

that the respondents might have arrived at the same result by lawful means, and that without infringing the appellants' right they might have produced a nail which would have proved an equally dangerous rival of the globe nail.

The sole question is, what was the loss sustained by the appellants by reason of the unlawful sale of the respondents' nails? The loss must be the natural and direct consequence of the respondents' acts. In the first place, I think the claim for loss of profits by reason of the reduction of price must be rejected. I do not think that was the natural or direct result of the respondents' acts. The appellants seem to have had no difficulty in ascertaining where the competing nails were made, and in coming to the conclusion that they were produced by machinery which infringed their patent rights. The appellants must be taken to have believed in their case. If they believed that the respondents were infringing their rights, and relied on obtaining redress in due course of law, it appears to me that it was not a reasonable course on their part to reduce the price so as to injure their own trade. On establishing their rights they would be entitled either to the profits which the respondents might have made, or to the damages which they could prove they had sustained. In lowering their prices they seem to me to have been prompted by a desire to provide for the contingency of their failing in their action, and by an anxiety to drive their rivals from the field whether they were right or wrong.

There remains the other head of damage—loss of sales by reason of the competition of the respondents.

I think the appellants are entitled to take into account the total quantity of nails sold by the respondents, and that they are not limited, as the Lord Ordinary held they were, to the period commencing on the 27th of June 1883. Although that was the date on which the appellants acquired their title to the patents, they succeeded to the rights and to the property of their predecessors in title.

Then comes the question, to what extent did the wrongful acts of the respondents operate to prevent sales by the appellants? I think it would be going too far to say that if the respondents had not been in the field the appellants would have sold an additional quantity equal to the amount sold by the respondents. But considering that the respondents seem to have worked the ground occupied by the appellants, and having regard to the progressive increase in sales during the previous years, and to the fact that the sales of the appellants and of the respondents taken together did not largely exceed the appellants' sales in 1882, I think it is a fair inference that if the appellants had been left undisturbed the natural increase of their business would have come near the aggregate of the quantity sold by the appellants and respondents together.

If it were assumed that but for the interference of the respondents the appellants would have sold 5752 boxes in addition to what they actually sold, their loss, taking the actual prices, would be £611. I think it would be reasonable to strike off from that amount a moderate percentage as representing sales due to increased activity produced by the rivalry of two competitors. This would reduce the damages very

much to the amount found by the Lord Ordinary, though he has arrived at the result in a somewhat different way.

The amount of damages is not a matter of exact calculation, and your Lordships have not got before you all the materials which would be required to arrive at the most accurate estimate that could be formed, nor indeed all the materials that were before the Lord Ordinary. But it appears to me that substantial justice will be done if your Lordships confirm the amount that the Lord Ordinary has awarded. It would be lamentable to condemn the parties to further litigation.

As regards costs, it seems to me that the respondents ought to pay the costs of the trial before the Lord Ordinary, but that there ought to be no costs of the subsequent proceedings.

Interlocutor of the First Division reversed; interlocutor of the Lord Ordinary restored; no costs after the date of the Lord Ordinary's interlocutor.

Counsel for the Appellants—Rigby, Q.C.—Guthrie Smith. Agent—H. C. Godfrey, for Gill & Pringle, W.S.

Counsel for the Respondents—Finlay, Q.C.—Ure. Agent—W. A. Loch, for Maconochie & Hare, W.S.

Thursday, April 26.

(Before Lord Herschell, Lord Fitzgerald, and Lord Macnaghten.)

INLAND REVENUE *v.* TOWN AND COUNTY BANK (LIMITED).

(*Ante*, March 4, 1887, 24 S.L.R. 388; 14 R. 528.)

Revenue—Income-tax—Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), Schedule D, Cases I. and II., Rule 1—Deduction for Value of Premises occupied as Dwelling-house.

A bank was charged with income-tax under Schedule A of the Income-Tax Act, 1842, on certain premises belonging to it in which it carried on its business, and which were also to some extent occupied as dwelling-houses by the manager and agents, that accommodation being given by the bank to them as part of their emoluments. In assessing the bank for income-tax under Schedule D, the Income-Tax Commissioners refused to allow deduction from the gross profits of the bank of the annual value of these premises, in so far as they were occupied as dwelling-houses.

Held (affirming the judgment of the First Division) that the bank was entitled to deduct the value of the whole premises in question, the portions used as dwelling-houses not being beneficially enjoyed as such by the bank.

This case is reported *ante*, March 4, 1887, 24 S.L.R. 388, and 14 R. 528.

The Inland Revenue appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, this is an appeal from the judgment of the First Division of the

Court of Session, sitting as the Court of Exchequer in Scotland, reversing a decision of the Income-Tax Commissioners with reference to the liability of the respondents to pay a certain amount of income-tax claimed. The facts are very shortly stated. The respondents are an incorporated company carrying on the business of banking, and they own certain premises which they use for their business purposes, and those premises (to quote the language of the case) "contain certain accommodation occupied as a dwelling-house by the manager or resident agent of the bank." The respondents claim to deduct the entire annual value of the bank premises, including the portion so occupied by the manager or resident agent. The Crown, on the other hand, contend that the portion of the premises occupied for that purpose ought to be dealt with separately from what they term the bank premises proper, and that no deduction ought to be allowed in respect of the annual value of that portion of the premises belonging to the respondents.

My Lords, the question turns upon the construction to be put upon the 100th section of the Income-Tax Act of 1842. The case is a case under Schedule D, and to be dealt with according to the rules provided in relation to that schedule. It is asserted on behalf of the appellant that the rules prohibit all deductions except those which are expressly authorised by the Act, and that this deduction not being a deduction allowed the respondents are not entitled to insist upon it.

My Lords, the duty is to be charged upon "a sum not less than the full amount of the balance of the profits or gains of the trade, manufacture, adventure, or concern," and it appears to me that that language implies that for the purpose of arriving at the balance of profits all those deductions from the receipts, all that expenditure which is necessary for the purpose of earning the receipts, must be deducted, otherwise you do not arrive at the balance of profits, indeed you do not ascertain and cannot ascertain whether there is such a thing as profit or not. The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts. That seems to me to be the meaning of the word "profits" in relation to any trade or business. Unless and until you have ascertained that there is such a balance nothing exists to which the name "profits" can properly be applied.

My Lords, it is quite true that the section provides that "the duty shall be assessed, charged, and paid without other deduction than is hereinafter allowed," and I will assume for the purposes of this case that that does prohibit (although the words certainly appear to be applicable to the duty) the making of any deductions from the balance except those allowed by the subsequent provisions of the Act. It is to be observed that, properly speaking, there is nothing to which those words are applicable. The provisions of the Act do not expressly allow any deductions. What they do is to prohibit certain deductions with certain exceptions, and therefore it may perhaps in a sense be said that having prohibited certain deductions with certain exceptions the excepted things are allowed.

Now, my Lords, it is not disputed that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains. I am of course speaking for the moment of premises which are not used in any way as a place of dwelling, but are exclusively business premises. But there may be a question where the right to make that deduction is to be found. I am myself disposed to think that it is allowed, because it is an essential element to be taken into account in ascertaining the amount of the balance of profits. If not, it can only be included by a very broad extension of the terms actually used as being a disbursement or expense, which is money wholly and exclusively laid out or expended for the purposes of the trade. It is quite true that strictly speaking the annual value where the premises are owned and not rented is not money laid out or expended for the purposes of the trade, but it is admitted—and must, I think, have been admitted—that in either the one way or the other that deduction is to be made, because inasmuch as it is clear that even in the case of a dwelling-house, a part of which is used for purposes wholly unconnected with the trade, the annual value of the portion which is used for the purposes of the trade is to be deducted, it is evident that it can never be contended that in the case of premises used not for the purpose of a dwelling at all, but exclusively for trade purposes, the annual value is not to be deducted. The annual value is therefore to be deducted somewhere. It is to be deducted either by taking it as an element before arriving at the balance of profits and gains, or so included in a very broad construction of the provision relating to disbursements and expenses.

My Lords, if therefore the whole of these bank premises had been used for the business purposes of the bank without anyone dwelling in them it is quite clear that the entire annual value would have fallen to be deducted. But it is said that inasmuch as the manager of the bank dwells in a part of those premises that deduction is not to be made. Now, apart from the provision with regard to a dwelling-house, to which I will advert in a moment, I cannot see any foundation for such a contention. The portion of the bank in which the manager resides is as much used for the purposes of the business of the bank, so far as appears upon the facts stated in this case, as if it were used in any other way. He resides there for the purposes of the bank; the bank receive nothing for his residing there. The bank are in precisely the same position as if that portion of their bank premises were used in any other way, and used in the strictest sense for the purposes of the bank and the business of the bank. Therefore I do not see any reason why, if the annual value of the premises belonging to them used for the purposes of their business has to be deducted, any deduction should be made from that amount on account of the fact that the manager of the bank for purposes of the business or as part of his emolument (it seems to me not to matter which) occupies a portion of the bank premises.

But then it is said that the case of dwelling-houses is specially dealt with, and that no deduction is to be made in the case of dwelling-houses except in the manner specified.

Now, my Lords, it is to be observed that that

provision follows the general provision to which I have already alluded, and I think it would be extremely difficult to contend (the learned counsel who appeared for the appellant hesitated to admit this) that if the bank paid as part of his emoluments the rent of a house in which their manager lived, that would not be strictly speaking a disbursement or expense wholly and exclusively laid out or expended for the purpose of their business. Well, but if so, it is impossible to contend, or very difficult at least to contend, that an expense of that sort which comes within those terms, and which under those terms might be deducted, is rendered illegitimate as a matter of deduction by the words which follow. Now the words immediately following are "nor for any disbursements or expenses of maintenance of parties, their families, or establishments," which of course are not proper deductions in ascertaining the balance of profits of a trade or calling. Then follow the words "nor for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern." I think that that manifestly is intended to apply to the case where a dwelling-house is occupied or rented by the person assessed in part for business purposes and in part for purposes which are other than business purposes. In that case the Legislature has provided that a portion of the rent to be determined by the Commissioners, and that portion alone, is to be deducted from the profits of the business. That that is what is being dealt with seems to me to be clear from the clause which follows, "nor for any sum expended in any other domestic or private purposes distinct from purposes of such trade manufacture," and so on. That shows that what the Legislature were dealing with at that time and intended to refer to were disbursements for the expense of maintenance or the expense of residence or any other domestic or private purpose, and if that be the true view it would be wholly inapplicable to expenditure by a trader upon house rent for the purpose of housing his servants where such accommodation was necessary or incidental to the carrying on of his business.

It is contended on behalf of the appellant that the whole of this building is a dwelling-house. My Lords, I cannot agree in that conclusion. I do not think that the word "dwelling-house" is here used in any such sense, and that a bank or a manufactory or a warehouse becomes a dwelling-house because some servant of the trader resides in that building for the purposes of the trade.

My Lords, it is not necessary to decide whether the bank manager would be liable to income-tax in respect of the value of his residence as part of the emoluments of his employment. I may say, however, that it occurs to me that the liability, if it exists, is not under Schedule E, but under Schedule D, case 2, which appears to be the one applicable to such an employment as that of a bank manager, and under that Schedule the duty is to be computed upon "the full amount of the balance of the profits, gains, and emoluments of such profession."

A great part of the argument for the Crown has turned upon the suggestion that if the bank are allowed to make this deduction, no claim can be made in respect of the enjoyment of this

property by the bank manager. My Lords, it does not follow necessarily that the Crown must be entitled to make any such charge. If it is not to be regarded as an emolument of the bank manager, but as a burden laid upon him by the necessities of his employment, no doubt it may be that he is not liable. If, on the other hand, it is to be regarded as an emolument, the statute seems in express terms to make him liable. Of course it is not necessary in the present case, nor would it be proper in his absence to express any definite opinion as to whether he would be liable or not, but it is sufficient, I think, to say that the deduction which is proposed to be made appears to be one which is essential to arriving justly and truly at the balance of profits and gains of this business, and that therefore the judgment of the Court below ought to be affirmed.

LORD FITZGERALD—My Lords, I entirely concur with what has fallen from my noble and learned friend, and I think that the judgment should be affirmed. There is always considerable difficulty in putting a clear construction on the provisions either of the Acts of 1842 or of the Act of 1853, the Schedules to which Acts must be looked to, but I think we have a clear state of facts (save in one particular, to which I shall advert presently) which enables us to come to a just conclusion.

We find that a certain portion of the bank premises is "occupied as a dwelling-house by the manager or resident agent of the bank as the case may be, the said manager and agent receive said accommodation as part of their emolument in the service of the bank, but the annual value of the accommodations is not assessed to income-tax otherwise than under Schedule A;" then it is stated "that these dwelling-houses form the official residence of the agents, and are necessary for the proper carrying on of the business of the bank, that owing to the nature of the bank's business it is essential that a responsible official should reside on the bank premises, and that thus the whole premises belonging to and occupied by the bank or its officials or agents are used for the purposes of the bank's business. There is no necessity and no possibility for the bank as such having a dwelling-house merely for occupation. The whole premises are for the purposes of the bank—business premises."

Now, although that is only a contention put forward, yet it is a contention put forward without any controversy as to the facts, but I venture to say that I am not satisfied as to one of the propositions. All through the statement these are called "dwelling-houses." They are in fact a portion of the bank premises occupied for the purposes of the bank's business by a bank manager or a bank clerk. With all respect I should say that it does not follow that they are dwelling-houses at all, or that the occupation of certain rooms in the bank by the bank manager for bank purposes, which occupation is necessary for the protection of the institution and the carrying on of its business, converts the bank premises into a dwelling-house, though it may make them for certain purposes the dwelling of the manager and clerk.

However, passing from that, the first thing we have to do under this schedule is to

estimate the balance of the profits. Now, what is the balance of the profits? "Profits," I read on authority, to be the whole of the incomings of a concern after deducting the whole of the expenses of earning them—that is, what is gained by the trade. The whole expenses of earning them must mean, according to the schedule, the whole expenses incurred for the purposes of the business and nothing else, but I came upon the statement of facts to the conclusion that if these premises were either actually used as the counting-house and other parts of the bank were used, or of the residence of the bank managers or clerk upon the premises was necessary for protection purposes and for the purposes of carrying on the business of the bank, the whole premises, not the dwelling-house alone, but the whole premises of the bank were used for those purposes, and the annual value of them forms a proper deduction in estimating the balance of profits, which is the first thing to be done. That balance of profits is to be ascertained after deducting the whole of the necessary expenses, save those which by negative provisions are excepted in the statute.

My Lords, without going further it appears to me to be perfectly immaterial whether this accommodation is to be regarded as a part of the emolument of the manager of the bank for the performance of the duties imposed upon him, or as a part of the premises used solely and wholly for bank purposes. Upon the ground which I have stated it seems to me clear that this deduction is a deduction which the bank are entitled to make, and that therefore they have already paid the whole amount of income tax for which they are liable.

LORD MACNAGHTEN—My Lords, I quite agree. I think that the deduction was properly and necessarily made in estimating the profits and gains of the bank which were chargeable with duty, and that there is nothing in the first rule applicable to the first and second cases under Schedule D prohibiting the deduction. I do not think that a house in which a bank or limited company carries on business is a dwelling-house within the meaning of that rule. It is not and could not be used by the bank for any purpose distinct from their business. I think the expression "dwelling-house" in that rule means a house in which the person liable to pay income-tax dwells in the ordinary sense of the word.

Judgment appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellants—Att.-Gen. Webster—Sol.-Gen. Robertson. Agent—W. H. Melvill, for D. Crole, Solicitor of Inland Revenue.

Counsel for the Respondents—Sir H. Davey, Q.C.—Graham Murray. Agents—Grabames, Currey, & Spens, for J. & F. Anderson, W.S.

Tuesday, November 15, 1887.

(Before the Lord Chancellor (Halsbury), Lord Watson, and Lord Macnaghten.)

DOWAGER DUCHESS OF MONTROSE AND
OTHERS v. STIRLING STUART.

(*Ante*, vol. xxiv., p. 105.)

Warrandice—Heir and Executor—Catholic Secularity.

By a trust-disposition and settlement, executed in 1853, the granter conveyed his whole estate, heritable and moveable, to trustees, for the purpose, *inter alia*, failing heirs of his body, of conveying his estate of M, and his other lands in the county of L, to his brother, and the heirs of his body, under the fetters of an entail. By the same deed he directed his trustees, failing his own issue, to make over the whole residue of his estate to the person who should succeed to M.

By a codicil, dated in 1876, he disposed to his wife, in the event of her surviving him, the lands of B and A (which were among the lands originally directed to be entailed), and bequeathed to her the whole residue of his estate. By a previous deed he had appointed his wife his sole executrix. The disposition of B and A contained a clause of warrandice in ordinary form under the Titles to Land Consolidation Act 1868 (31 and 32 Vict. cap. 101), which imports absolute warrandice. In 1882 the truster granted a bond and disposition in security for £250,000 over the estates of M, B, and A.

On the truster's death his widow maintained that no part of the debt of £250,000 was payable out of B and A, or out of residue, but that the whole debt was entirely chargeable against M.

Held (affirming the judgment of the Second Division) that the truster had in imposing the obligation of warrandice used words limited in their significance to personal obligation, and that his widow, as personal representative and executrix, must herself discharge the obligation of warrandice.

This case is reported *ante*, November 26, 1886, 24 S.L.R. 105, and 14 R. 131.

The Dowager Duchess of Montrose and Mr Stirling Crawford's trustees appealed.

At delivering judgment—

THE LORD CHANCELLOR (HALSBURY)—My Lords, in this case the question for your Lordships' decision appears to me to be clear beyond all doubt. Mr Stirling Crawford appears to have left three estates, which were charged with a sum of £250,000. With respect to two of them he left them to his widow, the present appellant, with a clause of warrandice that they should be free from all obligations, of course including the proportionate part of this £250,000 to which by law they would be liable.

It is not denied that if nothing more appeared each of these three estates, the one (Milton) which went to the testator's brother and heir-at-law, and which was left to him by a sufficient disposition and not as heir-at-law, and the two which went to his widow, would be rateably chargeable with the