Saturday, January 26.

FIRST DIVISION.

[Exchequer Cause.

MOORHEAD, SONS, & COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue—Excess Profits Duty—Exemption —"Trade or Business"—"Commercial Traveller"—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 39.

By section 39 of the Finance (No. 2) Act 1915 the trades and businesses to which excess profits duty applies are all trades or businesses carried on in the United Kingdom with certain specified exceptions, "but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)."

Held that the term "commercial traveller" as used in the section was not limited to individuals, and that therefore a limited company which through one of its departments carried on the business of commercial travelling was entitled to exemption from excess profits duty *quoad* that part of the business.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) enacts—Section 39—"The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting (*a*) husbandry in the United Kingdom, and (*b*) offices or employments, and (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount, but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)."

Moorhead, Sons, & Company, Limited, produce importers and merchants, 104 Brunswick Street, Glasgow, appealed to the Commissioners for the Special Purposes of the Income Tax Acts against an assessment to excess profits duty in the sum of £948, 12s. made upon the company for the accounting period from 1st October 1920 to 31st March 1921 under the provisions of the Acts relating to that duty.

The Commissioners who heard the appeal, although they were of opinion that it was possible for them to separate that part of the company's business which was claimed to be that of commercial travelling, and although they held that the company in respect of such part of its business carried on a business of commercial travelling, decided that the company could not itself be called a commercial traveller, and that no part of its business was therefore that of a commercial traveller so as to be entitled to the exemption claimed. They therefore confirmed the assessment and determined the appeal accordingly.

The appellants obtained a Stated Case for the opinion of the Court of Session, as the Court of Exchequer in Scotland, which set forth, *inter alia*:—"The following *facts* were admitted or proved—1. The company was incorporated as a private limited company on 20th November 1915 for the purpose, *inter alia*, of taking over a business previously carried on by a partnership. Article 3 of the memorandum of association provides as follows—'The objects for which the company is established are—(1) Primarily and without prejudice to the other objects of the company, to acquire and take over as a going concern, and thereafter to carry on and develop, the business and undertaking and all or any of the property, assets, and liabilities of Moorhead, Sons, & Company, produce importers and merchants, one hundred and four Brunswick Street, Glasgow, and with a view thereto to adopt and carry into effect, with or without modification, the minute of agreement dated the twenty-sixth day of October 1915, entered into between the said Moorhead, Sons, & Company, and Robert Moorhead, produce importer and merchant, one hundred and four Brunswick Street, Glasgow, the sole partner of the said firm, as such partner and as an individual, of the one part, and William Kyle, 105 Saint Vincent Street, Glasgow, for and on behalf of the company of the other part, and referred to in article 4 of the articles of association of the company. (2) To carry on or to continue to carry on at any place or places in the United Kingdom of Great Britain and Ireland or elsewhere all or any of the businesses of merchants, brokers, commission merchants, agents, and dealers in all their branches, and also to carry on or continue to carry on any other trades or businesses, whether manufacturing, growing, raising, or otherwise, which usually are or conveniently can be carried on in connection with or subsidiary to the businesses hereinbefore referred to or any of them, or which may seem calculated in any way, directly or indirectly, to enhance the value of the same.' 2. The business carried on by the company may be described as falling under three heads—(*a*) The company acts as merchants of produce, which it buys and sells on its own account as principal. (*b*) The company acts as agent for various American firms and companies for whom as principals it sells produce on commission. (*c*) The company acts as agent for various firms and companies in the British Isles. No dispute arises as to the liability of the company to excess profits duty under the first two heads, but the company claims exemption from excess

profits duty on commission earned in that branch of its business which falls under head (c). 3. The agency business carried on by the company on behalf of firms and companies in the British Isles may be described as follows—(1) The company, by its servants, canvasses merchants in Glasgow and the surrounding district for orders for produce, which orders it transmits to its principals to be executed by them. The goods are sent direct by the principal to the customer, and payment is made by the customer to the principal without the interference of the company, who are in no way concerned with the collection of accounts. The invoice for the goods is sent to the customer through the company, to whom a statement of orders is rendered monthly by the principals. When this statement is agreed upon the company receives a remittance for the amount of the commission, viz., 1¼ per cent. on the goods supplied, no allowance being made for travelling expenses. The orders obtained by the company are not passed through the company's books. (2) The company acts or has acted, in the manner described in the previous sub-paragraph, as agent for seven different firms or companies in the period which falls under review in this appeal. A list of the firms is annexed hereto and forms part of this case. The company has in each case acted under a verbal arrangement, there being no written agreements in any case between it and its principals. The company receives no payment from its principals except the commission above referred to. (3) The agency business so done by the company is not relatively a large part of the business of the company, and is mainly performed by two of the junior servants of the company who devote a part of their time to travelling to obtain the orders, and when not so engaged the two junior servants devote their attention to other branches of the company's business. The orders are only obtained as the result of such travelling, although in some few cases they are sent direct to the company's office. The area travelled over is the area in or immediately around the city of Glasgow, but journeys are also made to Edinburgh, Leith, Dundee, and Aberdeen. (4) The nature of the agency business of the company is further illustrated by a letter dated 5th January 1921 and a memorandum dated 1st June 1923, addressed by Marsh & Baxter Limited to the company. . . .

"Counsel on behalf of the company contended that it was in respect of a particular branch of its business acting purely as a commercial traveller, and was thus exempt from excess profits duty *quoad* that branch of its business under the exemption conferred upon commercial travellers by section 39 of the Finance (No. 2) Act 1915. Reference was made to the case of *Commissioners of Inland Revenue* v. *William Ransom & Son, Limited*, (1918) 2 K.B. 709, and to the case of *Binney* v. *Commissioners of Inland Revenue*, (1920) 3 K.B. 348.

"The Inspector of Taxes, on behalf of the Commissioners of Inland Revenue, contended—(1) That no part of the business carried on by the company was a business of commercial travelling, and (2) That the company was not a commercial traveller and was therefore not entitled to exemption. The Inspector referred to the case of *Esplen, Swainston, & Wilson, Limited* v. *Commissioners of Inland Revenue*, (1919) 2 K.B. 731, in support of his contention, and maintained that the case of *Binney* v. *Commissioners of Inland Revenue*, (1920) 3 K.B. 348, was distinguishable from the present case."

The *question of law* for the opinion of the Court was—"Whether on the facts above stated the company is entitled to the exemption claimed?"

Argued for appellants—The Commissioners had found in fact that the appellants carried on, *inter alia*, the business of commercial travelling. This was equivalent to a finding that they carried on the business of a "commercial traveller." In terms of the Interpretation Act 1889 (52 and 53 Vict. cap. 63) the term "commercial traveller" might include either an individual or a corporation. In any event in a revenue statute a liability which was not made clear by its terms was not to be presumed. The appellants' contention was supported by the cases of *Commissioners of Inland Revenue* v. *William Ransom & Son, Limited*, [1918] 2 K.B. 709, and *Binney* v. *Commissioners of Inland Revenue*, [1920] 3 K.B. 348. The decision in the case of *William Esplen, Son, & Swainston, Limited* (*cit.*) turned on section 39 (c), which dealt with professions and did not apply to the business of commercial travelling.

Argued for respondents—The description "commercial traveller" could only be applied to an individual. The case of *Binney* (*cit.*) bore out this contention. Moreover (in the absence of definition) the terms of an Act were to be construed in their ordinary sense. The case of *Esplen* (*cit.*) favoured respondents' contention.

LORD PRESIDENT (CLYDE)—This is an appeal against assessment to excess profits duty in respect of a particular department of the appellant company's business.

Prior to 20th November 1915 Messrs Moorhead, Sons, & Company had carried on business in Glasgow as produce importers and merchants. On that date the firm was converted into a private limited company under the name of Moorhead, Sons, & Company, Limited, which took over and now carries on the said business.

The company's business consists of three departments—(1) The buying and selling of produce as ordinary merchants, (2) the selling of American produce as commission merchants, and (3) the obtaining of orders in the capacity of agent for other produce merchants who pay the company a commission on the orders obtained. It is with regard to the latter department of the company's business, which is actually performed by two of its junior servants who travel and canvass for orders in the same way as ordinary commercial travellers do, that the present question arises.

The appellant company maintained before the Commissioners that in respect of this

particular branch of its business it acts purely as a commercial traveller, and is therefore exempt from excess profits duty *quoad* that branch, in terms of section 39 of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89). The Inland Revenue contended before the Commissioners that no part of the business is a business of commercial travelling so as to be entitled to exemption. But the Commissioners, while holding that in respect of the third department of the company's business, it does in fact carry on the business of commercial travelling, decided that it cannot itself be called a commercial traveller so as to be entitled to the exemption claimed. The question is obviously a very narrow one.

Section 39 of the Finance (No. 2) Act 1915 applies primarily to all trades or businesses of any description carried on in the United Kingdom. *Prima facie* therefore the profits of the appellant company's business are liable to tax. But the section goes on to exclude from its operations, *inter alia*, "offices or employments," and if the section had ended there it might have been a question whether the class of agency carried on under the third department of the company's business was not entitled to exemption as an "employment." The exceptions made are, however, qualified by the next part of the clause, which expressly includes among the businesses liable to the tax "the business of any person taking commissions in respect of any transaction or services rendered," and also the business "of any agent of any description." There is no doubt that the word "person" wherever it occurs in the section includes both individual and corporate persons. So far therefore the effect of the section is to include the disputed branch of the appellant company's business among businesses liable to the tax, since the disputed part of the business is "the business of a (*corporate*) person taking commissions in respect of transactions or services rendered," and also, for that matter, "the business of an agent" for other produce-selling merchants. But by a further parenthetical qualification introduced at the very end of the clause, the general inclusion of such businesses is made subject to two special exceptions. It will be seen, on reference to the clause itself, that this qualification applies grammatically to the word "person" or to the word "agent," not to the word "business." But we have seen that "person" includes corporation, and obviously the word "agent" is equally comprehensive. Omitting, then, only those words which are immaterial for the present purpose, the latter part of the clause seems to read as follows:—"but including the business of any (*individual or corporate*) person taking commissions . . . and of any (*individual or corporate*) agent . . . not being a commercial traveller or an agent whose remuneration" does not depend on the amount of agency business done. If the disputed part of the appellant company's business had been remunerated by fixed payments made to it by its principals, the Commissioners would, I imagine, have been compelled to give it exemption, because the word "agent" includes a corporate agent. They have, however, held that the corporation cannot be "a commercial traveller" within the meaning of the section, although it does the very business which admittedly justifies the use of that description in the case of an individual. There are probably few cases in which a company—even a private limited company—performs the service or agency of commercial travelling, just as there are probably few cases like that of *Binney* v. *Inland Revenue Commissioners* ([1920] 3 K.B. 348), in which an individual carried on a large part of his business of commercial travelling by means of a staff of sub-agents or travellers paid by himself. But the object of the section is to tax, or exempt from taxation, as the case may be, the profits of certain classes of business, whether they are carried on by individuals or by companies, and it seems to me much too narrow to hold that because the usual species of commercial traveller is an individual, no company which does exactly the same kind of business and on the same terms can belong to the same genus. The special importance attached to personal qualifications in the statutory exemption of professions, which led Mr Justice Rowlatt to refuse exemption to a limited company formed by a partnership of naval architects and consulting engineers (*William Esplen, Son, & Swainston* v. *Inland Revenue Commissioners*, [1919] 2 K.B. 731), has no application to the business or employment of commercial travelling. Personal qualifications are neither more nor less important in the case of a commercial traveller than in any other kind of business whose profits are liable to the tax.

My opinion therefore is that the question put to us must be answered in the affirmative.

LORD SKERRINGTON—The sole question which we have to consider is whether the Special Commissioners were wrong when they decided that upon a just construction of section 39 of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) exemption from excess profits duty was not given to the business of commercial travelling by whomsoever carried on, but that it was given to such a business only when owned and carried on by one or more individuals who could be described as commercial travellers. I could have understood, though I should not have agreed with, a finding to the effect that the business of commercial travelling was of such a personal and confidential character that it could not be carried on by a corporation. This view, however, is excluded by the finding on the part of the Special Commissioners that the appellant company did in fact carry on the business of commercial travelling. It seems to me to follow from this finding that the appellants' business is one of the businesses which the statute specifies as entitled to exemption from the new tax. I think that the appeal must be sustained.

LORD CULLEN—I concur.

LORD SANDS—In my view of the genesis and construction of section 39 of the Finance Act (No. 2) 1915 (5 and 6 Geo. V, cap. 89) there is (1) a charging definition, (2) an exception, (3) an exception to that exception and (4) an exception to the latter exception. Accordingly, as it seems to me, without perhaps disregarding altogether any intermediate light, we may eliminate exceptions 1 and 2 and attach the final exception to the original definition. This will then run—"The trades and businesses to which this part of this Act applies are all trades or businesses of any description carried on in the United Kingdom . . . excepting the business of a commercial traveller."

The Special Commissioners have found that the appellants carry on the business of commercial travelling. But they have found that they do not fall within the exceptions because as a limited company they cannot be appropriately described as "a commercial traveller." The former finding is not open to review, but the latter is. If the exception had been conceived simply in favour of "a commercial traveller," it might not have been easy to quarrel with the finding. But the exception is in favour of "the business of a commercial traveller." The Commissioners have found that the appellants carry on the business of commercial travelling. As it seems to me this is not distinguishable from a finding that they carry on the business of commercial travellers. The respondents rely upon the singular in the statute, the "a." But both under the special and the general interpretation clauses the plural may be read in. In this view the exception which I have stated above would run "excepting the business of commercial travellers." Accepting the finding of the Commissioners that the appellants carry on the business of commercial travelling it seems to me that they fall under the exception. It might be somewhat inappropriate to describe a limited company as being "a distiller," but there is nothing unusual or inappropriate in describing such a company as one carrying on the business of distillers.

I recognise that the contrary view as adopted by the Commissioners is a maintainable one, particularly in view of the personal elements which underlie the intermediate exceptions (*b*) and (*c*). But this is a revenue statute, and a liability which is not made clear by its terms is not to be deduced from considerations of presumed intention.

The Court answered the question of law in the affirmative.

Counsel for Appellants—Robertson, K.C. — King Murray. Agents — Patrick & James, S.S.C.

Counsel for Respondents — Leadbetter, K.C.—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Friday, January 18.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Blackburn, Ordinary.

COOPER SCOTT *v.* GILL SCOTT AND OTHERS.

Prescription — Positive and Negative Prescriptions — Deed of Entail — Intrinsic and Extrinsic Objections—Act 1617, *cap.* 12—*Ex facie Valid Irredeemable Title — Conveyancing* (*Scotland*) *Act* 1874, *sec.* 34.

A deed of entail executed in terms of a trust-disposition and settlement correctly repeated in its narrative clause the destination in the trust-disposition in favour of a certain series of heirs. The dispositive clause, however, interpolated in the destination a person who was a stranger to the investiture thus set forth. The institute who first took the lands under the deed of entail was the person called immediately before the person thus interpolated, and as such institute possessed the lands for more than forty years without challenge. In an action of reduction of the deed of entail after the death of the institute, at the instance of the person who should have been called against the person thus interpolated, *held* (by a majority of Seven Judges, Lord Hunter and Lord Ormidale *diss.*) that though the dispositive clause was contradicted by the terms of the narrative clause, still as the former was unambiguous the objection to the deed was an extrinsic objection, and was therefore excluded both by the positive and by the negative prescriptions.

Observed per the Lord President, Lord Skerrington, and Lord Cullen, that section 34 of the Conveyancing (Scotland) Act 1874 was to be regarded as an amendment of the provisions of the Act 1617, cap. 12, relative to the positive prescription as those provisions had been interpreted by the Court, and that accordingly the words "*ex facie* valid" implied no more than that the title must be free from any "intrinsic nullity" within the meaning of these decisions.

Authorities examined.

John Albert Douglas Cooper Scott, *pursuer*, brought an action against (first) Robert John Gill (otherwise Robert John Gill Scott), and (second) the heirs-male whomsoever of the deceased Mrs Jane Gill or Young, sometime wife of William Young, *defenders*, for declarator that the trustees under the trust-disposition and deed of settlement and relative codicil of the late Peter Redford Scott were bound to execute a deed of entail in terms of a certain destination, that the deed of entail as executed was void in so far as it included in the destination certain persons, and that the pursuer was now entitled to succeed to the entailed estates. The summons also concluded for reduction