them on 10th December 1918 was illegal, invalid, and *ultra vires*; (fourth) that the pretended appointment of William Bennet Gardner as inspector of poor for the said parish of Arbroath and St Vigeans made by the defenders on 4th May 1920 was and is illegal, invalid, and *ultra vires*; (fifth) of consent of parties hold production satisfied by lodging . . ., being certified excerpts from minutes of meetings of the defenders held on 10th December 1918 and 4th May 1920, and reduce and decern in so far as they relate to the pretended appointments foresaid of the said Henry Myles and the said William Bennet Gardner, and restore and repone the pursuer thereagainst *in integrum*: Assoilzie the defenders from the sixth conclusion of the summons, and decern."

Counsel for Pursuers — Mitchell, K.C.— — Gilchrist. Agents — Ferguson Shinie, Solicitor.

Counsel for Defenders—Moncrieff, K.C.— King Murray. Agents — Menzies, Bruce-Low, & Thomson, W.S.

Friday, July 8.

FIRST DIVISION.

[Exchequer Cause.

INLAND REVENUE *v.* MERCHISTON CASTLE SCHOOL, LIMITED.

***Revenue** — Income Tax — Profits — Deductions — Expenditure Wholly and Exclusively for Purposes of Business—School—Casualty Payable for Sports Ground — Income Tax Act* 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule D, First Case — Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedule D.*

In making a return for assessment for income tax under Schedule D of the Income Tax Acts a company carrying on the business of a school deducted from the profits the amount of a duplicand falling due at definite periods and paid during the year in question for ground owned by the company and used for the sports of the school. *Held* that the payment was in respect of ownership of the ground apart from the business carried on in the school, and that accordingly the company were not entitled to deduct it in estimating the balance of the profits of their business for the purposes of assessment to income tax.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, enacts—Schedule D, First Case, Rule First—*Computation of Duty on Trade.* — "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 . . . upon a fair and just average of three years. . . ." *Rules Applying to the First and Second Cases—First Rule*—"In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade. . . ."

The Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2, enacts—". . . For the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act . . . and to be charged under such respective schedules (that is to say) . . . Schedule D—For and in respect of the annual profits or gains arising or accruing . . . from any profession, trade, employment, or vocation, . . . and to be charged for every twenty shillings of the annual amount of such profits and gains. . . ."

John Dow, Surveyor of Taxes, Edinburgh, *appellant*, being dissatisfied with a decision of the Commissioners for the General Purposes of the Income Tax Acts in an appeal by the Merchiston Castle School, Limited, *respondents*, finding that a sum of £560, 8s., being the amount of a duplicand paid by the respondents for part of their property which was used for the sports of the school, represented a trading expense necessarily incurred by the respondents in carrying on the business of a school, obtained a Case for appeal.

The Case set forth — "1. The following facts were admitted or proved:—(1) The assessment was based on the average profits of the appellant company for the three years ending 30th September 1917, and the ground of appeal was that in arriving at the profits for the twelve months ending 30th September 1917 there should be allowed as a deduction a sum of £560, 8s. as a working expense of the business in the circumstances hereinafter appearing. (2) The said company was formed in 1896. The objects of the company as set out in the memorandum of association are, *inter alia*, as follows:—(*a*) To purchase, acquire, and carry on the educational establishment of Merchiston Castle School, Edinburgh. . . . (*b*) To purchase or acquire and carry on in the United Kingdom other boarding and day schools in addition to, or in lieu of, the boarding and day schools at present carried on by the said John Johnston Rogerson. (*c*) For the above purposes to purchase, acquire by absolute title, lease, feu, or otherwise, and hold, let, and use lands, heritages, and other real property and rights in lands and heritages and real property, and erect such buildings as may be from time to time found desirable for the purposes of the company. . . . (*h*) To use any sum which may be set aside as a reserve fund or as a sinking fund, or as a depreciation fund, as working capital, or in any other way the company may deem right and suitable, or to invest the same and any other funds of the company in the purchase or on the security of heritable property in

Scotland, or in any security in which trustees in Scotland may invest their funds. (*i*) The doing of all such other lawful things as are incidental or conducive to the above objects. . . . (4) The said company is owner of various properties in and adjoining Colinton Road, Edinburgh, in which it carries on the operations of the school. These properties consist of the old building of Merchiston Castle, and several modern villas containing class-rooms and living accommodation for the resident pupils and masters; there is also a cricket and sports ground which is also owned by the company, and in respect of which an annual feu-duty is paid to the superiors of the ground, the Merchant Company of Edinburgh. The appellant company has been regularly assessed under Schedule A as owner of the said ground, and in paying the annual feu-duty to the superiors has deducted the amount of income tax corresponding thereto. The subjects in respect of which the casualty was payable are the school playing fields. Special lump charges, separate from and additional to the regular term fees, are made by the appellant company against the school pupils in respect of, *inter alia*, the necessary expenses of the school fields and games. (5) In the feu-charter of the cricket and other ground, extracts from which are annexed hereto and form part of the case, it is provided that a duplicand of feu-duty over the field should be paid to the superiors at intervals of 21 years. The clause is in the following terms:—'And doubling the said maximum feu-duty of Three hundred and fifty pounds sterling for one year only at the expiration of each period of twenty-one years from and after the said term of Martinmas Eighteen hundred and seventy-four, over and above and exclusive of the feu-duty of the year in which such duplication is payable, with the interest of the said duplication at the above rate from the term when the same shall become due till paid.' The proportion of said feu-duty allocated on the cricket ground is £280, 4s., with corresponding duplicand of £560, 8s. A payment of this duplicand amounting to £560, 8s. was duly made to the Merchant Company on 20th February 1917. Income tax was not deducted by the appellant company when making said payment of £560, 8s., but was paid by the superior direct. This sum of £560, 8s. was not wholly charged against the revenue account of the company for that year, but was charged against a 'casualty' account which had been created for the purpose of meeting the charge of the duplicand when due, and to which a regular amount of £26, 13s. 9d., or 1/21st of the duplicand, had been credited annually. In the adjustment of the computations of assessable profits in past years the amounts so credited to this 'casualty' account, which were debited against profits in the annual profit and loss accounts, were disallowed and were included in the assessments to income tax. (6) In making up the return for assessment purposes for the year 1918-19 the company deducted from the profits shown on the accounts the sum of £560, 8s., in respect that the expense was one relating to its business year ending 30th September 1917, although not, as explained above, actually wholly charged against the profit and loss account for that year. Upon the report and accounts for the year to 30th September 1917 being submitted along with this statement to the surveyor of taxes with a view to an assessment being agreed upon, he disputed the right of the company to charge the said amount as a special deduction, and in arriving at the assessment, the subject of appeal, such amount was not deducted.

"2. Mr R. D. Rainie, C.A., Edinburgh, secretary of the company, and Mr Arthur M. Thomas, S.S.C., Edinburgh, agent of the company, appeared on behalf of the appellant company and contended that in arriving at the balance of profits and gains upon which they were liable to assessment for income tax under Schedule D the amount of the duplicand in question fell to be deducted from the profits of the year in which the duplicand became exigible, out of which profits it was actually paid. The duplicand was a payment of a fixed amount falling due at fixed intervals of time. It was indistinguishable in its legal character from feu-duty although the interval of time at which it fell due was greater than in the case of a feu-duty, and like feu-duty formed a proper charge against revenue. The appellant company maintains that the duplicand as well as the feu-duties payable in respect of the fields is therefore a proper disbursement or expense of their business, which disbursement or expense requires to be and is wholly and exclusively laid out or expended for the purposes of their said business. They do not come within the description of inadmissible deductions contained in the rules for ascertaining the duties payable under Schedule D as set forth in the Income Tax Acts. On the contrary they are by clear implication from the said rules recognised as legitimate deductions. In any event they form an essential element to be taken into account in ascertaining the amount of the balance of profits assessable for income tax for the year, and deduction in respect of them is necessary and proper to the assessment of the appellant company's profits for income tax purposes. As a portion of the appellant company's charges against the pupils is specially designed to meet the expenses of the playing field, including the duplicand in question, it is submitted that the corresponding portion of their gross income may be properly regarded as appropriated to payment of the duplicand. The appellant company having been refused permission to set aside out of their annual profits the sum necessary to provide a sinking fund for payment of the duplicand, were entitled to deduct the duplicand when paid in adjusting the assessable profits for the year of payment.

"3. The Surveyor of Taxes (Mr John Dow) contended, *inter alia*—(1) That the expense claimed had no reference whatever to the business of carrying on the public school, and was not a charge incurred in earning the fees and other income derived by the company from this source, but that

it entirely arose in its character not of trader but of property owner. The case of *Strong & Company, Limited* v. *Woodifield*, (1906) A.C. 448, was referred to. (2) That in ascertaining the balance of profits and gains no deduction was allowable in respect of a feu-duty. (3) That the only allowance legally due to the company in respect of property and land owned by it and occupied for business purposes was the annual value thereof as provided in section 9 of the Finance Act 1898, which allowance had already been made in full in arriving at the assessment. (4) That an alternative claim to have the payment set against the assessment under Schedule A was invalid as the payment was not exigible as rent. The case of *M'Gregor* v. *M'Farlan*, (1889) 16 R. 438, was referred to.

"4. The Commissioners after due consideration of the facts and arguments submitted to them were of the opinion that the said sum of £560, 8s. represented a trading expense necessarily incurred by the appellant company in carrying on the business of Merchiston Castle School, and allowed the appeal."

Counsel for the appellant having opened the case, the Court called upon counsel for the respondents.

Argued for the respondents—The duplicand, which was just additional feu-duty (*Fisher's Executrix* v. *Fisher's Trustees*, 1903, 6 F. 196, 41 S.L.R. 126, *per* Lord Trayner), was a recurring payment to meet a continuing business demand. It was therefore to be treated, not as capital expenditure or as a price, but as a business expense (*Hancock* v *General Reversionary and Investment Company*, [1919] 1 K.B. 25, *per* Lush, J., at p. 37—adopting a dictum of the Lord President in *Vallambrosa Rubber Company* v. *Inland Revenue*, 1910 S.C. 519, 47 S.L.R. 488), and being paid for the purpose of earning the business profits fell to be deducted in making an estimate of the balance chargeable (*Rosyth Building and Estate Company* v. *Inland Revenue*, 1921, 58 S.L.R. 363; *Usher's Wiltshire Brewery, Limited* v. *Bruce*, [1915] A.C. 433, *per* Lord Atkinson at p. 450, Lord Parker of Waddington at p. 458, and Lord Sumner at p. 467; *Russell* v. *Town and County Bank*, (1888) L.R., 13 A.C. 418, *per* Lord Herschell at p. 424; *London Cemetery Company* v. *Barnes*, [1917] 2 K.B. 496). The case of *Strong* v. *Woodifield*, [1906] A.C. 448, where the question was as to capital expenditure, did not apply. The deductions allowed under Schedule A did not meet the company's loss. Provision was made under Schedule A for the case of feu-duties but not for that of duplicands. This omission itself strengthened the contention that duplicands should be deducted under Schedule D.

Counsel for the appellant were not called upon.

LORD PRESIDENT—The appellant company is owner of various properties, including Merchiston Castle itself, a number of villas occupied in connection with the school carried on in the Castle, and a sports ground. As such owner the company is liable to assessment under Schedule A and is so assessed accordingly. Further, as being engaged in business, viz. the business of the school, the company is also assessable and assessed under Schedule D in respect of the profits made in that business. The question in the present case relates to the assessment of the appellant company under Schedule D only. It is—Whether the company in estimating its profits under Schedule D is entitled to make deduction of a casualty which it has had to pay in respect of the sports ground which it owns and occupies for the purposes of the school?

It appears plain that a casualty payable in terms of the feu-charter by which a piece of property is held is something which is paid as a condition of the ownership which that title confers and not as an expense of carrying on business in those premises. In short, the payment of this casualty is a payment which is made by the appellant company as owner of the premises, because it is a condition imposed upon its ownership, and is not a payment incurred in carrying on the business of a school in the premises. It is therefore a payment which is referable to their assessability under Schedule A, and not to their assessability under Schedule D.

It is true that both Schedule A and Schedule D prescribe methods which are more or less artificial in character for estimating the income both of an owner of property and of a person carrying on business. As regards Schedule A, the statute prescribes as the measure of the owner's income the estimated annual value of the premises subject to certain defined deductions. That value may bear little relation to the amount either of the feu-duty payable in respect of them or of the burden which falls on the owner in a particular year in the shape of a casualty. But the taxpayer is of course bound by the statutory measure. Again, with regard to Schedule D, the statute provides its own standard for estimating profits. It restricts deductions from the returns arising from the business to expenses wholly and exclusively laid out for the purposes of the business. And with regard to the expense of providing the premises in which the business is carried on, the 9th section of the Finance Act of 1898 expressly provides that where "any sum is deducted on account of the annual value of the premises used for the purpose of [a business] the sum so deducted shall not exceed the amount of the assessment of the premises for the purpose of income tax under Schedule A." Nor, indeed, would it be consistent with the scheme of the Income Tax Acts to admit, in the assessment of the profits derived from the carrying on of a business, any deduction in respect of the cost of business premises higher than that which may be regarded as being the fair annual value of the premises to a person desiring to carry on a business in them—whatever burdens may be attached to the ownership of them.

I think therefore that the conclusion arrived at by the Commissioners must be recalled and the appeal allowed.

LORD MACKENZIE—I concur. In my opinion the payment was made by the owners of the school simply *qua* owners apart from the business they carry on in the school, and the payment therefore cannot be treated as a deduction from profits under Schedule D.

LORD SKERRINGTON—I agree with your Lordships. The true ground of judgment is stated in a nutshell by the Surveyor of Taxes in Head III (1), where he says — "That the expense claimed had no reference whatever to the business of carrying on the public school, and was not a charge incurred in earning the fees and other income derived by the company from this source, but that it entirely arose in its character not of trader but of property owner."

LORD CULLEN—I am of the same opinion. The obligation for feu-duty with recurring duplicand is incurred to enable the feuar to be the owner of the property irrespective of how he may use it. If he chooses to occupy it for the purposes of his trade or business he is entitled under Schedule D to deduction of the annual value but to no further deduction.

The Court recalled the determination of the Commissioners.

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

Counsel for Respondents—Wilton, K.C.—Burn Murdoch. Agents—Cornillon, Craig, & Thomas, W.S.

Saturday, July 16.

SECOND DIVISION.

QUILTER *v.* KEPPLEHILL COAL COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (3)—*Partial Incapacity—Application by Workman for Review of Compensation—Relevancy of Averment of a General Reduction of Wages.*

Held that a miner had not set forth relevant grounds for asking review of compensation where the sole ground averred was that since his compensation was fixed there had been "a general reduction of wages to the extent of at least 2s. per shift."

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) First Schedule (3), enacts — "In fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

An arbitration was held in the Sheriff Court of Lanarkshire at Hamilton between William Quilter, miner, 118 Main Street, Shotts, *appellant*, and the Kepplehill Coal Company, Limited, *respondents*, to determine the rate of compensation payable to the appellant in respect of partial incapacity due to injuries by accident arising out of and in the course of his employment with the respondents. The appellant being dissatisfied with the decision of the Sheriff-Substitute (SHENNAN) appealed by Stated Case.

The *facts* as stated in the Case were as follows — "(1) That on 26th May 1920 the appellant was engaged in the respondents' employment as a coal miner at Stane Pit, Shotts; (2) that on said date he sustained injuries to his right hand by accident arising out of and in the course of said employment, whereby he was for a time totally incapacitated and is at present partially incapacitated; (3) that the respondents paid the appellant full compensation during the period of his total incapacity, and thereafter 15s. per week in respect of partial incapacity down to 5th February 1921; (4) that the respondents were and are willing to continue payment of compensation at the rate of 15s. per week from said 5th February, but the appellant claims that he is entitled to a higher rate of compensation."

The Case further stated — "The sole ground on which the appellant claims an increase in the rate of his compensation is that since 5th February 1921 the respondents 'refuse to make payment of compensation reasonable and adequate in the circumstances having in view the fact that since 31st January 1921 there has been a general reduction of wages to the extent of at least 2s. per shift.'

"I heard parties' agents on 10th May 1921, and on 16th May 1921 I issued an opinion in which I found that the appellant had not set forth relevant grounds for asking review of compensation. On 27th May 1921 I dismissed the appellant's application.

"I was of opinion that a general fall in the rate of wages did not in itself constitute a change of circumstances which justified the appellant in demanding that his rate of compensation should be increased. I held that the requisite change of circumstances must be one personal to the workman, and not merely a general economic change affecting him in common with uninjured workmen."

The *questions of law* for the opinion of the Court included the following—"2. Was I right in holding that the appellant had not set forth relevant grounds for asking review of compensation?"

The arbitrator appended the following *note* to his award:—"Although in form an original application, this is really a case in which the workman seeks review of the weekly compensation payable to him. He