, *e.g.*, any permanence or any expectation of profit whether in the shape of dividends or otherwise. I think they were merely temporary items (as they are described in the argument for the appellants) in the running agency account, very similar to advances which a law agent may make to a client in the course of a litigation and for the purpose of enabling the litigant to carry on his suit.

The cases cited to us on behalf of the Crown appear to me to be clearly distinguishable upon the facts. The authorities to which we were referred by the appellants, while not perhaps strictly applicable, present a somewhat close analogy, and in my opinion support the appellants' contention. No doubt they dealt with the question whether certain expenditure was outlay in earning profit or was an application of profits earned and not directly with the question whether certain advances were employed in the appellants' business. But *Reid's Brewery Company v. Male*, [1891] 2 Q.B. 1, seems to involve the very point with which we are now dealing. There the appellants carried on the business of brewers and also as an adjunct of their business that of bankers and money-lenders, and in the course of such business lent money to their customers on security and received money on deposit from their customers, who were allowed to draw bankers' cheques on the brewing company. The latter claimed to deduct from the assessment to income tax on profits from trade bad debts in respect of such loans to customers; and it was held that the money advanced to customers was used in the business and was not capital invested,

and accordingly that they were entitled to the deduction claimed. Pollock, B., in the course of his opinion, said—"It is found on facts that 'in no case is any loan or advance made by way of permanent investment, whether it be by way of deposit of deeds, mortgage, promissory note, or otherwise.' That might not be, perhaps, in itself sufficient, but the description of the course of business shows beyond doubt that this is not capital invested; it is capital used by the appellants, but used only in the sense that all money laid out by traders, whether in purchase of goods be they traders only, or raw materials be they manufacturers, or on loans in the case of money-lenders or pawnbrokers, is used. It is used, and is out of capital, but is not invested in the ordinary sense of the word." Now this passage seems to me in terms applicable to the facts of the present case; and indeed the facts here are *a fortiori*, for the appellants had no security for their advances and received no interest upon them; nor did they carry on a separate branch of their business in making advances to colliery companies who supplied them with coal for sale. If it had been held that the brewing company must be treated as carrying on two businesses, one of which was that of brewing beer and the other of lending money, obviously the money employed in the latter business could not be treated as capital in the brewing business; and the losses incurred in the one would not have been deductible from the profits of the other. If in that case it was held, and I assume rightly for the decision was not challenged, that the losses by bad debts in the banking business might properly be deducted from the profits of the brewing business, I think it necessarily follows that the money lent to customers formed part of the capital of the brewing business. The two businesses were so co-related as to be capable of being treated as one. Here the appellants carry on only one business, but they find it necessary, for the purposes of that business and with a view to increasing the profits, to use some of their working capital in making advances to a company of which they hold the sole selling agency. I think in a reasonable and commercial sense the money so advanced is employed in their business of coal brokers and coal merchants, and that accordingly the decision of the Special Commissioners was wrong and should be reversed. We were informed that parties would have no difficulty in adjusting the figures if they obtained our decision on the question of principle, and they will, no doubt, aid us in fixing the precise sums on which the appellants may be properly assessed in view of the provisions of the Finance Act relating to excess profits duty.

LORD MACKENZIE—The question of law in this case is whether, on the facts found proved as set out in the case, the capital of the appellants was decreased to the extent mentioned during the accounting period, within the meaning of section 41 (3) of the Finance (No. 2) Act 1915? If it was, then they must suffer an addition to be made to the profits of the accounting period at the

statutory percentage per annum on the amount by which the capital has been so decreased. The purpose of this is to enable like to be compared with like for the purpose of excess profits duty during the pre-war and the accounting period. The question so stated is intelligible enough, though when it is translated into figures in the case it is not easy to follow what has been done. Nor are the facts found in a satisfactory manner, the information given being of a meagre description. It is enough to say that, in my opinion, the capital of Waldie & Sons was not decreased by the payments to the Hirst Coal Company of £11,174 and £18,338 at 31st May 1915 and 31st May 1916 respectively. The appellants are *del credere* commission agents who have the disposal of the whole of the Hirst Coal Company's output. Their interest is to sell as large a quantity of coal as possible, their profit being their commission of 3d. per ton. In order to get the coal for the purpose of their business Waldie & Sons found it to their advantage to employ part of their capital in subsidising the Hirst Coal Company, who are coal producers. The payments made were in the ordinary course of their trade, and, nothing being said to the contrary, it must be assumed that it was within their powers as contained in their memorandum of association. The case states that the payments were in excess of the sums due for coal actually received, the money value being equivalent to about three months' supply of coal. A credit was created in favour of the Hirst Coal Company, but I am unable to see how it can be successfully contended that the appellants' capital was thereby decreased. The prepayments were not disproportionate to the amount of the deliveries. Suppose the case not of buyers but of sellers who allow an extended period of credit. The seller allows, say, three months' credit, and for that period is without his money though he has parted with his goods. Here the buyer is without his goods for three months though he has parted with his money. The argument against the appellants was that these sums were *de facto* lying outside their business, whether they are properly to be regarded as invested or not, and that they were not used in making their profit. The appellants were, in my opinion, quite entitled to take the view that their profits, to a proportionate amount, would have been non-existent had they not utilised a portion of their capital in this way. It may be that the whole of the appellants' capital, less what is required for the expenses of office and staff, may be profitably employed in the manner indicated. It was suggested that these could not be represented as payments to create a trade credit, because there is no finding that the Hirst Coal Company were under obligation to deliver coal to the appellants. There is a finding, however, that the appellants have the sole disposal of the Hirst Coal Company's coal output, which in effect is a finding that there is a thirlage agreement. The fair inference is that profit arising from this to the appellants is to be attributed to the use by them

of a part of their capital in the way described. There is no suggestion in the case that the payments were made in order to earn dividends on the shares in the Hirst Coal Company held by the appellants. Nor is there any suggestion of a money return to the appellants in respect of the payments, which would be the case had the payments represented proper investments outside the business.

In my opinion the determination of the Special Commissioners is wrong.

LORD SKERRINGTON—The appellants, a limited company carrying on business as "coal merchants, brokers, and exporters," are the sole selling agents for a colliery company in which the appellants own most of the share capital and also some of the debentures. The coal produced by the latter company is sold by the appellants in their own name and to their own customers. The appellants make monthly payments to the Colliery Company of the prices realised for its coal, less the appellants' commission of 3d. per ton. The appellants take the risk of bad debts. For some years the Colliery Company "has been doing badly, and in order to provide it with sufficient cash resources to raise the coal, the appellants made payments largely in excess of the sums due for coal actually received." The question of law which we have to answer is, whether upon these facts the Special Commissioners were entitled to determine that the advances so made by the appellants to the Colliery Company formed no part of the capital employed in the appellants' business within the meaning of Part III of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 8) relating to excess profits duty.

The case does not state, nor did counsel represent it to be a proper inference from any of its statements, that the moneys in question were advanced by the appellants from a purely benevolent motive, or for the purpose of safeguarding and rendering profitable their investments in the shares and debentures of the Colliery Company. On the contrary, I understood the Lord Advocate to admit that in making these advances the directors of the appellants' company must be assumed to have intended to further the interests of the business carried on by that company. Further, it is not stated and it was not argued that any material change took place in the character of the appellants' business during any of the periods—pre-war or post-war—which have to be compared. I construe the case as meaning that the agency contract, and the advances made in pursuance thereof, were incidental to the business carried on by the appellants' company during all these periods. It is true that the case does not enable us to fix the amount of the direct pecuniary profit which the appellants derived from the agency contract. For that purpose it would be necessary to know the amount of the commissions earned during each period, and also the loss sustained by the appellants during the same periods in consequence of making advances which, as the Case states, "bear no interest." Even if the direct pro.

fit was not great, one may conjecture that it was indirectly for the interests of a coal-selling company to be in a position to satisfy the requirements of its customers. Apart from the specialty that no interest was charged on the advances, the appellants' agency contract was not unlike that of a produce broker who in any particular case may consider that it is profitable to advance money to enable a colonial planter to sow and reap his crop, and who then looks to the proceeds of the sale of the crop in the home market in order to recoup him for his advances either in whole or in part as the case may be. In the case with which we are concerned the appellants appear to have considered that it was worth their while to allow the Colliery Company to have in its hands cash advances representing the value of the coal which it would probably supply in the next ensuing three months.

I have difficulty in understanding why money advanced by the appellants for the benefit of their business, and in pursuance of an agency contract incidental to that business, should not be regarded as capital employed in their business. The Lord Advocate tried to assimilate the credit balances in the appellants' agency account to credit balances which they might at any time have in their bank account in respect of cash which they neither required nor intended to use for the purposes of their business, but which, for example, lay in bank awaiting a permanent investment. The difference between the two cases is obvious and crucial. The credit in the agency account was created for no other purpose except to carry on the appellants' coal-selling business. On the other hand, in the case figured by the Lord Advocate the credit in the bank account represented cash which was not required or intended to be used in the business. The argument seemed to overlook the familiar fact that if money is advanced in order that the borrower may use it as capital in his business, the right to demand repayment of that money may form part of the capital of the lender's business if he is an agent or banker or other person whose business it is to make such advances.

For these reasons I am of opinion that the determination of the Special Commissioners was erroneous.

The LORD PRESIDENT and LORD CULLEN were absent.

The Court reversed the determination of the Commissioners and remitted to them to adjust the assessment.

Counsel for the Appellants—Wilson, K.C.—Mitchell. Agents—Fraser, Davidson, & Whyte, W.S.

Counsel for the Respondents—The Lord Advocate (Clyde, K.C.)—R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, July 18.

SECOND DIVISION.

[Dean of Guild Court at
Glasgow.]

SMITH v. RENNIE.

Burgh—Dean of Guild—Appeal—Defect of Jurisdiction—Petition—Amendment—Competency—Court of Session Act 1810 (50 Geo. III, cap. 112), secs. 36 and 37—Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxviii), secs. 322 and 325.

The Court of Session Act 1810, section 36, enacts—“Bills of advocation from . . . inferior judges in Scotland against interlocutory judgments shall be allowed only upon the following grounds:—First, of incompetency, including defect of jurisdiction. . . .” Section 37—“Bills of advocation from such inferior judges shall not in any case be received against interlocutory judgments upon grounds of iniquity or error, but only after final judgment shall have been pronounced.”

The Glasgow Police Act 1866 enacts—Section 322—“If any proprietor to whom . . . notice has been given considers himself aggrieved by the requisition . . . he may . . . deliver to the Clerk written objections . . . , and [the procurator-fiscal of the Dean of Guild Court] shall apply to the Dean of Guild for a warrant to cite the objecting proprietor . . . , and the Dean of Guild shall thereupon inquire into, try, and decide the said questions. . . .” Section 325—“If the proprietors to whom notice has been given fail to comply . . . with the requisition contained in such notice it shall be lawful for the procurator-fiscal of the Dean of Guild Court . . . to enforce the same by applying to the Dean of Guild for a warrant to execute the work . . . , and the Dean of Guild may grant a warrant.”

In terms of the Glasgow Police Act 1866 the Master of Works gave notice to one of a body of trustees, as heritable creditors, requiring them to rebuild the fallen portion of the boundary wall of a back court, and intimating that if they had objections they must lodge the same in writing within the time required by the Act. The trustees lodged objections, but the procurator-fiscal erroneously, on the footing that no objections had been lodged, presented a petition for a warrant to execute the work. The Dean of Guild subsequently allowed the petition to be amended so as to proceed, on the footing that objections had been lodged, and on a prayer for a warrant to cite the objector, and for an inquiry into and decision on the question raised. The respondent appealed to the Court of Session against what were admittedly interlocutory judgments of the Dean of Guild. *Held* (1) that the appeal was competent in respect that it raised a question of incompetency, including defect of jurisdiction, and (2) that it was