But it naturally occurred to another class of the community who are supposed to be pretty influential in their way, that the principle of this exemption of houses occupied only for the purposes of trade might be very justly extended to houses occupied entirely for the purpose of carrying on professions. And accordingly by the 5th of Geo IV. we have an exemption of "any house, tenement, or building, or part of a tenement or building in the said Act described which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling by which such person or persons shall seek a livelihood or profit." Now, taking these two exempting statutes together, I think there can be very little doubt as to what the construction would be if we had not to deal with the enactment in the 41st Vict. cap. 15. I should say the result of them was to exempt premises devoted wholly to the purposes of trades or professions.

Now, this being the state of the law prior to the Act of the 41st of Victoria, it falls to be observed in the first place that that is an Act not only for the purpose of introducing certain amendments on the Inhabited-House Duty Acts, but it is an Act to grant certain duties of customs and inland revenue, to alter other duties, and to amend the laws relating to customs and inland revenue. I think it would be rather strange if by that statute there was introduced, without any preamble giving the slightest notice of such a change of the law, a farther exemption from the tax laid on under the 48th of Geo. III. One would not expect to find such an enactment there, and accordingly I think we find nothing except what is quite in consonance with the two previous exempting statutes. The words are—"Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit," shall be exempt. Now, there is no word there so far as I see that has not been used in some of the previous statutes. The word business is used in the previous exempting statutes, and I do not think it can be intended to have in this statute any larger or different meaning from that which it had in the previous statutes.

I ought to have noticed also in passing that there is some importance to be attached to the preamble of section 3 of the Act 2nd and 3rd of Will. 4, cap. 113, where in reciting the previous exempting statutes the words used are "wholly occupied by them in the day time only for the purposes of their trades or professions." Now, these words in that preamble express exactly the meaning that I attach to the two previous exempting statutes.

Coming back now to the 41st of Victoria, we have, as I said before, no word used that is not to be found in the previous exempting statutes, and I do not think there is anything in the collocation of the words that suggests the idea of an intention to alter or enlarge the previous clauses of exemption. "Any trade or business" is very naturally used for the purpose of embracing businesses of the nature of trade, but which yet cannot perhaps very properly be called trades. Lord M'Laren has referred to the case of persons carrying on the business of hiring. That can hardly be called a trade in any proper sense of the term, but it is very properly called a business, and persons in the situation his Lordship figured would I think be quite within the exempting clause. In like manner it was held, previous to the Act 41 Vict. cap. 15, that an insurance company is not a trade, though it certainly carries on a business for profit—*Edinburgh Life Insurance Company* v. *Inland Revenue*, 2 R. 394. In short, I cannot find in this section any indication of an intention, as I said before, to enlarge the exemption, or any words used which in any fair and reasonable sense can be held to alter the law in that respect.

Now, the premises in question are said to be occupied for a business, and in one sense of the word that may be true, but are they occupied for a business within the meaning of that word as used in this statute? I think business in this statute means a business carried on for the purpose of profit, and I do not care whether the words "by which the occupier seeks a livelihood or profit" are held to apply to trade or business or not, because even if these words were not there, I should still construe the word business as a business carried on for the purpose of profit, in its nature resembling trade. The word "business" must take its colour from the company in which it is found. But the business of Sir M. S. Stewart consists merely in ingathering, enjoying, and employing the income of his estate. And therefore I concur with the majority of your Lordships in holding that this determination of the Commissioners must be reversed.

The Court reversed the determination of the Commissioners, and sustained the assessment appealed against.

Counsel for Appellant—Graham Murray—Howden. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for the Surveyor of Taxes—Sol.-Gen. Darling — Young. Agent — David Crole, Solicitor of Inland Revenue.

Thursday, January 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

HEYS *v.* KIMBALL & MORTON (LIMITED).

Contract — Sale — Condition — Immediate Entry.

A company carrying on business as sewing-machine manufacturers offered to purchase certain premises "on condition of immediate entry being given,

and of acceptance within three days." In making this offer they were aware that the premises were let to a firm of furniture manufacturers, and contained a quantity of furniture. The offer was made on 26th and was accepted on 28th March, and on the 30th the purchasers resiled from it on the ground that the tenants in possession had failed to vacate the premises. It was proved that if the purchasers had insisted, the tenants could have vacated the premises by the 30th. In an action by the seller against the purchasers, *held* that the defenders were bound to implement their agreement, in respect that there had been no default on the part of the pursuer or anything else to justify them in repudiating it.

Messrs Kimball & Morton (Limited) carried on business as manufacturers of sewing-machines in Glasgow. Having lost their premises by fire they entered into negotiations for the purchase of certain premises in Preston Street, of which Mr Henry Heys was the proprietor. The subjects consisted (1) of a large furniture factory, engine-shop, &c., behind, and a space of vacant ground in the rear in possession of the firm of G. Taggart & Co., under a lease expiring at Whitsunday 1889; (2) of a space of ground in the front, leased till Whitsunday 1889 to Messrs Arrol & Co., proprietors of adjacent engineering works.

On Tuesday 26th March Messrs Kimball & Morton wrote Mr Heys' agents in these terms—"We beg to offer Three thousand seven hundred pounds for the property and ground in Preston Street (subject to feu-duty of £43 odds). One thousand pounds to be paid at Whitsunday, and the balance to lie for seven years, at four per cent., on the security of the property, the balance to be reducible at any time on three months' notice being given. This offer is made on condition of immediate entry being given, and of acceptance within three days," &c.

Further negotiations having been entered into between the parties with a view to the offer being increased, Messrs Kimball & Morton, on Thursday the 28th March, wrote again to Mr Heys' agents in these terms:—"Gentlemen,—We are unable to increase our offer of 26th inst., which is understood to include engine-boiler and all fittings connected thereunto belonging to proprietor now in buildings. The right to reduce bond to be reserved only by us, &c. *P.S.*—While possession of the buildings is to be given immediately, it is understood that these conditions will not apply to the vacant ground in front of buildings if you fail to arrange for this with the tenants.—K. & M."

By letter of the same date the offer contained in the above two letters was accepted by Mr Heys.

On 30th March Messrs Kimball & Morton wrote Mr Heys' agents the following letter:—Referring to our letters of 26th and 28th inst., our primary object in making offer being to obtain *immediate* possession of property in Preston Street, and the present tenant having failed to vacate the premises, we hereby withdraw our offer, and decline to proceed with the purchase," &c.

The present action was raised by Mr Heys for the purpose of compelling Messrs Kimball & Morton to implement their part of the above agreement, and further, in the event of their failure to do so within such time as the Court should appoint, for £1000 in name of damages.

The defender pleaded, *inter alia*—"(1) The pursuer having failed to implement the condition as to immediate occupancy of the premises in question expressed in the defenders' offer, they were entitled to resile from the offer."

From the proof which was allowed it appeared that the defenders before making their offer had seen the premises, and were aware of the nature of Messrs Taggart & Co.'s occupation. At the date of the offer Messrs Taggart & Co. were in process of removal to new premises, and the premises at Preston Street were practically vacated as a manufactory, but a good deal of furniture had still to be removed. On Friday 29th March Mr Morton, secretary to the defenders' company, visited the premises, and was shown the copy of a letter by Messrs Taggart & Co. to the pursuer, undertaking to remove from the back premises that week, and from the front premises the next or the following week, and to give possession to the incoming tenant then. He expressed no dissatisfaction at the delay. The partners of the firm of Messrs Taggart & Co. gave evidence to the effect that if they had been pressed they could have vacated the premises by Saturday the 30th March. Mr Taggart said—"If we had been told on the Friday to make a special effort at some other person's expense to take away everything belonging to us, we could have had the whole job done before the Saturday morning. It was just a question of men and money." Mr Packer, another partner, said—"By putting on plenty of men we could have cleared out everything, including the furniture, in two days. (Q) With an effort could it have been done by the Saturday night?—(A) I believe it could; the furniture was lying loose in the place, and we had plenty of room to put it in."

On 26th November the Lord Ordinary (KYLLACHY) pronounced this interlocutor—"Having taken the proof, heard counsel, and considered the cause, Decerns against the defenders to implement the missives of sale libelled, conform to the conclusions of the summons to that effect, reserving to the pursuer to move for decree in terms of the further conclusions for damages in the event of the defenders' failure to implement the decree now pronounced within one month from the date hereof, and reserving to the defenders their defences thereto: Finds the pursuer entitled to the expenses hitherto incurred by him," &c.

"*Opinion.*—The question in this case is whether the defenders were justified on Saturday the 30th of March in resiling from the contract with the pursuer which had been concluded on Thursday the 28th. Their ground for resiling was, as expressed

in their letter, that the pursuer had failed to give them 'immediate entry,' as stipulated in the missives, and the question of failure appears to depend on this—whether the period for immediate entry had expired by the forenoon of Saturday the 30th, when the defenders' letter was written—that is to say, within forty-eight hours of the conclusion of the contract.

"In my opinion that question must be answered in the negative, with the result that the pursuer is entitled to decree. I am unable to hold that, according to the true meaning of this contract, immediate entry had ceased to be possible within so short a period.

"It must be considered that the term 'immediate entry' is not a term as to the meaning of which it is possible to lay down any general or hard and fast rule. It perhaps means something more than entry within a reasonable time, but it does not necessarily mean instantaneous entry, or entry within an hour or a day of the conclusion of the contract. The question as to what in any given case it does mean must I think be determined by reference to the circumstances of each case, and the circumstances of this case are, I think, sufficient to show that the parties here did not contemplate entry within forty-eight hours of the completion of the contract.

"In the first place, I cannot overlook that the parties were admittedly bargaining with reference to subjects which they both knew to be in the occupation of tenants, who necessarily required time to remove their plant and stock-in-trade from the premises. And that was an operation which could not reasonably be expected to be performed in an hour or a day.

"No doubt before accepting the defenders' offer the pursuer may have been bound to make arrangements with his tenants for immediate removal, but it could hardly, I think, have been contemplated that the operations of removal should have been begun before the contract was completed, or, if begun, that they should also have been completed by that time. I quite appreciate the defenders' argument that the pursuer had three days to accept the defenders' offer, and that it was not impossible within that time both to have arranged with the tenants, and to have procured the removal of the tenants' belongings. But I confess I think that the defenders lay undue stress upon the circumstance that the missives contained the not unusual stipulation that their offer should be open for acceptance for three days. I greatly doubt whether that stipulation had special reference to the matter of entry. I am disposed to read it merely as fixing in ordinary course a period for the consideration of the defenders' offer. And that for that purpose it was not too long a period, is, I think, shown amongst other things by this—that the negotiations between the pursuer and defenders continued during the three days, and the final bargain was not struck until the Thursday, when the defenders wrote declining to increase their offer, and the matter was closed at a meeting between the parties or their representatives.

"In the next place, there is another test of the meaning of parties, to which it is, I think, legitimate to appeal. I mean the conduct of the defender Mr Morton, who went, as we have heard, to the premises accompanied by his foreman on Friday the 29th, and spent some hours in various communings with the tenants. If, as the defenders suggest, Mr Morton was entitled to expect possession on the evening of the 28th, and to expect that the premises would be void and redd for him at that time, still more, of course, was he entitled to expect that on the following day. But although he finds the former tenants in possession on the 29th, and also finds a great part of their stock of furniture and plant and machinery still in the premises, he makes no complaint to the effect that the premises have not been cleared. He expresses no disappointment, and makes no suggestion of any failure in that respect on the part of the pursuer. On the contrary, it is not until after the close of the interview, and after he or his foreman have made a full examination of the premises, and when the tenants have handed to him a copy of their letter to the pursuer agreeing to remove, that for the first time it seems to have occurred to him that the pursuer had not put himself in a position to give immediate entry, and therefore that his company were free from the bargain. Now, whatever may have been the apprehensions on that subject which the terms of the tenants' letter may have excited, the fact that Mr Morton did not think of repudiating the contract till he learned of that letter makes it to my mind plain that he did not expect on the forenoon of the 29th (the day after the acceptance) to find the premises ready for his occupation. In other words, his conduct showed that he did not expect immediate entry in the sense of entry simultaneous with the conclusions of the contract.

"In my opinion, therefore, the contract must be held to mean no more at most than this, that the tenants in occupation should, upon the close of the bargain, remove with all due despatch. And if this be so, I do not, I confess, think it doubtful that the defenders' repudiation on the morning of Saturday the 30th was not justified by any default which had then occurred.

"It remains only to consider whether the terms of the letters (including the letter referred to) which had passed between the pursuer and the tenants were such as to justify the defenders in resiling on the ground that the pursuer was disabled from giving immediate entry in the proper sense of that term. Now, how stands that matter? The pursuer had, it appears, an obligation from Messrs Taggart, the tenants, to have the premises wholly vacant within (speaking roundly) ten days from the 28th, and the evidence makes it, I think, quite plain that it was entirely within the pursuer's power, if he had been asked to do so, to have procured the defenders' entry on the morning of Monday 1st April, or even earlier. In other words, the evidence

leaves no doubt in my mind that if Mr Morton had intimated that he declined to wait for ten days, and desired entry to the whole premises, say on Monday the 1st of April, he would have got that entry. I think it proved that the pursuer was in a position to give it. At all events, the defenders have not proved the contrary, and therefore I think that at the date of repudiation there had been no default on the pursuer's part, or anything else to justify the defender's repudiation.

"I shall therefore decern against the defenders in terms of the conclusion for implement, reserving to the pursuer to move under the conclusion for damages if he fails to obtain implement of the contract."

The defenders thereafter lodged a minute, stating that they elected not to implement the missives of sale libelled, and dispensed with the time allowed in the above-recited interlocutor to make their election.

On 8th January 1890 the Lord Ordinary pronounced this interlocutor—"The Lord Ordinary having heard counsel on the motion of the defenders that the amount of damages shall now be fixed, in respect of the defenders' election not to implement the missives of sale libelled, as said election is set forth in the minute, Refuses said motion, and on the motion of the defenders grants leave to reclaim."

The defenders reclaimed, and argued—The terms "immediate entry" must be strictly construed. They implied that there should be no obstruction on the part of the tenants after the three days allowed in the offer had elapsed.

The pursuers were not called upon.

At advising—

LORD PRESIDENT—I have no doubt that the Lord Ordinary's decision in this case is right. There are, I consider, two conditions appended to the offer of Mr Morton—First, that it should be accepted within three days; and second, that the offerer must have immediate entry. With regard to the first, I am disposed to think that the condition meant that if the offer was not accepted within three days it fell at once without anything more being said about it, but that does not prove that the offerer might not have withdrawn his offer within three days if it had not been accepted. The consideration of that question, however, forms no part of the Lord Ordinary's judgment, and it is not necessary for the purposes of this case.

The question in the case turns upon the meaning of "immediate entry." The offerer visited the premises previous to making his offer, and the seller and he were both aware of the fact that these premises were occupied by tenants who were no doubt under obligation to remove as soon as asked by the proprietor, but all the same were tenants with a great amount of property and furniture, &c., in the premises, and it was quite obvious that these goods had to be removed before the offerer could have obtained possession. In these circumstances words are inserted in the offer stipulating for immediate possession. It is said that these words do not admit of construction, but I think they must, for if they were construed in their strict literal sense the offerer would have been entitled, if his offer was accepted, to walk straight to the premises and insist on having possession. No one has maintained that, and the record shows that the purchaser himself did not so understand these words. Unless, however, they had that meaning, it seems clear that the time to be allowed the seller for giving possession must depend on the circumstances of the case, and that these words must mean that the purchaser is to have such early possession as is practicable in the circumstances, and I agree with the Lord Ordinary that the contract does not mean "instantaneous entry," or, as he puts it in another part of his opinion, "entry simultaneous with the conclusion of the contract." If this is conceded—and I think it must be—then the whole matter turns upon the question whether the offerer might have got such possession as he was entitled to expect under the contract. Now, I think it is very clearly proved by the evidence of the persons who were in possession of the premises that the contract having been concluded on Thursday March 28th, the purchaser could have been in possession by April 1st—that is to say, the Monday following, and that appears to me to be just as early possession as he could reasonably have expected. If this is quite clear, as I think it is, that this could have been done, is it possible to say that without further negotiations the purchaser was entitled to repudiate the contract by the letter of 30th March. I think that was an entirely unjustifiable proceeding on the part of the purchaser, and that we are bound to grant decree for specific implement of the contract.

LORD SHAND—I agree with your Lordship's opinion, and the reasons on which it has proceeded, and with every word of the Lord Ordinary's note. The words "immediate entry" must be read with reference to the circumstances of the case. Both parties saw that the premises were full of heavy furniture, and all that the seller was bound to do was to see that the premises were cleared with due dispatch. The only circumstance which would entitle the purchaser to bring the contract to an end would be if he were in a position to show that there had been a declinature or refusal on the part of the seller to give such possession. What happened was, that the purchaser saw a letter in the hands of the tenant giving ten days to the tenants to remove in, and he thought fit to act upon that letter, but that was a letter with which he had no concern. The only person with whom he had to do was the seller. If he had said to the seller that he wanted entry next morning he would have got it, at least to a part of the premises, and he would have obtained to the rest on the Monday morning following. I am therefore clearly of opinion that the purchaser

had no warrant for cancelling the bargain.

LORD ADAM—I am of the same opinion. The offer was made on 26th March, and was accepted on the 28th. The purchaser refused to implement his bargain on the 30th, on the ground that the pursuer had been unable to give him immediate possession. The evidence, however, of the tenants in possession is, that they could have cleared out of the premises by Saturday. That being so, entry might and could have been given on 30th March, and I cannot doubt on the proper construction of the contract that that is immediate possession. I think Mr Morton was led astray by the letter which the tenants had written to the pursuer's agents. He seems to have thought it binding on all parties, and that consequently he could not get possession for ten days, whereas he could have got possession if he had asked for it.

LORD M'LAREN—I think the Lord Ordinary's judgment is entirely consistent both with sound principle and the justice of the case, and I do not desire to add anything to it. I conceive, however, that his interlocutor of 26th November must be adhered to with the variation suggested, namely, the omission of the words in which reference was made to the conclusions for damages.

The Court recalled the interlocutor of 26th November so far as it reserved to the pursuer to move for decree in terms of the further conclusion for damages in the event of the defenders' failure to implement the decree therein pronounced within one month from the date of the said interlocutor, and reserved to the defenders their defences thereto: *Quoad ultra* refused the reclaiming-note, and adhered to said interlocutor, and to the interlocutor dated 8th January 1890, and decerned.

Counsel for the Pursuers (Respondents)—Murray — Baxter. Agent — T. G. Martin, W.S.

Counsel for the Defenders (Reclaimers)—Asher, Q.C.—Low—Ure. Agents—Dove & Lockhart, S.S.C.

Thursday, January 30.

SECOND DIVISION.

COCHRANE AND OTHERS (HALDANE'S TRUSTEES) *v.* LIVINGSTONE (SHARP'S TRUSTEE).

Succession — Trust — Vesting Excluded — Discretionary Powers of Trustees—"Heirs in mobilibus" Construed.

A testator directed his trustees "to hold and retain, or pay, invest, or apply, in manner after mentioned," the residue of his estate for behoof of his mother's brothers and sisters, equally among them, share and share alike, declaring that the issue of predeceasing beneficiaries should be entitled to their parent's share, and "further declaring that the provision hereinbefore conceived in favour of the said brothers and sisters, and the issue of any deceased brother and sister of my said mother, shall not be held to have vested in them, or any of them, so as to give such residuary legatee power to assign his or her share, nor shall the same be assignable or arrestable or affectable by the diligence of their or of any of their creditors, . . . the said provisions being intended by me as purely alimentary, and not alienable by the said residuary legatee's acts or deeds."

The management and disposal of the shares were left to the absolute discretion of the trustees, "and in the event of any residue or portion of the capital or of the income arising therefrom of the share of any of my said residuary legatees remaining in my trustees' hands at the period of the death of the recipients thereof, then my trustees shall be bound to account for and pay over the same to such deceased legatee's heirs *in mobilibus*, and take their discharges therefor.

One of the residuary legatees survived the truster, but died leaving in the trustees' hands a balance of his share of the testator's estate. He left a trust-disposition and settlement.

Held that the share had not vested in him, and that it was not carried by his settlement, but fell to be paid to his heirs *ab intestato*.

Robert Haldane, druggist in Stirling, died on 9th December 1882 leaving a trust-disposition and settlement dated 7th September 1875, whereby he directed his trustees to deal with the residue of his estate as follows:—"And lastly, whatever rest, residue, and remainder there may be of my said whole estate, after said expenses and the foresaid legacies have been paid, I direct and appoint my trustees to hold and retain, or pay, invest, or apply in manner after mentioned, for behoof of the whole brothers and sisters of my late mother, equally among them, share and share alike; but declaring always that if any of the said brothers and sisters of my said mother have already predeceased or may yet predecease me leaving lawful issue of his, her, or their bodies, then such issue shall be entitled to take and receive their deceased parent's share, equally amongst them, share and share alike; and further declaring that the provision hereinbefore conceived in favour of the said brothers and sisters, and the issue of any deceased brother and sister of my said mother, shall not be held to have vested in them or any of them so as to give such residuary legatee power to assign his or her share under these presents, nor shall the same be assignable or arrestable or affectable by the diligence of their or any of their creditors, or the creditors of the husband of any female residuary legatee who may be married, for debts contracted or which may be hereafter contracted by them; nor shall the same be subject to the *jus mariti* or right of administration of