He says—"I confess I have never been able to understand in this case how a policy of insurance could be kept up for the benefit of a donee when no donee was in existence." Here, again, in order to apply the tax to the particular case in dispute one must introduce words into the statute, such as, "for the benefit of any existing or future donee or person who may become a donee." I find no such words. Unless you introduce by construction those words into the statute it is impossible, as Lord Adam says, to understand how it could be kept up for the benefit of a donee when no donee was in existence; I agree with him. The Lord Ordinary's view seems to have been that the moment a policy of insurance is taken out, the person who takes out the policy keeps it up not only for his own benefit but for the benefit of some possible donee at a future time. That really is an essential condition of the construction contended for by the Crown, and I am unable to agree with that construction.

Under these circumstances I think that this appeal should be dismissed with costs, and the interlocutor affirmed, and I move your Lordships accordingly.

LORD HERSCHELL—I am entirely of the same opinion. The first question is, whether the money payable under the policies was property to which the lady became entitled on the death of her father by reason of the disposition which he made when he assigned the policies to her. I do not intend to lay down any principle or to say anything applicable to any case but the one with which we are dealing. I shall solely consider whether that comes within the words of the enactment or not. In my opinion it does not. I do not think it is accurate to say that the sum payable by the Insurance Company became hers by reason of the disposition which her father made. It is admitted that the entire sum cannot be said to have become hers by reason of that disposition; she would never have got it but for the fact that the premiums continued to be paid upon the policy. Therefore the suggestion is that it must be split up into two portions, the one to be attributed to the payment of premiums by her father before the donation, the other to be attributed to the payment of premiums by her afterwards, and that, being so divided, upon the former of those two sums the duty would be payable. I can find nothing in the words of the Act to warrant and give support to such a contention. For these reasons I think that the appeal entirely fails so far as the Succession-Duty Act is concerned.

Then it is said that account-duty is payable by virtue of the Act of 1881 and the 11th section of the Act of 1889. In order to bring the case within those statutes it is necessary to show that the policy, the duty on the proceeds of which is in question, has been either "wholly kept up" "for the benefit of the donee"—which of course is not the case here—or has been partially kept up for the benefit of the donee. In my opinion it would be really an abuse of words to say that the policy was "kept up for the benefit of the donee" at the time when payments were being made by the father of the lady—not for her benefit as far as appears, or for anybody's benefit but his own. The contention is, that because he afterwards creates a donee, the payment of premiums which he made, when for aught that appears he had no donee at all in his mind—I do not mean merely any individual donee, but no notion of creating a donee—must be regarded, if he creates a donee, as having been made for her benefit. I do not think it is reasonable to treat the language of the Act of Parliament in that way. I think that it would really be not using the words of the statute but abusing them if we put such a construction upon them.

LORD MACNAGHTEN—I am of the same opinion.

LORD MORRIS—I concur.

LORD SHAND—I am of the same opinion; and while quite concurring in what has fallen from your Lordships, I think the grounds of judgment have been very clearly and accurately stated by the learned Lord President and Lord Adam in the Court of Session.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellant—The Lord Advocate (Graham Murray, Q.C.)—The Solicitor-General (C. S. Dickson, Q.C.)—The Hon. Evan Charteris. Agent—Francis C. Gore, for the Solicitor of Inland Revenue.

Counsel for the Respondent—Shaw, Q.C.—A. M. Anderson. Agents—Keeping & Gloag, for William Gunn, S.S.C.

COURT OF SESSION.

Tuesday, February 23.

SECOND DIVISION.

[Exchequer Cause.

THE ASSETS COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue—Income-Tax—Profits or Gains—Property and Income-Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule* (*D*), *First Case — City of Glasgow Bank* (*Liquidation*) *Act* 1882 (45 *and* 46 *Vict. cap. clii*), *sec.* 17, *and First Schedule, III.* (*a*), (*b*), (*c*), (*d*), *and* (*h*).

A company which was formed in 1882 for the purpose of enabling the affairs of the City of Glasgow Bank to be wound up, acquired the assets of the bank, with a view to their gradual realisation, in return (1) for a sum

sufficient to discharge the then known liabilities of the bank and the liquidators; and (2) an undertaking to pay any subsequently emerging debts of the bank. The assets taken over by the company stood in the liquidator's books valued at certain estimated sums, but the price paid by the company for them was not affected by the amount of these valuations. When in the course of realisation by the company, a sum greater than the amount of its valuation was obtained for an asset; the balance was not treated as income but was credited to capital under the head of "suspense account for surplus assets." Considerable sums were carried to the credit of this account, as the result of the sale of assets and the recovery of debts during the years 1891, 1892, and 1893, and in 1893 a sum of £15,000 was, in accordance with an interlocutor of Court, paid to the shareholders out of the sum at the credit of the suspense account, this payment being treated as a "repayment of surplus capital." Income-tax under the head of profits and gains was claimed for the year 1894-95 on the average amount of the sums carried to the credit of the suspense account in the years 1891, 1892, and 1893. *Held* that the whole of the assets having been acquired in return for a slump sum and an obligation to pay subsequently emerging debts, there were no materials to enable the Court to determine what was the price paid by the company for the particular assets in question, and that accordingly the case for the Crown failed.

Opinion (*per* Lord Young) that the Assets Company were not traders in respect of the assets of the City of Glasgow Bank acquired by them, and that accordingly the excess of the sum realised for these assets over the sum paid for them did not constitute "profits or gains" in the sense of the Income Tax Acts.

This was a case stated by the Commissioners for the General Purposes of the Income-Tax Acts for the county of Edinburgh, on the requisition of the Assets Company, Limited, who objected to an additional assessment, under Schedule (D) of the Income-Tax Acts, upon them for the year 1894-95 of £9000, subsequently restricted to £7166, in respect of profits not included in a first assessment of £1673 for that year.

The additional assessment was in respect of profits on sales of assets of the company on the average of three years to the 31st day of December 1893. The Assets Company, Limited (hereinafter called "the company") was registered in May 1882 in terms of an agreement, dated 11th May 1882, between the City of Glasgow Bank and the liquidators thereof of the first part, and James L. Boyd and John Wilson for and on behalf of a company to be formed under the Companies Acts, and to be styled "The Assets Company, Limited" of the second part. The company was formed in order to enable the liquidation of the bank to be finally closed so as to prevent accumulation of interest on the amount of claims unpaid, and the possibility of any further call on the remaining partners of the bank, and in order to preserve the outstanding assets of the bank for more advantageous realisation than could be effected in the ordinary course of liquidation. Accordingly, one of the objects of the company was, on behalf of the solvent contributories, to acquire from the liquidators of the bank the whole assets summarised in the appendix to the agreement, together with all other assets or rights of the bank, for a payment sufficient to enable the liquidators to pay and discharge the liabilities of the bank, and in addition a sum to be held and applied by the liquidators in meeting the expenses of the liquidation so far as not already paid, the company also giving a general undertaking to pay all debts of whatever kind of the bank. The company was promoted by the committee of contributories who had been appointed to advise with the liquidators in regard to any question arising in the liquidation.

The appendix to the agreement referred to above was a state of the affairs of the City of Glasgow Bank (in liquidation) at 22nd October 1881, which showed liabilities amounting to £1,338,116, 6s. 9d., and assets estimated to be worth £1,508,698, 12s. 1d. consisting of—

1. Cash due by bankers and cash on hand	£168,968	7	4
2. Bills current taken by the liquidators from contributories and others, less rebate . . .	53,688	18	7
3. Bonds, Debentures, Stocks, &c.	37,094	8	1
4. Estates of large debtors estimated at . . .	243,000	0	0
5. Heritable properties in Scotland, valued at .	72,857	18	1
6. Balances on credit accounts and overdrafts valued at . . .	36,829	13	7
7. Bills current at stoppage of bank considered good	3,350	0	0
8. Past-due bills valued at	12,681	17	0
9. New Zealand and Australian Land Company's stock	802,112	16	10
10. Amount estimated as recoverable from contributories . . .	78,114	12	7

The state of affairs thus showed an estimated surplus of £170,582, 5s. 4d.

The shares were to be offered (1) to the solvent contributories, (2) to the surrendering contributories, and (3) to the public. The whole capital of the company was subscribed by the solvent contributories of the bank. An Act of Parliament entitled the City of Glasgow Bank (Liquidation) Act 1882 (45 and 46 Vict. cap. clii.) was obtained, which confirmed the agreement and empowered the liquidators to

give effect to it. It enacted, *inter alia*, as follows—"Section 17. Where any shares or debentures in the company which shall be applied for and taken in pursuance of the powers in this Act shall be held for several persons or purposes in succession, such sums as the directors of the company shall declare to be dividends on the shares, and the interest on such debentures shall be and be deemed to be annual income, and applicable as such for the benefit of the persons or purposes for the time being entitled to the income of such shares, and all other sums, whether payable at intervals or not, shall be deemed to be capital, and applicable as such for the benefit of the persons or purposes for the time being entitled to the capital of such shares."

The objects of the company as set forth in article 3 of the memorandum of association were, *inter alia*, (*a*) to adopt and carry out, with or without modification, the said agreement; (*b*) to purchase or otherwise acquire, improve, and cultivate lands and hereditaments acquired under the agreement, or necessary or advantageous for the due development or improvement of the same, or for the advantageous disposal thereof, or for the conduct of the business of the company, whether freehold, leasehold, or of any other tenure in the United Kingdom, the Colonies, or other countries; to develop the resources of the same by building upon, clearing, draining, and otherwise improving and farming the same; to stock and farm the same; to sell, feu, lease, exchange, mortgage, pledge, or otherwise deal with all or any of the real and personal property of the company; (*c*) to pay for any purchases, in whole or in part, in cash, or by ordinary shares, preference, guaranteed, or deferred shares in the company in either case fully paid up or partly paid up, or by the debentures of the company; (*d*) to hold stocks, shares, debentures, or other securities of other companies, and to dispose of the same; (*g*) from time to time, by special resolution, to modify the conditions contained in the memorandum of association, so as to increase the capital of the company, or to consolidate, divide, or reduce the capital; and (*h*) to invest the moneys of the company upon such securities in the United Kingdom, the Colonies, or elsewhere, as may from time to time be determined.

The articles of association provided, *inter alia*—"44. The company may by a special resolution, but not otherwise, . . . at any time, or from time to time, sell and dispose of the whole or any part of the business and assets representing the capital stock of the company to any other company or society, and may also dissolve the company and wind up its business." "69. The directors may declare and pay out of the profits of the company, but not otherwise, a dividend on the amount paid up on account of the respective shares of the company, and they may also, at the end of any half-year, declare and pay an interim dividend or other payment by way of bonus or otherwise, at such rate as they may deem expedient."

In 1893, in terms of a special resolution, duly confirmed by the Court, a sum of £15,000 was paid to the shareholders out of the sums credited to suspense account. This was treated by the interlocutor of the Court, and was entered in the company's accounts as "repayment of surplus capital." The assets and investments of the company consisted of various real and other properties and securities, and of sums expected to be recovered from estates of contributors of the bank. Its income stated in its published revenue accounts consisted of the returns from these assets and investments. From time to time the company had sold portions of its assets or investments at prices exceeding the values at which they were estimated in the books of the liquidators. These values did not affect the amount paid to the liquidators, which would have been the same if the book values had been increased or diminished to any extent. The surpluses arising from sales as before mentioned had not entered into the revenue accounts, but had been credited to capital under the head of "suspense account for surplus assets." Surpluses from such sales and from recoveries from debtors of the bank had arisen prior to and during the three years of average. In the first year of the company's existence the surplus was £189,830, 7s., being the excess of the liquidator's or book values over the sum paid by the company. The sums at the credit of suspense account during each year subsequent to 1882 were as follows:—

As at 31st	December	1883	£206,163	16	6
Do.	do.	1884	217,709	7	5
Do.	do.	1885	117,442	1	9
Do.	do.	1886	122,106	17	4
Do.	do.	1887	55,260	16	2
Do.	do.	1888	29,460	1	3
Do.	do.	1889	70,598	6	8
Do.	do.	1890	40,009	9	3
Do.	do.	1891	49,301	8	2
Do.	do.	1892	54,713	6	10
Do.	do.	1893	61,507	19	8
Do.	do.	1894	48,753	17	9

In years which showed an increase in the sum at the credit of the suspense account, that increase was the difference between the sum which was realised by the sale or recovery of assets and the sum at which such assets were valued in the books of the liquidators. In years which showed a decrease the decrease was accounted for by reduction of capital, or sums paid to shareholders as repayment of surplus capital.

As appears from the above table, there was an increase in the sum standing at the credit of suspense account in each of the years 1891, 1892, and 1893, that increase amounting in 1891 to £9291, in 1892 to £5411, and in 1893 to £6794.

For many years there were heavy shrinkages on the book values, as shown above. These were not deducted from revenue, and the appellants were assessed and paid tax on their full revenue without any deduction on account of said shrinkage.

Income-Tax for 1894-95 was claimed by the Crown on the sum of £7166, being the average increase on the sum at the credit of suspense account taking an average of the three years 1891, 1892, and 1893.

The actual surplus for the year to 5th April 1895 was £2245,

The Assets Company, Limited, appealed against this assessment to the Commissioners for the General Purposes of the Income-Tax Acts for the County of Edinburgh.

The Commissioners refused the appeal, whereupon the appellants expressed dissatisfaction with their decision as being erroneous in point of law, and required that a case should be stated for the opinion of the Court of Exchequer under the Statute 43 and 44 Vict. cap. 19, sec. 59.

A case was stated accordingly, in which, or in the City of Glasgow Bank (Liquidation) Act 1882, and the memorandum and articles of association of the company, which were produced with and were to be referred to as part of the case, the facts above narrated were set forth.

The Property and Income Tax Act 1842 (5 and 6 Vict. cap. 35) enacts, section 100—"And be it enacted, that the duties hereby granted, contained in the schedule marked (D), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment. Schedule (D) . . . Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned. *First Case*—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act. Rules:—First—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern, shall have been usually made up, or on the fifth day of April preceding the year of assessment." . .

On 6th January 1897 the Lord Ordinary in Exchequer Causes (STORMONTH DARLING), on the motion of the parties, appointed the case to be heard by the Lords of the Second Division, for which Division it had been marked in terms of the Act of Sederunt of 9th December 1880.

Argued for the appellants—(1) There were no materials here for ascertaining profits. The amount at which the assets acquired by the company were valued in the books of the liquidation was not the price which was paid for them by the company. These valuations were mere book entries, and did not affect in any way the amount of the price, which was (1) a slump sum sufficient to pay the bank's debts then known, and (2) an obligation to pay any other subsequently emerging debts. The profit on that transaction could not be ascertained till all the assets of the company were realised. The profit realised by the sale of particular items or recovery of particular claims could not be ascertained, because the prices paid for particular items, or for rights to particular claims transferred to the company by the liquidators, were not ascertained or indeed ascertainable. (2) The sums which had been carried to suspense account, and from which the average on which tax was claimed had been derived, were not profits within the meaning of the Income Tax Acts, even if they could be taken to represent accurately the difference between the price obtained for an asset and the price paid for it by the company. The company was not entitled to distribute such sums in dividends, but only by way of distribution of surplus capital—City of Glasgow Bank (Liquidation) Act 1882, section 17; articles of association, article 69. These amounts were not profits of any trade, manufacture, adventure, or concern in the nature of trade. The sole function of this company was the realisation of the assets taken over. It was not a trading company, at least it did not trade in these assets. A person who buys something and sells it again at a higher price than he paid for it was not liable for income-tax on the difference, unless he was a dealer in the thing which he had so bought and sold again. The Crown must show that a profit had been realised by the turnover of assets by way of trading in them. That was not the case here. The powers taken in article 3 of the memorandum of association were all intended to be exercised only for the purpose of realising the assets taken over, and did not entitle the company to trade generally in such kinds of property. Sub-section (*b*) only gave powers of purchase for the purpose of facilitating an ultimately successful realisation of the properties taken over; sub-section (*d*) only applied to stocks taken over from the liquidators; and sub-section (*h*) was merely a subsidiary power to be used incidentally for the main purpose of realisation. (3) The case of the *Scottish Investment Trust Company, Limited* v. *Inland Revenue*, December 12, 1893, 21 R. 262, was distinguished from the present in respect (*a*) that that company was entitled to sell, exchange, or otherwise dispose of, deal with, or turn to account any of its assets, that it did so deal with them, and that the gains so made were entered in revenue account; and (*b*) that the prices paid for stocks and securities subsequently sold at a higher price were in that case ascertained.

Argued for the Crown—This was a trading company. It carried on a trade, adventure or concern in the nature of trade, within the meaning of the Property and Income-Tax Act 1842, section 100, Schedule D, first case. The company was referred to as carrying on a "business" in its articles of association, article 44. The assets of the company were its stock-in-trade, in which it was entitled to deal, and did deal, memorandum of association 3, (*b*), (*c*), (*d*), and (*h*), and it was liable for income-

tax in respect of gains made by the sale of its assets. Even where gains could not properly be treated as revenue, or distributed as a profit among the shareholders, by the constitution of a company, or by its Act of Parliament, such "gains" must still be treated as "gains" for the purposes of the Income-Tax Acts — *Mersey Docks* v. *Lucas*, 1883, 8 App. Cas. 891, and especially *per* Lord Herschell at p. 905; *Edinburgh Southern Cemetery Company* v. *Surveyor of Taxes*, November 29, 1889, 17 R. 154; *Sowerby* v. *The Harbour Commissioners of King's Lynn*, 1887, 3 T.L.R. 516. Moreover, although as in a question of correct book-keeping or prudent management, part of the gains made in a business were properly regarded, not as revenue, but as capital coming in place of the capital irrecoverably expended in making the gains, still the gross amount of such gains, and not the amount of the true revenue after making such deduction, was the sum on which income-tax was payable — *Coltness Iron Company* v. *Black*, January 7, 1881, 8 R. 351, and April 7, 1881, 8 R. (H. of L.) 67; *Edinburgh Southern Cemetery Company* v. *Surveyor of Taxes*, *cit.* A trading company which carried on "a trade, adventure, or concern in the nature of trade," was liable for tax on "gains" made by it in the process of changing investments of its capital, when such investments were sold for a larger sum than had been paid for them—*Northern Assurance Company* v. *Inland Revenue*, February 8, 1889, reported as a branch of *Scottish Union and National Insurance Company* v. *Inland Revenue*, 16 R. 461, at p. 473; and *Scottish Investment Trust Company, Limited* v. *Inland Revenue*, *cit.* In view of the rules formulated above, and established by the decisions quoted, this company was liable for income-tax on "gains" resulting from the sale of its investments. The differences between the sums at which assets belonging to it were valued when they were taken over by the company, and the price which they realised when sold, were "profit" or "gain" in the sense of the Income-Tax Acts, and the company were liable for tax on the amount of such differences. That amount clearly appeared from the case stated, and the company was therefore liable for tax on the sum brought out. The total amount paid for the assets was less than the sum of the valuations, and the liability for emerging debts must now be of little moment.

At advising—

LORD TRAYNER—The claim for additional assessment made by the Income Tax Commissioners, which is the subject of this case, is based upon the ground that the Assets Company has made a profit on the realisation of certain of its assets upon which tax is payable and has not been paid. The profit is said to have been derived from two sources, viz., by prices realised for investments in excess of the amount paid for such investments, and by recoveries from debtors "during the three years of average." If it were established or assumed that the company had made gain or profit by the realisation of certain stocks or other investments which it held as part of its capital, a somewhat difficult question would arise, namely, whether, looking to the character and constitution of this company, the purpose for which it was formed, and the peculiar transactions under which the assets in question were made over to it, the present case was ruled by the decisions to which we have been referred. If that question had here to be determined, I could not, according to my present opinion, concur in all the views expressed in the decided cases. But that question, as it appears to me, does not arise for decision here, because I think we cannot affirm, on the statements in the case before us, that the Assets Company has in fact made the profit in respect of which it is sought to be made liable for the additional assessment. It is impossible to say in any view of the case that the Assets Company has realised more for the assets sold than it paid for them without knowing what it paid for them. This important fact is not known to us. When the Assets Company took over the assets of the City of Glasgow Bank still remaining in the hands of the liquidators, the value of such assets was "estimated" by the liquidators, and that estimate we have. But the estimated value was not the price paid by the Assets Company, for, as is stated in the case, "these values did not affect the amount paid to the liquidators, which would have been the same if the book values (*i.e.*, the estimated values) had been increased or diminished to any extent." Accordingly, we are not told what was the value of their assets at the time of their transference to the company, nor the price it paid for them. It is not possible, therefore, as I have said, to say whether the price received by the company on realisation of the assets is more or less than the price for which they were transferred, and consequently not possible to say that they have been sold at a profit. Further, the amount of profit on which income-tax is now sought to be imposed consists partly of "recoveries from debtors." But debts recovered (although considered by the creditor not recoverable) are not gain or profit in the sense of the Income Tax Acts. The amount recovered from debtors must therefore be deducted from the sum on which the tax is claimed. That, however, cannot be done here, because the amount of such recoveries is not given, and that precludes our affirming, as the Commissioners have done, that the whole additional assessment claimed is due and payable. I am of opinion that on the case as presented to us we must hold that the determination of the Commissioners is wrong.

LORD YOUNG concurred.

LORD MONCREIFF—I am of opinion that the case presented to us does not contain materials to enable us to decide whether,

during the year to 5th April 1895, and two preceding years, profits or gains were made by the Assets Company on the realisation of assets or investments. The data on which we are asked to hold that profits or gains were earned during those years are, I understand, the sums realised on the sale of investments as compared with the values at which the assets realised stood in the books of the liquidators of the City of Glasgow Bank when taken over by the Assets Company. Now, I do not think that we can take those book values as truly representing the prices paid for the assets or investments. Indeed, the case itself negatives this, because it states that "those values did not affect the amount paid to the liquidators which would have been the same if the book values had been increased or diminished to any extent."

There may be great difficulty in obtaining any reliable basis for fixing the prices which should be held to have been paid for any particular asset, because not only was a lump sum paid, but part of the consideration was that the company undertook liabilities of indefinite amount. But whether this is practicable or not, the case does not present materials for deciding that matter.

In so holding I assume that we are bound by the cases of *The Northern Assurance Company* v. *Russell*, 16 R. 473, and *The Scottish Investment Trust Company* v. *Forbes*, 21 R. 262; and that if it had been clearly shown that profits were made by the Assets Company on realisation of its investments, there is nothing in the constitution of the Assets Company, or the purposes for which it was formed, to prevent such surpluses being treated on the authority of those cases as profits or gains in the sense of the Income Tax Acts.

But assuming this, we have, as I have said, no materials for affirming that profits or gains were made on the sale of investments during the years in question.

LORD YOUNG—I intimated my concurrence in the judgment expressed by Lord Trayner, and I also concur in what has been said by Lord Moncreiff, but I wish to give expression to the doubt which I entertain as to the cases in which a gain made by the sale of property at a price more than was paid for it, may be regarded as income. I should like to point out here a source of difficulty in the way of holding that the Crown has made out upon the facts as set forth in the case, that there is an assessable income. What is stated in the case is that the profit on which tax is claimed consists of "surpluses from such sales—that is, sales of parts of the property purchased — and from recoveries from debtors of the bank," and so on. Now, what about recoveries from debtors? The company took them over. I should say that I have really no doubt that any person or any company making a trade of purchasing and selling investments will be liable in income-tax upon any profit which is made by that trade. It is quite an intelligible business, just as intelligible as a trade consisting in the purchase and sale of goods in the ordinary trade of a merchant or shopkeeper. The trade is good or bad according as it is carried on profitably or not, and the profit arises from purchasing goods at the trader's price, and in selling them at a retail price or a wholesale price or a larger price than that which was paid for them. But it is another proposition altogether that, where no trade is carried on, a gain or loss upon the purchase and re-sale of property comes within the meaning of the Income Tax Acts. Take even proper traders. If proper traders sell their old premises and buy new ones, and sell the old premises at a higher price than they paid for them, investing the price which they get in the purchase of a site and the erection of new premises, I should say it was a totally untenable proposition that anything in excess of what they had paid for the old premises, perhaps twenty years before, at a better time for purchasing property, is income within the meaning of the Acts. I do not think it is at all. It is no more so in the case of a trader than in the case of a private individual selling his house at more than he had paid for it, or selling his carriage or pictures at more than he paid for them. That is not income in any sense, although a dealer in pictures, like a dealer in goods, or a dealer in the buying and selling of houses, who made it a trade, would come within the region of income-tax. But this company in realising more for the debts which they had purchased, were not making a trade of buying and selling debts. There is nothing to indicate that. Anybody who makes a trade of buying and selling doubtful debts will be liable, upon the principle which I have indicated, in income-tax upon any gain which he makes by that trade. But it is no part of this case that that was the trade of this company. They took over all the debts of the bank, and they undertook to pay them. On the other hand, they got assigned to them all the debts due to the bank by doubtful debtors, and which the bank could not immediately realise, and which it was inconvenient for them to wait on for; they bought these. Is it to be said that they were making a trade of buying and selling doubtful debts? There is nothing to indicate that in the least. The proposition that where anybody purchases a doubtful debt and realises more than he paid for it, there being only one purchase, and the purchaser not being a trader in that kind of thing, such gain is income, is, I think, a proposition which cannot be sustained. Now, I think we have nothing upon the face of this case to show that in a trade of buying and selling there was income or gain made by this company upon which the assessment is made.

I have expressed these views as indicating generally what is in my mind in regard to this particular case. It may be that there is income from trading upon which this company has not been assessed; but if that be so, the Inland Revenue will be able to state a better case with more

intelligible detail of facts, which will enable the Court to judge of it in another year. In regard to what we have here, I entirely agree with Lord Trayner and Lord Moncreiff that there is no case upon which we can with safety sustain the conclusions at which the Commissioners have arrived.

LORD JUSTICE-CLERK—I also concur.

The Court reversed the determination of the Commissioners, and found the appellants entitled to costs.

Counsel for the Appellants—D.-F. Asher, Q.C.—Salvesen. Agent—J. Smith Clark, S.S.C.

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

Wednesday, March 3.

SECOND DIVISION.

[Sheriff-Substitute at Dunfermline.

FERRIS *v.* COWDENBEATH COAL COMPANY, LIMITED.

Reparation—Master and Servant—Defect in Ways—Manholes in Coal Mine—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* 1, *and sec.* 2, *sub-sec.* 1—*Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 49, *General Rules* 14 *and* 16.

The manholes constructed in a coal mine in terms of the Coal Mines Regulation Act 1887 are part of the ways of the mine.

In a coal mine some rubbish had been placed in one of the manholes at the side of the wheel-brae by orders of the person whose duty it was to see that the ways were in a proper condition. After the rubbish had been there some days a labourer at work in the mine, hearing the hutches approaching him, sought refuge in the manhole, but finding it blocked was prevented from getting in, and was knocked down and injured by a hutch.

Held that there was a defect in the condition of the ways in terms of section 1, sub-section 1, of the Employers Liability Act 1880, and that the employer was liable in damages.

By section 1 of the Employers Liability Act 1880 (43 and 44 Victoria chapter 42) it is enacted—"Where after the commencement of this Act personal injury is caused to a workman (1) by means of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer . . . the workman, or in case the injury results in death the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

By section 2 of the said Act it is enacted—"A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say, (1) under sub-section 1 of section 1, unless the defects therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition."

By section 49 of the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58) general rule 14, it is enacted—"Every underground plane on which persons travel which is self-acting or worked by an engine, windlass, or gin, shall be provided (if exceeding 30 yards in length) with some proper means of communicating distinct and definite signals between the stopping-places and the ends of the plane, and shall be provided in every case with sufficient manholes for places of refuge, at intervals of not more than 20 yards, or if there is not room for a person to stand between the side of a tub and the side of the plane, then (unless the tubs are moved by an endless chain or rope) at intervals of not more than 10 yards." And by general rule 16 it is enacted—"Every manhole and every place of refuge shall be constantly kept clear, and no person shall place anything in any such manhole or place of refuge."

John Ferris, labourer, Cowdenbeath, raised in the Sheriff Court at Dunfermline, against the Cowdenbeath Coal Company, Limited, an action of damages for £250 at common law, or otherwise for £150 under the Employers Liability Act.

The Sheriff-Substitute (GILLESPIE) dismissed the action as irrelevant *quoad* the first conclusion, and *quoad ultra* allowed a proof.

The pursuer appealed for jury trial. An issue was adjusted in common form and on 18th December 1896 the case was tried before the Lord Justice-Clerk and a jury.

The evidence brought out the following facts:—On 11th July 1896 the pursuer was in the employment of the defenders as an oncost-man in No. 1 pit Lumphinnans. He was ordered by John Laird, whose duty it was to see that the ways in the pit were in a proper condition, to clean a wheel-brae in the pit on an incline on which hutches are worked by means of an endless chain, the full hutches in running down the brae pulling the empty ones up. This wheel-brae was over 200 yards in length, and at the side of the incline there were manholes for places of refuge at intervals of not more than 10 yards, as provided by the Coal Mines Regulation Act 1887, for the use of those employed in the mine to take shelter in when the rakes of hutches were running on the incline. The men got notice of the approach of the hutches by the movement of the chain on which they