have expressed my doubts in the course of the discussion of the propriety of our interference; but the Lord Ordinary has gone into the action on the footing that it was right aliment should be given, and has decided the amount of aliment to be given, and I am not prepared to disturb his decision. I should have thought that the amount given was going to the verge of unreasonableness, but at the same time I am not disposed to change it.

Lord Young—My opinion is the same. I share your Lordship's doubts, but I also agree that the parties having gone on before the Lord Ordinary with the action to decide the amount of aliment due by the defender to the pursuer, and the Lord Ordinary having decided that question, I am not prepared to go back from that judgment.

The husband did not turn the wife out of his house, but he went out of the house himself without giving her sufficient support. The wife then brings an action of declarator that her husband is bound to adhere, and as incident to that she puts in a conclusion that he is bound to aliment her until he did adhere. The conclusion for aliment however was a mere incident of the conclusion for adherence.

Now, in the course of the case a minute was put in for the pursuer, but I confess I think it was curiously carried out. The minute was—"Gunn for the pursuer proposed to delete the conclusion of the summons for adherence, and he therefore craved his Lordship to grant leave accordingly." Now this minute is a proposal to delete the conclusion for adherence. I find that that conclusion was deleted, but these words were added on the margin, "that the defender as the husband of the pursuer has deserted her." Now, that comes just to be the case of a wife saying, My husband and I have agreed to separate, and I ask the Court that my husband should be ordained to pay me a certain sum of aliment. I think the proper answer to that is, the separation you agreed to was part of your own affairs, and we think that the amount of aliment ought to be the same also. But on the record the husband says that he cannot live with his wife, and before the Lord Ordinary it was agreed that it was reasonable that he should pay her aliment. Now, I am not prepared to say what kind of cases should or should not come up to the Inner House. But the Lord Ordinary could not look upon this case as other than that of a wife deserted by her husband, and that he had not led any evidence to justify his desertion. Now, the amount of aliment depends on what is the profit of a fruiterer's business in Edinburgh. I suppose it is a matter of some difficulty to fix the exact amount of profit the defender draws from the business. The Lord Ordinary in fact does not seem quite clear what should be taken as the proper sum. But the Lord Ordinary has investigated the matter and has decided it. I do not think that it was necessary to bring a reclaiming-note on such small grounds as those which can be urged for that before us, and I should not feel that I was acting rightly if I ordered a change, unless it appeared clearer than it does that Mr Jameson's income was much larger than what the Lord Ordinary thought it. I see no reason why we should not simply refuse the reclaiming-note, and of course with expenses.

Lord Craighill—I confess that I have come to a different conclusion. As regards the propriety of the action I say nothing. The question which is for decision in this case is, whether the Lord Ordinary has allowed too large a proportion of what he stated to be the income of the defender as aliment for his wife? If he has not, then his interlocutor should be allowed to stand, but if he has, then I think a reduction of the amount of aliment should be made. In regard to that question we have to consider—

First, what is the income of the defender? The witnesses for the pursuer say that his income is £300 a-year, while the witnesses for the defender say that it is £105 per annum. As regards the defender's free income, I agree with the Lord Ordinary in his estimate of the sum, and think that he has followed the equitable course of taking the mean between the two sums. I think that the sum to be divided is £200 per annum. The defender is also supporting his child.

But secondly, what is the allowance that has been made in similar circumstances? The rule which was followed in the Outer House, so far as I remember, and the rule as laid down by the Lord President in the case of *Lang*, is, that a fourth of the free income is a reasonable sum to be given, and the pursuer was obliged to confess in answer to my question that he knew of no case where more had been given. That has been the practice in this Court and I am for not departing from the practice which is an only guide in cases of this sort. I regret to differ from your Lordships, but as that was my opinion, I considered that I ought to give expression to it.

Lord Rutherfurd Clark—I agree with your Lordships that the Lord Ordinary's interlocutor ought to be affirmed. I confess that I do so, however, only on the ground that the Lord Ordinary has under-estimated the free income of the defender.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuer (Respondent)—Gunn. Agent—Daniel Turner, S.L.

Counsel for Defender (Reclaimer)—Salvesen. Agent—D. Howard Smith, Solicitor.

Saturday, February 20.

FIRST DIVISION.

[Exchequer Cause.

INLAND REVENUE *v.* WATT.

Revenue—Income-Tax—Deduction of Losses—Property Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Schedule D, First Case, Rule Third, and sec.* 101—*Income-Tax Act* 1853 (16 *and* 17 *Vict. c.* 34), *sec.* 2, *Schedules B and D.*

Held that a farmer who was assessed for income-tax under Schedule B upon the rent, in respect of the occupation of his farm, and who was also assessed under Schedule D in respect of the annual profits arising from his business as a seed merchant, was not entitled, either under sec. 100, Schedule D,

first case, rule third, or sec. 101 of 5 and 6 Vict. c. 35, to deduct from the profits arising from his business as seed merchant the loss which he had sustained as tenant of the farm.

William Watt, seed merchant at Cupar and Perth, appealed to the Commissioners of Income-Tax for the Cupar District of the county of Fife against an assessment made on him under Schedule D of the Income-Tax Acts (5 and 6 Vict. c. 35, and 16 and 17 Vict. c. 34) for the year 1884-5, of £350 in respect of his profits as a seed merchant.

The ground of appeal was that Mr Watt's losses in farming for the same year exceeded the whole amount of his profits as a seed merchant.

By that Schedule duty is payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment or vocation." . .

Schedule B enacts that duty shall be payable for lands, and in respect of the occupation of all such tenements and heritages as aforesaid (*i.e.*, in the United Kingdom), and be charged for every twenty shillings of the annual value thereof."

These schedules are contained in section 2 of 16 and 17 Vict c. 34, which is a re-enactment of the provisions of 5 and 6 Vict. c. 35. The earlier Act contains rules for the computation of the duty.

By 5 and 6 Vict. c. 35, it is provided, sec. 100, Schedule D, first case, rule third, that "in estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from . . . such profits or gains . . . on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern."

By sec. 101 it is provided that "nothing herein contained shall be construed to restrain any person carrying on, either solely or in partnership, two or more distinct trades, manufactures, adventures, or concerns in the nature of trade, the profits whereof are made chargeable under Schedule D, from deducting or setting against the profits acquired in one or more of the said concerns the excess of the loss sustained in any other of the said concerns over and above the profits thereof." . . .

The Commissioners, "without indicating an opinion as to whether in any other case loss by farming could be set against profits from trades and professions assessable under Schedule D, decided unanimously that in the present case, Mr Watt having taken the farm with the intention of working it in connection with his seed business, the loss which had occurred might fairly be described as 'arising out of such trade, manufacture, adventure, or concern' (section 100, Schedule D, first case, rule third), and accordingly granted relief from the assessment appealed against."

The Surveyor intimated dissatisfaction with the decision of the Commissioners, and this Case was stated by them for the opinion of the Court under sec. 59 of the Taxes Management Act 1880 (43 and 44 Vict. c. 19). The facts were stated in the Case as follows:—"(1) It is admitted by Mr Watt that apart from the farm of Dura Mains his assessable profits under Schedule D amount to the sum of £350. Indeed, he returned that amount in his statement of income rendered to the assessor on 5th August 1884. (2) It is admitted by the Surveyor of Taxes that Mr Watt's loss on Dura Mains for the assessment year 1884-5 exceeds the said sum of £350."

The contentions on either side before the Commissioners were thus stated in the case—Mr Watt stated that he had taken the farm "for the sole purpose of assisting his seed trade in order that he might grow farm seeds for the wholesale and retail market," and he claimed that under section 101 of the Income-Tax Act 1853 he was entitled to set his loss on the farm against the profits from his general seed business.

The Surveyor of Taxes maintained generally that it was not competent to set loss sustained on property, or profits assessable under one schedule of the Income-Tax Acts, against the gains assessable under another schedule. He pointed out, with reference to the present case, that farmers and all other occupiers of land are by the Income-Tax Act chargeable under Schedule B, the rules for charging which are entirely dissimilar from those applicable to Schedule D, being based on rental and not on profits. He contended that it was only competent under section 101 in the case of persons who carry on "two or more distinct trades, manufactures, adventures, or concerns in the nature of trade, the profits whereof are made chargeable under the rules of Schedule D" to impute loss on any one such concern against profits on another. The words of section 101 were identical with those used in describing profits liable in assessment under Schedule D (see section 100, Schedule D, first case). The obvious intention of the statute was, he held, that merchants, manufacturers, and others who were engaged in two or more concerns in the nature of trade, and both or all of which were assessable under Schedule D, should be allowed to set off losses on one such concern against profits on another.

On appeal the argument for the Surveyor was as above stated, and he cited the case of *The Corporation of Birmingham*, June 9, 1875, Tax Cases, 26.

The respondent argued that both under section 100, Schedule D, first case, rule third, and under section 101 of 5 and 6 Vict. c. 35, he was entitled to set his loss on the farm against the profits from his general seed business.

At advising—

Lord President—I cannot agree with the Commissioners here in the result which they have arrived at. The appellant is a seed merchant, and he carries on that business in the town of Cupar and in the town of Perth, in each of which places he has a shop. Now, the occupation of a seed merchant, like every other merchant, is to buy and sell. There may be engrafted on that no doubt, as in many cases there is, the occupation of producing that which the merchant sells, and then he is a manufacturer as well as a merchant, and it may be described in a kind of way that the occupation which this appellant carries on at the farm of Dura Mains is really the manufacturing of seeds to be used in his business, and I am quite willing so to take it. But these are two totally separate and distinct characters. They may be combined in the ordinary case of a merchant and manufacturer as one business no

doubt, but they may also remain, as I think they do in the present case, necessarily unconnected with each other in the sense of the Income-tax Acts. The one assessment to which Mr Watt is subject as the occupier of Dura Mains farm is an assessment under Schedule B of the Act, and under no other schedule, and under that schedule he is assessed according to the amount of the rent which he pays to his landlord. His other assessment as a seed merchant is under Schedule D of the Act, and is laid on according to a different rule altogether, viz., upon the amount of his annual profits calculated upon the average of three years. Now, the proposal is to deduct from the profits made in his business as a seed merchant the loss which he has sustained as lessee of Dura Mains, his farm. I do not say that it might not have been quite reasonable that the statute should have provided for such a case, and should have allowed for such a deduction, but I am afraid without some such special provision it is impossible to allow it, and this becomes all the more clear from the very section of the statute upon which the appellant himself relies—the 101st section of the Act 5 and 6 Vict. cap. 35—because that provides that where two businesses are carried on by the same people—where two trades are carried on by the same person or persons—both of these falling under Schedule D—then it shall be competent to deduct the losses sustained in the one business from the profits realised in the other before assessing for the income-tax. If there had been any intention upon the part of the Legislature to extend that provision to assessments which are laid on under different schedules of the statute, it is very clear that that would have been specially provided for, and the very omission of that, while the case provided for in section 101 is thereby specially provided for, I think, makes it evident that such a proposal as is here made never was in the contemplation of the Legislature at all, and cannot be admitted. The special ground upon which the Commissioners have proceeded in making their deliverance is upon the words of the first case, rule 3, of Schedule D in section 101, and the special part of that third rule founded upon is this, that in estimating the balance of profits and gains chargeable under Schedule D no deduction is to be made "on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern," and the Commissioners have held that the loss arising out of this speculation, the lease of Dura Mains farm, is a loss connected with or arising out of the trade of Mr Watt as a seed merchant, and by implication therefore they hold it to be signified in this particular rule that such loss may be deducted. Now, I do not think that in any proper sense—and especially not in the statutory sense—can this undertaking or adventure in connection with Dura Mains farm be held to be connected with or arising out of the trade of a seed merchant. No doubt there is a connection in a popular sense. That is plain enough. But if we were to deal with everything connected with a trade as falling within this description — "connected with or arising out of a trade"—within the meaning of the third rule, I do not see to what extent we might not be pressed to go in construing expansively this provision of the statute, and after all it is not a direct provision justifying the demand here made, but merely certain words giving rise to an implication more or less strong. I think upon both grounds maintained it is impossible to sustain this claim of Mr Watt, and therefore the determination of the Commissioners must be reversed and the assessment sustained.

Lord Mure—I am of the same opinion. We are here dealing with a purely statutory matter, and unless we can find distinct grounds in the statute for what the Commissioners there propose to do I do not think it can be sustained. I am quite satisfied on the explanations your Lordship has given of the various clauses in the statute that this exemption or freedom from taxation is not sanctioned by any of the provisions of the statute.

Lord Shand—I think the case must be taken on the assumption of the fact upon which the Commissioners have proceeded, that this gentleman did carry on this farm in connection with his seed business, but even taking it so, I have come to the conclusion with your Lordship that according to the provisions of these Income-tax Acts the loss beyond the amount of the rent of that farm cannot be taken into view in estimating the profits with reference to the seed business. The broad ground upon which I proceed is this, that it appears to me that where a farm is in the possession of a tenant or occupier the statute prescribes that the mode in which the assessment with reference to that farm is to be laid on is, that the rent is to be taken, and that the only relief which is given to a tenant whose loss exceeds the amount of the rent is that he shall be free from assessment under the clauses which allow an abatement in that case. In short, the carrying on of the farm—the occupation of the farm—does not lead to an assessment as upon profits made, but leads simply to an assessment as upon the amount of the rent, with right to the person, if his losses exceed the rent, to be free of the assessment altogether under the clause of abatement. That being so, I think there really is an end of this case. It is quite true that this gentleman carries on the business of a seed merchant, and I take it to be quite true that he carries on this farm in connection with that, and the Legislature might have provided that that being so, in such a case what the Commissioners should look at is the profit he is making over all—farm and seed business all taken in one. That might have been quite equitable, but I do not think it is so provided, and I think that when losses are spoken of in section 100 of the Act 5 and 6 Vict. cap. 35, these losses for which a deduction is to be allowed are losses in connection with the trade or business, not in connection with the farm, which is to be assessed in a totally different way. My view upon that matter is strengthened, and indeed made absolutely clear, by the circumstance that there is one class of land which is to be differently treated. If a man is carrying on business as a nurseryman or seedsman, and he has a nursery, the statute provides that the nursery is not to be taken at its rent with a view to assessment as a farm is to be taken, but the nursery is to be dealt with as a subject yielding profit, and accordingly, if there had been a similar provision that a farm was to be taken in the same way, I think this would have been a good claim for exemption. But it is quite clear that the case of a farm is put in a totally different

condition from the case of a nursery, which has a special clause applicable to itself. In a nursery you are to look to profit; in a farm you are to look to rent; and in looking to rent the only deduction or abatement that is allowed is such loss in working the farm as sweeps away the rent, and no further deduction is allowed. On these grounds I am of opinion that the decision of the Commissioners must be reversed.

Lord Adam—I am of the same opinion. I think it is quite clear that the only profits or gains with which we are dealing in this case were the profits or gains made or lost by Mr Watt in his proper business as seed merchant at Cupar, and that becomes clear, because it was made matter of admission at the bar, and could not be disputed, that any profit Mr Watt might have made out of his farm would not have been carried into Schedule D, and accordingly Mr Watt was assessed under Schedule B, and he applied for and obtained a deduction of the whole rent of his farm under that schedule. Now, if that be so, I think the whole matter of the assessment with regard to the farm is disposed of otherwise, and does not come into this account at all. Upon these grounds I concur with your Lordship in the conclusion at which you have arrived.

The Court reversed the determination of the Commissioners and sustained the assessment.

Counsel for Surveyor — Lorimer. Agent—D. Crole, Solicitor for Inland Revenue.

Counsel for Respondent—Wallace. Agents—Bruce & Kerr, W.S.

Monday, February 22.

TEIND COURT.

(Before the Lord President, Lords Mure, Shand, Rutherfurd Clark, and Adam.)

MINISTER OF BONHILL *v.* ORR EWING AND OTHERS.

Teinds—Augmentation.

In a process of augmentation in which the heritors opposed the augmentation on the ground that the teinds were exhausted, the minister lodged a condescendence setting forth that there was free teind, to which the heritors lodged answers. Circumstances in which the Court thereafter *granted* the augmentation, leaving the various points raised to be determined in the process of locality.

In this case the Rev. William Simpson, minister of the parish of Bonhill, asked an augmentation of stipend to the extent of five chalders.

The heritors contended that there was no free teind, as the teind had been exhausted by the last augmentation, which had been granted in 1814.

The Court ordered the minister to lodge a condescendence setting forth the free teind which he alleged to exist in the parish.

The minister accordingly lodged a condescendence setting forth that there was free teind sufficient to meet the augmentation asked. In the state of teinds appended thereto were entered, *inter alia*, lands described as "part of Ladyton," and also lands described as "part of Milton of Napierston."

Answers were lodged by certain heritors, in which (1) Mrs Ewing, proprietrix of "part of Ladyton," objected to the inclusion of these lands on the ground that they were held *cum decimis inclusis;* and (2) Sir Archibald Orr Ewing, proprietor of "part of Milton of Napierston," objected to the inclusion of these lands on the ground that there was a sub-valuation of them, dated in 1630, upon which decree of approbation had followed in 1814, and that the proprietor had ever since paid the full amount of the valued teind.

The minister contended—(1) With regard to Ladyton, that the *decimæ inclusæ* right founded on was a charter in these terms of, *inter alia*, "Totas et integras quinque marcatas terrarum antiqui extentus de Ladytoun cum decimis garbalibus ejusdem a solo prius nusquam separatis et suis pertinen," granted by the Provost of the Collegiate Church of Dumbarton, with consent of King James VI., in favour of John Cunningham of Drumquhassill, dated 10th March 1571–72, and recorded in the Privy Seal Register. This he pointed out was not a grant of lands *cum decimis inclusis*, and further, could not operate such a grant, as it did not flow either from one of the privileged orders or from one of the regular clergy; (2) with regard to Milton of Napierston, it was maintained that a new valuation of these lands had been led in 1812, according to which there would be free teind, and that this barred the proprietor from founding on the old sub-valuation of 1630 (which he maintained to be invalid in respect the parson of Luss did not appear or consent), approved in 1814, according to which there would be no free teind.

Cases cited for the minister—*Macleod* v. *Heritors of Morvern*, November 22 1865, 38 Scottish Jurist, 49.

For the Heritors—*Wood* v. *Earl of Stair* (*Glenluce* case), November 9, 1874, 2 R. 76; *Minister of Yester* v. *Marquis of Tweedale*, March 13, 1867, 5 Macph. M 592.

At advising—

Lord President—I should be sorry to go back on what was decided in the *Glenluce* case, 2 R. 76, which certainly laid down a general rule. But the rule, I apprehend, only went this length, that when a minister applies for an augmentation, and the heritors meet this with the objection that there is no free teind, and in support of that objection produce a decree of valuation or *decimæ inclusæ* right, which upon the face of it supports their objection, then if the minister proposes to challenge either the valuation or the charter, he must do so in a declarator, and cannot obtain his augmentation until he has succeeded in that challenge.

The case before us, however, does not necessarily fall under the general rule established in the *Glenluce* case, nor do the circumstances of this case correspond with those in the case of the *Marquis of Tweedale*, 5 Macph. 592. In that case there was on the face of the charter produced an obvious or at least an apparent defect.

Further, there is here a point raised with regard to the valuation of Sir Archibald Orr Ewing's lands. There was a sub-valuation of these lands in 1630 by the Sub-Commissioners, but Sir Archi-