COURT OF SESSION.

Wednesday, March 19.

FIRST DIVISION.

[War Compensation Court at Edinburgh.

MACKENZIE BROTHERS *v.* THE ADMIRALTY.

War—Emergency Legislation—Compensation for Losses—Requisition of Distillery—Direct Loss by Reason of Interference with Business—Loss of Special Profits Attributable to War Conditions—Indemnity Act 1920 (10 *and* 11 *Geo. V, cap.* 48), *sec.* 2, *sub-sec.* (2), *iii* (*a*) *and* (*b*), *Schedule, Part II.*

The proprietors of a distillery which was requisitioned and taken possession of by the Admiralty under the powers conferred by the Defence of the Realm (1914) Regulations, claimed compensation for loss of profits. *Held* that on a sound construction of the Indemnity Act 1920 (particularly section 2 and Part II of the Schedule) the estimate of the profits lost should be based on the ordinary profit-making capacity of the business under normal conditions and therefore should not include enhanced profits attributable to war conditions.

The Indemnity Act 1920 (10 and 11 Geo. V, cap. 48), which makes provision for compensation to persons who have sustained loss by reason of interference with their property by the Government during the war, enacts—". . . (2) The payment or compensation shall be assessed in accordance with the following principles:—(iii) (*a*) If the claimant would, apart from this Act, have had a legal right to compensation the tribunal shall give effect to that right, but in assessing the compensation shall have regard to the amount of the compensation to which apart from this Act the claimant would have been legally entitled and to the existence of a state of war, and to all other circumstances relevant to a just assessment of compensation: Provided that this subsection shall not give any right to payment or compensation for indirect loss. (*b*) If the claimant would not have had any such legal right the compensation shall be assessed in accordance with the principles upon which the Commission appointed by His Majesty under Commissions dated the thirty-first day of March Nineteen hundred and fifteen and the eighteenth day of December Nineteen hundred and eighteen (commonly known as the Defence of the Realm Losses Commission) has hitherto acted in cases where no special provision is made as to the assessment of compensation, which principles are set forth in Part II of the Schedule to this Act. . . .

"SCHEDULE—Part II.

"*Principles on which the Defence of the Realm Losses Commission has hitherto Acted.*

"The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or in respect of loss of mere pleasure or amenity."

Mackenzie Brothers, Dalmore Distillery, Alness, and the trustees of the late Andrew Mackenzie, sole partner of that firm, made a claim in the War Compensation Court against the Lords Commissioners of Admiralty in respect of loss due to the Admiralty's occupation of Dalmore Distillery.

On 7th January 1924 the War Compensation Court awarded the claimants the sum of £5700 in respect of loss of profits from 19th January 1919 to 7th December 1921.

The judgment of that Court, which sufficiently sets forth the facts and circumstances, was in the following terms:—"On 30th June 1916 possession was taken by the Admiralty of some of the buildings belonging to the claimants, but this occupation is not said to have interfered with their business. On 31st October 1917 complete possession of the claimants' premises was taken by the Department. From June 1917 until 19th January 1919 a general order was in force preventing distilling. In June 1920 the premises were restored to the claimants. A fire, however, had occurred in February 1919 which had destroyed certain of the buildings. During the occupation by the Department no rebuilding rendered necessary by the fire had been undertaken. This work was done after the claimants obtained possession. Malting was started by them on 7th December 1921. During the period of reinstatement the claimants removed two stills of considerable age and replaced them by new stills. Apart from the rebuilding this work of introducing new stills would have occupied a considerable period of time and thereby reduced the output for the year. No point, however, was made by counsel for the Department under this head, and we have therefore taken the date to which interference with the business extended as 7th December 1921. The items of claim made fall under three heads—(1) Out-of-pocket expenses incurred by the claimants in consequence of the occupation by the Department of their premises. (2) Rent for the premises occupied from 30th June 1916 until 19th January 1919, when the prohibition against distilling terminated. (3) Loss of profits in respect of interference with the claimants' business from 19th January 1919 until 7th December 1921. Under the first two heads no question of law arises. We have been asked, however, to state the principle of assessment adopted by us in dealing with the items falling

under the third head as raising a question of law as to the proper construction of certain clauses of the Indemnity Act 1920. . . . The legal right to compensation against the Crown is defined in the Defence Acts and particularly the Act of 1842. The nature and effect of the right is fully explained in the opinions of the Judges in the House of Lords in the case of *De Keyser's Royal Hotel* v. *Attorney-General*, [1920] A.C. 508. On the assumption that a dispossessed person has a legal right to have a fair rent as for use and occupation of his business premises, this does not prevent his putting forward an independent claim for loss of profits arising from interference with his business so far as such right is conferred by the Act itself—see the opinions of the Judges in the Court of Appeal in England in *A and B Taxis, Limited* v. *The Secretary of State for Air*, [1922] 2 K.B. 328. The principles of assessment for a part of a claim falling under this category are as already stated found in the part of the schedule quoted. In no case where we have to assess a claim for loss of profits during a period of occupation of business premises by a department have we proceeded upon hypothetical figures of what might have been expected in the way of profit based upon estimates of output and rate of profit. We have invariably asked information from claimants as to the profits actually earned prior to the period of occupation and for some time prior to the outbreak of war. The present claimants maintained that such information was irrelevant. They refused access to the auditors of the Government to the books of the firm, but upon their receiving from the Court, to whose notice the matter had been brought by the Admiralty, a letter indicating the Court's wishes, the information was made available and the desired figures were thus obtained. In the witness-box the accountant for the claimants adhered to their position that the actual profits earned by his clients prior to occupation had no bearing on the question. He said he had not checked the figures of the Government Accountant, but in cross-examination he admitted that he was not able to suggest any error in them. We have no doubt that they are accurate. They show a startling discrepancy between what in fact was earned prior to the war and what it is suggested would have been earned in consequence of war conditions, during the period for which a claim is made. For the year 1912 the profits of the business were £243, for the year 1913 they were £89, and for the year 1914 £1664, giving an average for the three years of £665. The years 1915 and 1916, during which war conditions prevailed, showed a loss of £378, 9s. 8d. and a profit of £7234, 6s. 10d. respectively. In the earlier years, 1910 and 1911, losses of over £4000 in each year were experienced, but during these years the business had been affected by a fire. If the six and two-third years prior to 30th June 1916 are taken an average annual loss of £298, 16s. 9d. is shown, while an average of five years prior to 31st October 1916 shows an average annual profit of £1788, 12s. 1d. The figures upon which the claimants rely in their claim bring out a hypothetical profit at the rate of £49,000 for the first year and a lesser rate of profit for the subsequent years. It was contended for the claimants that they had proved that they would have made the profits for which they claim if their business had not been interfered with. We are not able to agree. When their *pro forma* accounts are examined it is apparent that each figure is open to error, and that in the resulting figure the extent of possible error is greatly increased. As a basis even for estimating what would have been the probable amount of war profit during the period in question great discount would require to be made. The schedule of the Act appears to us to be so framed as to preclude our making an award based on purely war conditions. In the *Elliot Steam Tug, Limited*, [1922] 1 K.B. 127, L. J. Bankes at p. 132 said—'It does not follow that because a person proves a direct loss by reason of interference with his property he is entitled to payment or compensation because the principles upon which payment or compensation are to be assessed are laid down by the Act. Those principles are set out in the schedule to the Act and they appear to have been framed with the intention of awarding compensation to individuals who suffered losses over and above what the community in general suffered owing to the war, and to exclude compensation for any special loss or any loss of special profits due to the war or for any losses arising solely out of the existence of a state of war.' That statement accurately sets forth the way in which we have interpreted the provisions of the Act for compensating persons making claims for loss of profits."

The claimants appealed to the Court of Session.

In their note of appeal they stated, *inter alia*—"On 13th and 14th December 1923 evidence for the claimants and respondents was taken before the War Compensation Court at Edinburgh, and counsel for the respective parties were heard thereon. The claimants adduced evidence of the capacity of production of their distillery and plant, of the working costs of distilling including the current market prices at which barley was obtainable, of the existence of a demand for their entire production of whisky, of the fact that the claimants could have produced the quantities of whisky specified in their claim, and of the current prices they would have obtained therefor, all with reference to the conditions prevailing during the actual period of claim. The accuracy of these data was not challenged by the respondents' witnesses. The claimants' claim for compensation in respect of lost profits was arithmetically derived from these proved data. In corroboration of the claimants' ability to obtain the profits claimed during the period of claim the claimants further proved the profits which they have actually obtained in the periods immediately following upon their resumption of distilling operations at the end of 1921."

Argued for appellants—The amount of compensation claimed was the correct estimate of the profits which the claimants would have earned had their distillery not been requisitioned. This loss of profits was due not to "the existence of a state of war" but to the Admiralty's "direct" interference in taking over their business. Accordingly the proviso in the Schedule, Part II, did not apply to the assessment of the present claim. Apart from the Act of 1920 there was a right to compensation whenever the Crown acquired property either temporarily or permanently—*Attorney-General* v. *De Keyser's Royal Hotel, Limited*, [1919] 2 Ch. 197, *per* Swinfen Eady, M.R., [1920] A.C. 508, Lord Dunedin at 527, Lord Moulton at 553. The following cases were also cited:—*Elliot Steam Tug Company, Limited* v. *Shipping Controller*, [1922] 1 K.B. 127; *A and B Taxis, Limited* v. *Secretary of State for Air*, [1922] 2 K.B. 328; *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Company, Limited*, [1919] A.C. 744; *Moss Steamship Company, Limited* v. *Board of Trade*, [1924] A.C. 133; *Moneypenny* v. *Admiralty*, 1922 S.C. 706, 59 S.L.R. 468.

Argued for respondents — Under the statute the estimate of profits for the purposes of compensation should be based on the ordinary profit-making capacity of the business under normal conditions—that is to say, the increase due to war conditions should be excluded. The award by the Compensation Court complied with the terms of the statute and should be sustained.

LORD PRESIDENT (CLYDE)—This appeal is presented against an assessment of compensation under the Indemnity Act 1920 by the War Compensation Court. The scheme of the Act is twofold. On the one hand it gives indemnity to the officers and agents of His Majesty in respect of all interferences with the property and business of other persons which their duties—carried out in good faith—compelled them to make during the war. On the other hand it provides a limited measure of compensation to the persons whose property or business was so interfered with.

In the present case a distillery belonging to the appellants was requisitioned and taken possession of by or on behalf of the Admiralty. The appellants themselves were carrying on the business of distilling in the property, and their claim for compensation thus reduces itself substantially to a claim for loss of profits.

The history of the occupation of the property while it remained under the control of the Admiralty was unfortunate. It was handed over for the use of the naval forces of the United States, and while being so used a fire occurred in it. The question of compensation we have to decide is not, however, complicated by these circumstances in any way, but it is right to say in passing that the argument put forward by the appellants to the effect that in assessing the amount of compensatisn due the War Compensation Court ought to have taken into account the payment made to the Admiralty by the United States Government for the use of the premises appears to be plainly unsound.

The award made by the War Compensation Court is based on a full estimate of the profits lost by the appellants while deprived of the use of the distillery, on the basis of the ordinary profit-making capacity of the business under normal conditions—that is, apart from the very large inflation of profits which the appellants say was experienced by other distillery businesses which were not interfered with during the same period, owing to the peculiar conditions brought about by the war. The appellants' contention is that in limiting the award to compensation for loss of *normal profits*, and in refusing to include in the award compensation for those *excess profits* which the circumstances of the war might have enabled the appellants to make, the War Compensation Court has misinterpreted its powers and duties under the Indemnity Act 1920.

The Act provides compensation separately in two cases. The first case is that in which the claimant would apart from the Act have had a legal right to compensation and is dealt with in head iii (*a*) of sub-section (2) of section 2, where the measure of compensation given is defined. The other case is that in which the claimant would not have had such legal right and is dealt with in head iii (*b*) of the same sub-section, and the principles on which compensation in the latter case is to be assessed are set forth in Part II of the Schedule to the Act. It may be that it makes little or no difference to the result under which of the two cases the present claim falls. Anyhow, both parties have presented their arguments upon the footing that the claim should be assessed on the principles set forth in Part II of the Schedule.

It is to be observed in the first instance that according to head (*b*) of sub-section (1) of section 2 the compensation which may be competently awarded is initially limited to "direct" loss or damage only. No claim for indirect loss or damage is given to anybody. Turning to Part II of the Schedule, this initial limitation is again emphasised in the opening words, "Only the direct loss and damage suffered by reason of direct and particular interference" with the claimants' property or business is to be taken into account. Then follow a number of further limitations introduced by the words "and nothing shall be included in respect of" certain things, among which is "any loss or damage due simply and solely to the existence of a state of war." The language employed in the schedule to describe the principles on which the compensation should be assessed is, no doubt intentionally, popular in character. Treating it as such, it seems to me that the loss of an advantage only attainable in consequence of a state of war—put forward as a ground for claiming the statutory compensation—is within the meaning of the schedule a loss due simply and solely to the existence of a state of war. It was the existence of a state of war and nothing else which put what I have described as "excess profits"

within the claimants' reach, and the aggravation of their loss by being deprived of the opportunity of making the "excess profits" is an aggravation due simply and solely to the existence of a state of war. I think, therefore, the very large claim for "excess profits" advanced by the claimants and appellants was properly excluded by the War Compensation Court from its award. Were it otherwise, interference with a business which had never made any profits at all, and was in fact a sinking concern, might form the unanswerable ground of a huge claim for compensation on the plea that had it been left alone it might have been able to use the exigencies of war time so as to convert for the time being its losses into substantial profits.

The appellants maintained that the loss of their profits (whether at usual or at war rates) being a "direct" loss suffered by reason of "direct" interference with their business, the further limitations of the compensation in the schedule do not, if strictly construed, apply to their claim. This may not be an impossible construction of the schedule, but it is attended with serious difficulties. The appellants explained the exclusion of "loss or damage due simply and solely to the existence of a state of war" as referring to such eventualities as damage resulting from the operations of enemy airmen. But the Act is dealing only with such loss and damage as results from interference with property or business by His Majesty's officers and agents in the prosecution of the Defence of the Realm—and how could it have been thought necessary to provide that damage inflicted by enemy airmen should not be "*included*" in the assessment of compensation in respect of such interference? The argument seemed to imply that the exclusion of "loss or damage due simply and solely to the state of war"—as a competent element in a claim to compensation for loss of profits resulting from "direct" interference—was really surplusage. There are more general grounds for preferring the construction adopted by the War Compensation Court. It is a familiar principle of assessment of the compensation given by statute for an authorised undertaker's interference with property (including the business carried on in it) that a claimant is not allowed to inflate his claim by founding on any enhancement of the value of his property or business resulting from the circumstances which bring the undertaker on the scene. The sanction by Parliament of a public undertaking having for its object the opening up of a particular locality by transport facilities, may add considerably to the value of such of the scheduled properties as the undertaker may find it necessary to acquire. But none of the owners of those properties is allowed to inflate his claim by founding on the circumstance that the policy of Parliament in authorising the undertaking has enhanced their value. It does not seem to me to be reasonable (in the absence of anything in the Indemnity Act to conclude the matter) to attribute to the Legislature the intention of allowing a claimant, whose business has been interfered with in the general interest of the Defence of the Realm, to inflate his compensation by founding on the probable enhancement of his profits owing to the very circumstances which compelled His Majesty's officers to interfere, namely, the existence of a state of war. On the whole matter, therefore, I am for rejecting the appellants' construction of the Act—[*His Lordship then dealt with a subsidiary point with which the report does not deal*].

LORD SKERRINGTON—The language of the Indemnity Act 1920, and particularly of the Schedule, Part II, is in my judgment susceptible of the interpretation which the War Compensation Court has placed upon it. Further, when regard is had to the context and purpose of the enactment I think that this interpretation is actually the correct one, and that the tribunal was right in refusing to award to the claimant compensation in respect of his having been deprived of the opportunity of earning what are popularly, and accurately enough for the present purpose, described as war profits.

LORD CULLEN—I concur in the opinion of the Lord President.

LORD SANDS—There may be interference with business which causes no damage. Again there may be interference which would cause damage under peace conditions. Finally there may be interference that causes loss which would not have resulted from interference under peace conditions. For this last kind of loss the Act does not allow compensation. There is often a puzzle where questions of causation have to be considered. In the present case a claim can only be made where there has been interference. That cause must therefore be operative in every case in which a claim can arise. Accordingly when the Act, having postulated interference, goes on to speak of loss or damage "due to" something else, it is clear that some subsidiary cause or concomitant condition is referred to. Interference is postulated, but compensation is not to be allowed in so far as it was owing to the state of war that damage flowed from such interference. Accordingly I agree with the opinion of your Lordship in the chair.

The Court refused the appeal.

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