

business and the profits thereof of the interdict which forced the appellants to make expenditure in keeping open and in a workable state the area to which the interdict applied, which expenditure was in fact unremunerative. The making of this unremunerative expenditure caused the profits of the business during the period in question to be less than they would otherwise have been. The payment of the £4500 did not accrue from any transaction or dealing entered into by the appellants in the course of their business, but arose from a wrongful act of aggression on the part of the Railway Company which was injurious to the profits *de facto* earned by the business. It does not appear to me that a sum so paid can be regarded as a fruit or earning of the business or an ingredient in the profits thereof.

LORD ORMDALE—I concur in the opinions of the Lord President and the Lord Justice-Clerk, which I have had an opportunity of reading, that the sum received by the Glenboig Union Fireclay Company as compensation from the Caledonian Railway Company falls to be dealt with as capital. For the reasons stated by your Lordships it seems to me impossible to predicate of the £15,000 that they were profits arising or accruing from the trade or business of the company. On this topic I cannot usefully add anything to what your Lordships have said.

The question with regard to the sum received in name of damages is much more difficult, but I agree with Lord Salvesen that it was income and was properly credited to the revenue account of the company as an item essential to the proper computation of the profits of the year in which it was received. It was paid, no doubt, by the Railway Company as damages for the wrongous use of interdict, but its amount, as I read the case, was the equivalent of certain expenses legitimately incurred by the company in the ordinary course of working their mineral field for the purposes of their trade or business. It was not paid for the surrender of any asset of the company, or because of the failure in consequence of the action of the Railway Company as a profit-yielding subject of any portion of the mineral field. I agree that in the final event the expenditure was not productive. That was not because the company was unsuccessful in the litigation pending which the interdict was in force, but because of the embargo subsequently imposed. But neither was the expenditure unproductive in the sense that it constituted a loss to the company. It was neutral. It was not money thrown away. It was ultimately recovered by the company. But meanwhile, according to what appears to me to have been a perfectly competent and regular—if not the only proper—method of book-keeping, the expenditure had been debited in the company's revenue account for the purpose of ascertaining the net profits arising from their trade for the year or years in which it was incurred, with the result that those profits were diminished by the amount of it. The effect of crediting the sum in question

was in effect to replace the profits so displaced, and accordingly it seems to me that for taxing purposes and in the sense of the taxing statutes it may be rightly designated profits arising or accruing from the company's trade or business.

The Court refused the appeal.

Counsel for the Appellants—Macmillan, K.C.—Mackay, K.C.—Gentles. Agents—R. S. Miller, W.S.

Counsel for the Respondents—Solicitor-General (Murray, K.C.)—R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, February 19.

FIRST DIVISION.

[Exchequer Cause.

GUEST'S EXECUTRIX v. COMMISSIONERS OF INLAND REVENUE.

Revenue—Excess Profits Duty—“Where a Trade or Business has Ceased”—Realisation of Trading Stock—Liability of Executrix—Person Deemed to be Carrying on Trade or Business—Finance Act 1918 (8 and 9 Geo. V, cap. 15), sec. 35 (2) (a).

The Finance Act 1918, sec. 35 (2), enacts—“Where a trade or business has ceased but is deemed for the purposes of this section to have been carried on for any period—(a) the person by whom or by whose authority any trading stock is sold, whether as owner, agent, liquidator, trustee, or receiver, or other person acting in a similar capacity, shall be deemed to be the person carrying on the trade or business, and excess profits duty shall be assessed on and recoverable from that person, and nothing in sub-section (2) of section 45 of the principal Act shall operate so as to impose any liability to duty on the purchaser of the trading stock.”

An executrix and sole trustee under her husband's will sold the goodwill, books, and papers of his business, which had ceased at his death, and the office furniture to her son. She retained the book debts and the trading stock on hand at her husband's death, and gradually sold off the trading stock. Under the agreement by which she sold the goodwill there was reserved to her the exclusive use of her husband's business premises until the liquidation of the estate should be completed. *Held* that the executrix was to be deemed to be the person carrying on the trade or business within the meaning of the section, and that she was liable to excess profits duty accordingly.

Observed (per the Lord President) that even if the business had not “ceased” the executrix would probably be so liable, but under sub-section (1) of section 35 of the Act.

The Finance Act 1918 (8 and 9 Geo. V, cap. 15), sec. 35 (2), is quoted *supra in rubric*.

The executrix of George Guest, produce merchant, Glasgow, *appellant*, being dissatisfied with the decision of the Commissioners for the Special Purposes of the Income Tax Acts, confirming an assessment to excess profits duty for the accounting period commencing 6th May 1918 and ending 31st December 1918, in the sum of £4000, made upon her under the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), Part III, and subsequent enactments, appealed by Stated Case, in which the Commissioners of Inland Revenue were *respondents*. The accounting period was fixed by the Commissioners of Inland Revenue pursuant to section 35 (1) of the Finance Act 1918.

The Case stated—"The following facts were proved to our satisfaction or admitted at the hearing of the appeal:—1. The late Mr George Guest, hereinafter referred to as 'deceased,' carried on business as a produce merchant at 5 Oswald Street, Glasgow. 2. He died on 5th May 1918. 3. By his will the appellant (his widow) was appointed executrix and sole trustee, and is entitled to the whole of the income from the trust estate. 4. Subsequent to 5th May 1918 the appellant did not buy any goods, but gradually sold off the stocks on hand at that date, with the exception of a part thereof which was destroyed by fire on 5th October 1918. 5. By agreement dated 17th June 1918 the appellant sold to her son Samuel Guest for £200 the goodwill of the business together with the books, papers, and office furniture. The sale did not include the book debts nor any part of the stock, and the agreement reserved to the appellant the exclusive use of the whole of the premises occupied by deceased for business purposes until the process of liquidation of the estate should have been completed. 6. The said son Samuel commenced business on his own account in August 1918, and at the end of March 1919, by which date the appellant had sold almost all the stock, he bought from her the little that then remained unsold. . . .

"The *question of law* for the opinion of the Court is whether the appellant is to be deemed to be the person carrying on the trade or business within the meaning of section 35 (2) (a) of the Finance Act 1918, and liable to excess profits duty accordingly."

Argued for the appellant.—The appellant had realised the trading stock in the ordinary course of ingathering the executory estate. Section 35 (2) (a) of the Finance Act 1918 did not apply to profits made by such a realisation. The section was according to section 45 (1) to be construed with the Finance (No. 2) 1915 Act (5 and 6 Geo. V, cap. 89). "Owner" meant the owner who had carried on the business (Finance (No. 2) Act 1915, section 45 (2)), and "liquidator, receiver, or trustee" meant a person in the position of a trustee for creditors—Finance Act 1916 (6 and 7 Geo. V, cap. 24), section 56. "Otherwise than in the ordinary course of business" in section 35 (1) referred to such owner or trustee. In the cases to which section 35 (2) (a) applied there was no real change of ownership as there was in the case of an executrix. The purpose of the section was to meet the case, not previously provided

for, of an owner or trustee for creditors evading the tax by realising stock after a business had ceased. It was not intended that the estate of a deceased person should be assessed for excess profits duty in addition to estate duty. Hence words descriptive of an executor had been omitted from the section and provision made in sub-section (5) that references to the disposal of trading stock were not to include disposal by way of testamentary deed.

Argued for the respondents.—The case was covered in terms by section 35 (2) (a) of the Finance Act 1918. As executrix the appellant was the owner who had sold the trading stock. Section 45 (2) of the Finance (No. 2) Act 1915 did not exclude the case of a business ceasing owing to the death of the owner. Section 35 (2) (a) of the Finance Act 1918 was a collecting section and pointed out the person realising the stock as the person who had to pay the duty. He was not to be treated as a new owner—section 35 (2) (b). The pre-war standard was the standard of the business as carried on by the deceased owner.—*Inland Revenue Commissioners v. Gittus*, [1919] 2 K.B. 766. The absence of the word "administrator" or some equivalent was explained by the section being merely for collecting purposes. Sub-section (5) did not mean that where there was a change of ownership by testamentary disposition the stock was to be exempt from duty, but that with reference to sub-section (4) a disposal by testamentary deed was not to be treated as a sale. If the appellant did not choose to state proper accounts she could not object to the figures taken—*Macpherson & Company v. Inland Revenue*, 1912 S.C. 1315, 49 S.L.R. 979.

At advising—

LORD PRESIDENT — The deceased Mr George Guest carried on up to the date of his death on 5th May 1918 the business of produce merchant in Glasgow. Six months before his death he had added to his own business—by purchase from the controller of enemy aliens' businesses—the goodwill and assets of two enemy alien concerns in London. The appellant is Mr Guest's widow. She is executrix and sole trustee under his will. At his death she became owner as such executrix and trustee both of her late husband's own business and of the two alien concerns which he had acquired by purchase.

About six weeks after her husband's death (*viz.*, on 17th June 1918) the appellant sold the goodwill of her late husband's own business to her son; and about ten months after her husband's death (*viz.*, in March 1919) she sold to him a small residuum of the trading stock. Meanwhile she had sold off the greater part of the trading stock otherwise than in the ordinary course of trade.

The transactions which took place with regard to the assets of the two enemy concerns, while these were in the hands of the deceased, and after they came into the appellant's hands, are in a state of much obscurity, but apparently transactions did take place during both periods.

The Special Commissioners have assessed

the appellant as executrix and trustee in £4000 of excess profits duty in respect of her husband's own business and of the two alien concerns together, for the accounting period from 6th May 1918 (the day after Mr Guest's decease) to 31st December 1918.

It appears from the Stated Case that the greater part of the dispute—if not the whole of it—has arisen in connection with the accounts relating to the alien concerns, both as to the pre-war standard and as to the profits made during the accounting period. The Commissioners have given the appellant every indulgence in the way of time for the production of accounts of the profits made out of these concerns during the accounting period. The pre-war standard of the profits of these concerns has however been fixed by the Commissioners, and in the absence of accounts properly vouching the profits in the accounting period the Commissioners have had to estimate as best they can the difference between these and the pre-war standard. That difference enters into the assessment of £4000 which as I have already said covers the excess profits both of the original business and of the two alien concerns.

When the case came before us the appellant intimated through her counsel that she did not persist in the appeal *quoad* the alien concerns. The result is to limit the scope of the appeal in a rather awkward fashion, inasmuch as neither the Stated Case, nor the question of law submitted to us, is drawn with an exclusive eye to the condition of affairs relative to Mr Guest's original business by itself.

Confining attention to the original business, it appeared to be common ground between counsel that it "ceased," within the meaning of section 35 (2) (a) of the 1918 Act, on Mr Guest's death. It is perhaps right to point out that a business does not "cease" merely because (1) it is sold to a purchaser, or (2) passes into the hands of creditors, or (3) is transmitted on the death of its owner to his personal representatives; for the purchaser, creditors, or personal representatives may carry it on. If they do so the business does not "cease," although in the first and third alternatives a "change of ownership" has occurred. It was argued on behalf of the appellant that she was never the owner of the business. If she did not become owner of it when it passed to her as executrix and trustee, who did? The appellant's contention would leave the business ownerless, and I do not think it is tenable. It was of course in the power of the appellant as executrix and trustee, after she became owner of the business, either to cause the business to "cease" or to dispose of it to someone who wished to carry it on for himself. And it would not be surprising—on the assumption that the appellant took the latter course—if there was a period between Mr Guest's death and the disposal of the business during which the ordinary course of trading was interrupted or departed from. I am not satisfied that a business necessarily "ceases" because, although the goodwill is

sold to a purchaser who intends to continue trading with the old customers, the bulk of the trading stock and the book-debts are retained for realisation otherwise. Might not the business carried on by the purchaser with the old customers be just a continued carrying on of the old business? I realise that procedure after this fashion involves serious interference with the course of ordinary trading in the business; it may even suspend it for a time. But, *prima facie* at least, "ceasing" means more than that. In the present case I am unable, without more information than the Stated Case gives me, to decide that Mr Guest's own business ever "ceased." The question is one of fact, and counsel for the parties were no doubt well advised in treating it as impliedly decided by the terms of the Stated Case, which I wish had been more explicit. Even if, however, the business did not "cease" the appellant's liability will probably be the same, but under the first part of sub-section 1, instead of under sub-section 2, of section 35 of the 1918 Act, for the sale of the trading stock by her occurred "after the 22nd day of April 1918"; the sale was "otherwise than in the ordinary course of trade"; and while the stock prior to 17th June 1918—when the appellant sold the goodwill to her son—would be "stock belonging to the business," that part of it which still remained to be disposed of after that date—assuming that the sale of the goodwill involved not a cesser of the business but only a change of its ownership—would be "stock formerly belonging" to it.

The appellant further argued that inasmuch as the disposal of the stock (otherwise than in the ordinary course of trade) was carried out by her in virtue of her appointment as executrix and trustee under her husband's testamentary disposition, that disposal did not bring her within section 35 (2) (a) of the 1918 Act. This argument was based on the concluding words of section 35 (5). But it seems clear on the construction of the section as a whole that these words have no further application than to sub-section (4). If that be so they do not support the appellant's contention.

I think we must take the question on the assumption on which it was argued to us, viz., that the whole of the businesses owned by Mr Guest ceased at his death. So taking it, I am of opinion that it should be answered in the affirmative.

LORD MACKENZIE— I am of the same opinion.

LORD SKERRINGTON— It was contended before the Commissioners for the Special Purposes of the Income Tax Acts on behalf of the appellant, the executrix of George Guest (deceased), (1) that the assessment should be totally discharged as she did not carry on any trade or business as executrix, and was not liable under section 35 (2) of the Finance Act 1918, and (2) that in the event of her being so liable an addition should be made to the pre-war standard of profits as computed by the Commissioners of Inland Revenue in respect of pre-war profits real-

ised by two enemy alien concerns part of whose business had been acquired by the appellant's husband. While a great part of the Stated Case is taken up with statements of fact and contentions relative to these alien concerns, and is relevant solely to the amount of the assessment, the question of law as put to us raises no question as to the amount of the assessment or as to the method by which it was arrived at. We are asked "whether the appellant is to be deemed to be the person carrying on the trade or business within the meaning of section 35 (2) (a) of the Finance Act 1918, and liable to excess profits duty accordingly." The sole question therefore is as to the appellant's liability. Moreover, section 35 (2) (a) of the Act of 1918 applies only to a case "where a trade or business has ceased but is deemed for the purposes of this section to have been carried on for any period." The question of law assumes, as did also the counsel on both sides in the arguments which they addressed to us, that the business carried on by Mr Guest did in fact cease at his death. We are not asked to consider whether upon the facts proved or admitted the Special Commissioners were entitled to draw that inference.

Such being the question of law, it is at first sight difficult to see how the appellant can avoid the liability to excess profits duty which is expressly imposed by section 35 (2) (a) of the Act of 1918 upon "the person by whom or by whose authority any trading stock is sold, whether as owner, agent, liquidator," &c. The appellant as her husband's executrix was the owner of the trading stock in question, and it was sold by her orders. Her counsel pointed out, however, that Part III of the Act of 1918 is directed by section 45 (1) to be construed with the principal Act relating to excess profits duty—the Finance (No. 2) Act 1915. He further pointed out that by section 45 (2) of the principal Act, where a trade or business has ceased, the duty may be assessed on the person who owned or carried on the business "immediately before the term at which the trade or business ceased." He therefore argued that the word "owner" must be construed in the same restricted sense in section 35 (2) (a) of the 1918 Act. If so, the late Mr Guest and not the appellant was the person who owned or carried on the business immediately before the time at which it ceased. Moreover, the Acts did not contemplate an assessment upon a deceased person. In short, according to the argument of the appellant's counsel, the extended liability for excess profits duty introduced by the Act of 1918 was not intended to apply to a case where a trader died and his legal representative did not carry on the business but simply sold the stock-in-trade for the purpose of realising and dividing the estate. It was not intended that both estate duty and excess profits duty should be paid in such a case. In conformity with this construction of the Act the words "executor or administrator" were intentionally omitted from the enumeration in section 35 (2) (a) of the persons liable for excess profits duty upon the sale of a trading stock. For the

same reason it was enacted in section 35 (5) that "references to disposal of trading stock do not include disposal by way of testamentary disposition."

While I feel the force of these arguments I do not think that it is possible to give effect to them without resorting to something like judicial legislation. The word "owner" as used in section 35 (2) (a) of the 1918 Act obviously refers to the person who is the owner of a trading stock and who gives orders for its sale, and not to the person who was the owner of a business which has ceased to exist. In other words, the seller of the trading stock and not the former owner of the business is "deemed to be the person carrying on the trade or business," and as such is liable to be assessed for, and is bound to pay, excess profits duty on the profits from the sale of the trading stock. Moreover, the enactment in section 35 (5) is primarily intended to place a testamentary donee in the same position as an executor or administrator who takes a trading stock *ab intestato*. In neither case is there any liability for excess profits duty unless and until the donee, executor, or administrator sells the stock within the meaning of section 35 (4). I cannot construe section 35 (5) as enfranchising a sale by a testamentary donee. Why should such a donee be placed in a better position as regards this matter than an executor or administrator who succeeds to the trading stock *ab intestato*?

For these reasons I am of opinion that the question of law should be answered in the affirmative.

LORD CULLEN did not hear the case.

The Court dismissed the appeal and affirmed the determination of the Commissioners.

Counsel for the Appellant—Hon. W. Watson, K.C.—Graham Robertson. Agents—Macpherson & Mackay, W.S.

Counsel for the Respondents—Leadbetter, K.C.—Henderson. Agent—Stair A. Gillon, Solicitor for Inland Revenue.

COURT OF TEINDS.

Friday, February 25.

HENDERSON AND OTHERS, PETITIONERS.

*Church—Parish—Unification of Charges—
Petition to Court of Teinds.*

The second charge in a parish having become vacant the presbytery and kirk session presented a petition for unification of the charges. There was no evidence to show whether the parish was a united parish or how the two charges came into existence. The petition stated that the conditions which the collegiate charge was designed to meet no longer existed, that the temporalities of the benefice were not now sufficient for the