No. 98.—House of Lords. 26th April 1888.

Russell (Surveyor of Taxes) v. Aberdeen Town and County Bank.

Income tax.—Schedule D.—Deduction from profits. A bank owns the buildings in which its business is carried on, and portions of the buildings are occupied as residences by the bank managers and agents.

Held (affirming the judgment of the Court of Session), *that the annual value of the whole premises may be deducted in estimating the profits under Schedule D.*

At a meeting of the Commissioners of Income Tax for the county of Aberdeen, held at Aberdeen on 3rd August 1886—Present, Francis Edmond, LL.D., Esquire, of Kingswells; and George Jamieson, Esquire, of Rosebank—

John Keith, Secretary, and on behalf of the Town and County Bank, Limited, Aberdeen, appealed against the assessment upon the sum of 1,058*l.*, under Schedule D. of the Income Tax Acts, made on the bank for the year 1885-86.

The following facts were admitted:—

1. That the whole premises, both in Aberdeen and elsewhere, in which the appellants carry on business, are the property of the appellants, and that the appellants pay income tax on these premises under Schedule A. of 5 & 6 Vict. c. 35.
2. That the premises used as the head office of the bank in Aberdeen, and in the same way the premises used as the branch offices of the bank in the different places where they carry on business, contain certain accommodation 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 this accommodation is not assessed to income tax otherwise than under Schedule A. as aforesaid.
3. That the sum in question is the aggregate annual value of the portions of the said premises occupied by the officials or agents of the bank as their dwelling-houses.

4. That the sum in question, like the other sums on which tax has already been paid, had been deducted from the bank's profits before these were returned to the Income Tax Commissioners for assessment under Schedule D.
5. That the sum in question did not include any portion of the premises belonging to the bank used solely as counting-houses, but that deduction had also been made, and not objected to, from the bank's profits of the aggregate annual value of the portions of the bank's premises so used.
6. That, taking the premises belonging to the bank in Aberdeen and elsewhere, as a whole, the aggregate value of the portions used as counting-houses, and allowed as a deduction, does not exceed two-thirds of the value of the whole.

The appellants contended that in the return submitted by them deduction had been properly made from the bank's profits of the sum representing the annual value of its premises occupied by its officials or agents as their dwelling-houses; that these dwelling-houses form the official residences 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. The case is totally unlike one where a private banker both resides and carries on business in the same premises. The appellants have no dwelling-house in the sense of section 101, which must, in terms of section 100, be a dwelling-house in part used for the domestic or private purposes of the trader, and not one wholly used for the purposes of such trader's business. A dwelling-house is necessary for the private trader unconnected with trade *primâ facie*, therefore the dwelling-house must be considered as simply part of his private expenditure, and not as an incident of trade expenditure, and the fact that he uses part of it in connexion with his trade does not alter its character as his private dwelling-house. The provisions of section 101 obviate the hardness of this last conclusion. But it is not the province of any exception to enlarge the scope of the application of the rule. The exception must be confined to the cases where the rule itself operates. Now, in the case of the appellants, the general rule as for the private trader has no application. If a further duty is imposed on the sum of 1,058*l.*, the appellants will be charged on that sum twice over. It has already paid duty under Schedule A., and as the sum is for part of the value of the premises used by

them for purposes necessary or incidental to their business as bankers, they are entitled to make the deduction in terms of Rule I., Cases I. and II., as being disbursements or expenses wholly and exclusively laid out or expended for the purposes of their trade as bankers in earning their profits; and the Commissioners of Income Tax in Glasgow so decided in appeals at the instance of the Union Bank of Scotland, Limited, and the Clydesdale Bank of Scotland, Limited.

The Surveyor of Taxes, Mr. James Russell, maintained that under the rules of the Income Tax Acts the deduction in question could not be allowed. That, according to the first rule of the first case of Schedule D. of 5 & 6 Vict. c. 35., the duty had to be charged on a sum not less than the full amount of the balance of the profits "without other deduction than is "herein-after allowed"; and that by the first rule, applying to the first and second cases of Schedule D. of the above Act, it is expressly provided that no deduction shall be allowed "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, not exceeding the proportion of the said rent or value "herein-after mentioned"; and section 101 of the same Act provides, *inter alia*, "That nothing herein contained shall be "construed to restrain any person * * * "* * renting a dwelling-house, part whereof shall be used "by him for the purposes of any trade or concern, or any "profession, hereby charged, from deducting or setting off from "the profits of such trade, concern, or profession, such sum, not "exceeding two-third parts of the rent *boná fide* paid for such "dwelling-house, with the appurtenances, as the said respective "Commissioners shall, on due consideration, allow." That, in the present case, the managers and agents represented the bank, and the parts of the bank's properties occupied by them as their private dwelling-houses must be held as occupied by the bank exactly the same as in the case of a private banker: Further, if the assessments were confirmed, the amount would not, as stated by the appellants, be charged twice over; but, on the contrary, if the bank's contention were given effect to, the sum in question, or an equivalent amount, would escape assessment altogether. This was made clear from the following illustration, which was submitted to the Commissioners, viz.:—

	£
Suppose the bank to make a clear profit of -	5,000
Out of which they pay an agent a salary of -	500
Net profits -	£4,500
But ask him to pay a rent for his house of -	50
This leaves for distribution to shareholders -	£4,550

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On the above supposition, tax would be paid to the Crown as under:—

	£
Schedule D., net profits of bank - -	4,500
" E., agent's salary - - -	500
" A., rent of house paid by agent -	50
Total - -	£5,050

	£	£
Again, suppose the bank's profits to remain at - - - -		5,000
But a new agreement is made with the agent, by which he gets a salary of - - - -	450	450
And the house rent free, valued at -	50	
	£500	£4,550

This would practically leave all parties in the same position as formerly; it would give the agent 450*l.* to spend, apart from house rent, and leave for distribution among the shareholders, 4,550*l.*

It is thus evident that tax should be paid to the Crown on a total equal to the former total, or on 5,050*l.*

This is brought out by my contention that only the agent's salary, but not his free house, should be deducted from the bank's profits, thus:—

	£	£
Schedule D., bank profits - -	5,000	
Less agent's salary - - -	450	
		4,550
Schedule E., agent's salary - - -		450
" A., free house - - - -		50
		£5,050

According to the contention of the bank, tax would be paid on 50*l.* less, thus:—

	£	£	£
Schedule D., bank profits -		5,000	
Less agent's salary - -	450		
" house - -	50	500	
			4,500
Schedule E., agent's salary - - -			450
" A., free house - - -			50
			£5,000

According to this latter contention, the bank would pay on 50*l.* less than the sum it had for distribution among its shareholders. Further, he understood the decision in the Glasgow case was given upon grounds which did not at all apply to the present case; also that the decision of the local Commissioners of Glasgow could have no binding effect upon those of Aberdeen.

The Commissioners, having fully considered the case, concurred in the views of the surveyor, and unanimously dismissed the appeal. With this decision the appellants intimated dissatisfaction, and having subsequently complied with the requirements of section 59 of the Taxes Management Act, 1880, and requested a case to be stated for the Court of Exchequer, this case is hereby stated and signed accordingly.

The point of law for the decision of the court is, whether the bank is entitled to deduct from its profits, before returning them for assessment under Schedule D., the whole value of their bank premises, where such premises are in part occupied for residence by officers of the bank?

FRANCIS EDMOND, Commissioner.
GEORGE JAMIESON, Commissioner.

The case was heard before the Court of Exchequer (Scotland), First Division, on the 4th March 1887, when their Lordships pronounced the following interlocutor:—

"*Edinburgh, 4th March* 1887.—The Lords having considered " the case and heard counsel for the parties, reverse the deter- " mination of the Commissioners, and remit to them to allow " the deduction claimed by the appellants, and decern; find the " appellants entitled to expenses; allow an account thereof to " be lodged, and remit the same to the auditor to tax, and to " report.

"JOHN INGLIS, I.P.D."

Against this interlocutor the Surveyor appealed to the House of Lords.

Sir R. Webster, A.G. (with him *Robertson, S.G. for Scotland,* and *Young*), for Russell:—The first rule of Cases I. and II., Schedule D., section 100, 5 & 6 Vict. c. 35., expressly forbids a deduction in respect of the rent or value of any dwelling-house or part of a dwelling-house, except such part (not exceeding two-thirds) as may be used for the purpose of the trade or concern. That clearly contemplates a distinction between the part of the building used for dwelling in, and the part used for the trade or concern.

[*Lord Herschell.*—Suppose the bank were to pay the rent of a house for their clerk or manager, is not that a disbursement wholly laid out and expended for the purposes of their trade?]

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The Statute deals specifically with the question of dwelling-houses, and prohibits any deduction except in one particular case, and to one particular extent. The Lord President thought that the deduction claimed was good, because this was not the dwelling-house of the trader; that could only be supported by reading into the rule the words "occupied by the trader," and there is no warrant for introducing such a limitation.

It is suggested that the occupation by the officer of the bank is a perquisite in respect of which he would be personally chargeable under Schedule E., but although it may be a perquisite, it is not "payable" to him.

Sir H. Davey, Q.C. (*Murray* with him), for the respondents:—The question is, whether this is a disbursement wholly for the purposes of the bank or business. The bank find it necessary or expedient to have some responsible person residing permanently on the bank premises. A trader who lives over his own shop is in quite a different position. If it is a partner, or a trader carrying on business alone, who lives in the house rent free, that is part of his profits, not a disbursement to earn the profits. In like manner a payment of 100*l.* a year to a partner is part of the profit of carrying on the business, but a similar payment to a clerk or manager is a disbursement for the purpose of earning the profit.

A house hired or possessed by the bank for the purpose of carrying on its business is not a dwelling-house within the meaning of this rule. The rule contemplates a house which is used as a dwelling-house by the person hiring it. These premises are taken by the bank exclusively for the purposes of their business. The appellant's argument must go to this extent, that if a single room in the bank premises is used as a residence of a caretaker, watchman, or fireman, the bank cannot deduct more than two-thirds.

If the agent's salary and emoluments are increased to the extent of the value of the house, the Crown can claim income tax from him. If, on the other hand, in some particular case, or for some particular reason it cannot be regarded as an increase of emolument, then it is not part of anyone's income, and there is no reason why the Crown should get income tax upon it at all.

Lord Herschell.—My Lords, this is an Appeal from a 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 Respon-

dents 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 5th and 6th Victoria. 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 herein-after 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 any 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 on 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

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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 as 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 dis-"bursements or expenses of maintenance of the 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 the 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 so 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 here (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 this accommodation " is not assessed to income tax, otherwise than under Schedule A." Then it is stated " that these dwelling houses form the official " residences 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 or clerk.

However, passing from that, the first thing which we have to ascertain 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 come, 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 if the residence of the bank manager 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.