that prescription runs from the date of payment. There is an old case in Morison—*Stephenson* v. *Stephenson's Trustees*—on our practice in the matter, and it was there held that the sexennial limitation will, in the case of a bill payable on demand, run from the date of the bill itself. Mr Bell in his Commentaries treats the *terminus a quo* in the case of a bill payable at sight as still a matter of question. My own impression is that the limitation introduced by the sexennial prescription should not begin to run till the date on which the bill is payable.

Lords Young, Craighill, and Rutherfurd Clark concurred.

Counsel for Pursuer—Low—Graham Murray. Agents—C. & A. S. Douglas, W.S.

Counsel for Defender—Jameson—Dickson. Agents—J. & J. Ross, W.S.

Friday, March 4.

FIRST DIVISION.

[Exchequer Cause.

THE TOWN AND COUNTY BANK (LIMITED), ABERDEEN *v.* RUSSELL (SURVEYOR OF TAXES).

Revenue—Income Tax—Income Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *Schedule D, secs.* 100 *and* 101.

The manager and agents of a bank had as part of their emoluments dwelling-houses in the bank premises in the towns in which business was carried on, the bank paying income-tax on the whole premises under Schedule A, and the manager or agent not being charged with income-tax on the value of the dwelling-house. *Held* that the bank was not liable to pay income-tax under Schedule D on the annual value of the part of the premises used as dwelling-houses, because the providing of such houses to their officers as part of their emoluments was truly an outlay to be made before any profit assessable under that Schedule could be struck.

Opinion that the officials were liable under Schedule E to be assessed on the value of such houses as part of the emoluments of their offices.

At a meeting of the Commissioners of Income-Tax for the county of Aberdeen held in August 1886 an appeal was taken by the Town and County Bank (Limited) against an assessment on the sum of £1058, under Schedule D of the Income-Tax Acts, made on them for the year 1885-1886.

The circumstances in which the assessment was made were as follows—The premises used as the head office of the bank in Aberdeen, and the premises used as the branches of the bank in the different places where they carried on business, contained certain accommodation occupied as a dwelling-house by the manager or resident agent of the bank as the case might be. The manager or agent received this accommodation as part of their emolument in the service of the bank, but the annual value of this accommodation was not assessed to income-tax otherwise than under Schedule A of the Income-Tax Act 1842 (5 and 6 Vict. cap. 35), under which the whole premises of the bank paid income-tax. The £1058 was the aggregate annual value of the portions of the premises which were occupied by the officials or agents of the bank as their dwelling-houses, and did not include any portion used solely as counting-houses, the aggregate value of which (and upon which a deduction was allowed) did not exceed two-thirds of the value of the whole. The £1058 in question had been deducted from the bank's profits before these were returned to the Income-tax Commissioners for assessment under Schedule D.

It was contended on behalf of the bank that in the return submitted by them deduction had been properly made from the bank's profits of the sum representing the annual value of its premises occupied by its officials or agents as their dwelling-houses; that these dwelling-houses formed the official residences of the agents, and were necessary for the proper carrying on of the business of the bank; that owing to the nature of the bank's business it was essential that a responsible official should reside on the bank's premises, and that thus the whole premises belonging to and occupied by the bank or its officials or agents were used for the purposes of the bank's business. There was no necessity and no possibility for the bank as such having a dwelling-house merely for occupation. The whole premises were, for the purposes of the bank, business premises. The case was totally unlike one where a private banker both resided and carried on business in the same premises. The bank had no dwelling-house in the sense of section 101, quoted *infra*, which must, in terms of section 100 be a dwelling-house in part used for the domestic or private purposes of the trader, and not one wholly used for the purposes of such trader's business. A dwelling-house was necessary for the private trader unconnected with trade; *prima facie* therefore the dwelling-house must be considered as simply part of his private expenditure, and not as an incident of trade expenditure, and the fact that he used part of it in connection with his trade did not alter its character as his private dwelling-house. The provisions of section 101 obviated the hardness of this last conclusion. But it was not the province of any exception to enlarge the scope of the application of the rule. The exception must be confined to the cases where the rule itself operated. Now, in the case of the bank the general rule as for the private trader had no application. If a further duty were imposed on the sum of £1058, the bank would be charged on that sum twice over. It had already paid duty under Schedule A, and as the sum was for part of the value of the premises used by them for purposes necessary or incidental to their business as bankers, they were entitled to make the deduction in terms of rule 1, applicable to cases 1 and 2 (Schedule D), as being disbursements or expenses wholly and exclusively laid out or expended for the purposes of their trade as bankers in earning their profits; and the Commissioners of Income-Tax in Glasgow so decided in appeals at the instance of the Union Bank of Scotland (Limited) and the Clydesdale

Bank of Scotland (Limited)—Income-Tax Act 1842 (5 and 6 Vict. cap. 35), secs. 100 and 101, Schedule D, case 1; Income-Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 1, Schedule D, paragraph 1.

It was contended by the Surveyor of Taxes—Under the rules of the Income-Tax Acts the deduction in question could not be allowed. According to the first rule of the first case of Schedule D of the Income-Tax Act 1843 (5 and 6 Vict. cap. 35), the duty had to be charged on a sum not less than the full amount of the balance of the profits "without other deduction than is hereinafter allowed;" and by the first rule, applicable to the first and second cases of Schedule D, it was expressly provided that no deduction shall be allowed "for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern, not exceeding the proportion of the said rent or value hereinafter mentioned;" and section 101 of the same Act provided, *inter alia*, "that nothing herein contained shall be construed to restrain any person . . . renting a dwelling-house, part whereof shall be used by him for the purposes of any trade or concern, or any profession, hereby charged, from deducting or setting off from the profits of such trade, concern, or profession such sum, not exceeding two-third parts of the rent *bona fide* paid for such dwelling-house, with the appurtenances, as the said respective Commissioners shall, on due consideration, allow." In the present case the managers and agents represented the bank, and the parts of the bank's properties occupied by them as their private dwelling-houses must be held as occupied by the bank exactly the same as in the case of a private banker: Further, if the assessments were confirmed, the amount would not, as stated by the bank, be charged twice over; but, on the contrary, if the bank's contention were given effect to, the sum in question, or an equivalent amount, would escape assessment altogether.

The Commissioners concurred in the views of the Surveyor, and dismissed the appeal.

The Bank took a Case for appeal to the Court of Exchequer.

The question of law stated for the decision of the Court was—"Whether the bank is entitled to deduct from its profits, before returning them for assessment under Schedule D, the whole value of their bank premises, where such premises are in part occupied for residence by officers of the bank?"

At advising

Lord President—The facts of the present case are very simple, and they are stated very shortly in the terms of the case before us. The Town and County Bank carry on business in Aberdeen, and also in some other towns in the north of Scotland, and the whole premises, both in Aberdeen and elsewhere, in which they carry on business, are their own property. They pay income-tax upon the whole of these premises under Schedule A of the Act 5 and 6 Vict. c. 35. The premises at the head-office of the bank in Aberdeen, and in the same way the premises used as the branch offices of the bank in the different places where they carry on business, contain certain accommodation occupied as a dwelling house by the manager or resident agent of the bank, as the case may be. The manager and agent receive that accommodation as part of their emolument in the service of the bank. But the annual value of this accommodation is not, the Case states, assessed to income-tax otherwise than under Schedule A, by which I understand is meant that the bank manager or bank agent who receives the accommodation as part of the emoluments of his office is not charged with income tax under Schedule E. I shall have something to say about the propriety of that arrangement by-and-bye, but in the meantime I merely notice it in passing.

The footing upon which the Income-Tax Commissioners make the assessment to which I have referred is that the part of the premises used as a dwelling-house by the servant of the bank is held to be a dwelling-house used by the bank itself in the same way as if the bank, being a private individual, really dwelt in these premises. They state it thus in the course of the case: They say that by the first rule, applying to the first and second cases of Schedule D of the Act 5 and 6 Vict. c. 35, it is expressly provided that no deduction shall be allowed "for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern;" and they contend that in the present case the managers and agents represent the bank, and the parts of the bank's properties occupied by them as their private dwelling-houses must be held as occupied by the bank exactly the same as in the case of a private banker.

Now, I am of opinion that that contention is not well founded, upon the construction of the particular rule which is referred to, viz., the first rule applicable to the first two cases under Schedule D. Schedule D charges income-tax upon the profits of trade, and also upon the emoluments derived from any profession or calling. These are the two heads of Schedule D. The first is, duties to be charged in respect of any trade, manufacture, or adventure in the nature of a trade, not contained in any other schedule; and the other case is, the duty to be charged in respect of professions, employments, or vocations not contained in any other schedule. It is important to observe that the rule which we have got to construe here is applicable in both these cases under Schedule D—both to the profits of trade and to the profits of professions or callings. In regard to the profits of trade we have this general provision in the first rule applicable to the first case under the schedule, that the duties 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, manufacture, adventure, or concern, upon a fair and just average of three years. The duty is to be charged upon the balance of profit. Now, I do not apprehend that that term is used in this statute in any other sense than that in which it is used by traders and manufacturers in the management of their business and in the keeping of their books, and one has no difficulty in understanding what is meant by a balance of profits in a trader's books. It means the free balance left in name of profit after deducting the whole outlay and expenses. I know no other meaning of "balance of profits." The question

therefore comes to be in the first place, before we go to the particular rule we have to deal with, how the matter would be dealt with under this leading rule applicable to the assessment of profits on trade. Can it be doubted for one moment that the whole sums paid to the servants and officers of the bank are outlay to be deducted before striking the balance of profit? I do not think anybody could say that that is not so. The circumstance that the emoluments may come either in the shape of money or in some other shape—some advantage to the servant or manager—can make no sort of difference. If it costs the employer so much money to secure the services of the officer or manager, that is just an outlay that must be charged against the profits before you can strike a balance. And therefore in the present case, when you are dealing with those leading words of Schedule D, I should have no hesitation whatever in saying, that although part of the emoluments of the bank agent or the bank manager may be the enjoyment of a dwelling-house free of rent, that is just part of his emoluments, and part of the charges against the bank in striking a balance of profits.

We come next to the particular rule upon which the Income-Tax Commissioners found their deliverance, and that is the first of the two rules applying to both the first and second cases under Schedule D. The form of this rule is to prohibit deductions of certain things in estimating the balance of the profits or gains to be charged according to either of the first or second cases—that is to say, the profits or gains are to be charged according to the rule applicable to the case of trading profits, and of professions and employments. Now, there are four things embraced in this rule which it is provided shall not be deducted in estimating the balance of profit, and it so happens that the one we are more particularly concerned with is the third of these four. I shall take the liberty of asking attention, in the first place, to the other heads of prohibited deductions before I come to the one in question. The first is this,—there is to be no deduction for any disbursements or expenses whatever, not being money wholly and exclusively laid out and expended for the purpose of such trade, manufacture, adventure, or concern, or such profession, employment, or vocation. That is the first of them. One would have said that this was hardly a necessary provision, for it is involved in the enactment that the tax is to be levied upon the balance of profit—the free balance of profit. The second is this,—there is to be no deduction for any disbursements or expenses of maintenance of the partners, their families, or establishments. Now, I apprehend, there can be no doubt about what is meant by the partners. It means the trader or traders who are carrying on the business. There is to be no deduction of any disbursements or expenses for their own maintenance or the maintenance of their families or establishments. And then the fourth is this—there is to be no deduction for any sum expended in any other domestic or private purposes distinct from the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation. Now, taking these three together, I think they may all be described shortly in this way, that there is to be a careful distinction made between money that is expended for the proper purposes of the trade and money that is expended for any other, for any domestic or other similar purposes. The maintenance of the trader himself or his family, or of his establishment, is thrown entirely out of the question. It is only the outgoing, the outlay, which is rendered necessary for trade purposes, that falls to be deducted in striking the balance of profits.

Now, it is, as it were, in the very heart of this same rule that we find the words which are founded on by the Income-Tax Commissioners, and that they are these—"Nor for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern." That is quite in accordance with the other provisions of this rule, and it must be read in connection with them in order to see what is intended. The Income-Tax Commissioners say, that if an officer of the bank occupies a dwelling-house, then that is a dwelling-house within the meaning of this rule, although it may be given to him as part of his wages or emoluments, and so be directly and not merely in substance, but also in form, an outlay for the purpose of carrying on the trade. That would be entirely inconsistent with the general scope of the rule in my opinion, and would be to introduce into the middle of that set of provisions which I have just described a provision of a totally different description. It appears to me plain that the value of the dwelling-house which is not to be deducted is the value of the dwelling-house of the trader himself, and that in using that language the Legislature has really in view—mainly, at least—the fact that a trader or a professional man may use one part of his house for the purpose of his trade or business and another part for domestic purposes, and accordingly they distinguish between the two and say—So far as you devote a proportion of your house to trade purposes or professional purposes exclusively you shall be entitled to deduct that, because that is an outlay connected with your trade, but so far as you yourself dwell in it and keep a domestic establishment in it you shall not be entitled to any deduction. That is plainly the true meaning of this clause, and applying it to the present case I cannot doubt that this is a good deduction which is claimed by the bank, because it is not the dwelling-house of the trader. No part of the premises is occupied by the trader. The part of the premises which is occupied as a dwelling-house is simply given as part of the emoluments or wages of an officer of the bank.

The mistake, I think, which the Income-Tax Commissioners have committed, and which we are told prevails in practice, in some places at least, is that they have got the value of their income-tax as applicable to the occupation of this dwelling-house from the wrong party. They are not entitled to charge the bank as the owner of the premises and as the trader in this way, by refusing to deduct the value of this part of the wages of their officer, but they are quite entitled to charge against the officer himself, who occupies these premises, the income-tax upon the value of his occupation. The case of a bank-agent falls quite clearly within the provisions of Schedule E, for there it is provided that the duties shall be

charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said schedule, and to whom the annuities, pensions, or stipends in the same schedule are payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of said offices or employments. It cannot be doubted that this house occupied by the officer of the bank is a perquisite or profit belonging to his office. I think, therefore, the determination of the Commissioners must be reversed.

Lord Shand—I am entirely of the same opinion, and I have nothing to add to the statement your Lordship has made on the grounds of our judgment.

Lord Adam—The sum upon which the Crown proposes to assess amounts to £1058, and what that sum is appears clearly from the third article of the case. It is the aggregate annual value of the portions of the premises occupied by the officials or agents of the bank as their dwelling-houses, and if we go back to the second article of the case we find this fact stated, that these houses "contain certain accommodation occupied as a dwelling-house by the manager or resident agent of the bank, as the case may be." And then it is said—"The said manager and agent receive such accommodation as part of their emolument in the service of the bank." Now, that appears to me to show clearly that so far as expenses to the bank is concerned, it mattered nothing as in a question of profits whether the bank paid their officers entirely in money or gave them so much of their emoluments in money and so much in accommodation. The expense to the bank in either case would be entirely the same. That being so, the question we have to deal with arises on the first rule of the first case of Schedule D, and it says this, that the duty to be charged in respect thereof—in respect of profits—shall be paid on a sum not less than the balance of the profits or gains of such trade, and so on.

Now, what is meant by the balance of such profits and gains? I cannot but think that if this bank was making up a balance-sheet, altogether apart from revenue statutes or anything else, the only way it could arrive at a balance would be to strike off the whole expense of earning the profit, and that the salaries or emoluments paid to their servants in so doing, and also the expense of the necessary office accommodation, must necessarily be deducted by the bank before striking the balance. And I think it would matter nothing—it would be a mere matter of accounting and figures—whether or no the deduction was made in the shape of increased emoluments and paid all in money, or whether or no the deduction was made as so much money and so much value given to the officials in the matter of house rent or house accommodation. The result as it concerns the bank would be entirely the same in arriving at the amount of profit out of which a dividend was to be paid. Therefore, altogether apart from these revenue statutes, I should entertain no doubt at all that the whole of this sum would form a proper deduction before the profits were arrived at.

But then the revenue statute says this, that upon the full amount of the balance of profits so ascertained income-tax shall be paid "without any other deduction than is hereinafter allowed,' and the curious thing, so far as I can see, is that there is no deduction allowed at all except by way of exception. The construction of the statute is to prohibit deductions excepting so-and-so and so-and-so, from which we may draw the inference that that deduction is to be allowed. That is the frame of the statute, and accordingly in the third clause it sets out, deductions not to be allowed for so-and-so—and then we come to the case of professions, which is the second case, and the rules applying to both the preceding cases. It also proceeds on the same footing of deductions not to be allowed on the first and second cases, and we find it says this, that in estimating the balance of profits and gains to be charged according to either the first or the second case, no sum shall be set against or deducted from profits and gains—and then comes the deduction, "not being money wholly or exclusively laid out or expended for the purposes of such trade," and so on, from which the inference is direct that money wholly or exclusively laid out or expended for the purposes of such trade shall be allowed. Now, in asking myself whether the expense to the bank of house accommodation is a necessary disbursement, I think it is beyond doubt that that money was exclusively laid out and expended for the purposes of their business, and therefore this exemption falls directly under that first rule.

The second rule does not bear directly upon this. The next branch of the same rule goes on to say, as before, that no deduction is to be made of the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern not exceeding the proportion of the said rent or value hereinafter mentioned. I entirely agree with your Lordship that that case does not apply to the present one. In my view no part of these premises is occupied as a dwelling-house by the party who is being assessed. I think this rule is meant to apply to the case of a person who actually occupies the dwelling-house. If the party actually occupying the dwelling-house happens also to occupy a portion of it for his business purposes, then, and in that case, he is only to be allowed that deduction, but that is not the case we have to deal with at all, because the bank occupy no part of their premises as their dwelling-house. So far as they are concerned, the whole of these premises are occupied solely for the purposes of the bank. I therefore agree entirely with your Lordship in the result at which you have arrived. With reference to the question whether or no the occupants of those parts of the bank occupied as a dwelling-house are assessable under Schedule E, I see no reason to doubt that what your Lordship has said is sound, but as some of those officials, if the Crown are to lay hold upon them, may have something to say upon the subject, I would rather reserve my opinion upon that.

Lord Mure was absent.

The Court reversed the determination of the Commissioners and remitted to them to allow the deduction claimed with expenses.

Counsel for Town and County Bank—D.-F. Mackintosh, Q.C.—Graham Murray. Agents—J. & F. Anderson, W.S.

Counsel for Commissioners of Taxes—Sol.-Gen. Robertson, Q.C.—Young. Agent — D. Crole, Solicitor for the Inland Revenue.

Saturday, March 5.

SECOND DIVISION.

GLASS, PETITIONER.

Property—Burgh—Dean of Guild—Glasgow Police Act 1866 (29 *and* 30 *Vict. c. celxxiii.*) *sec.* 370.

Where the plans of a petitioner for warrant to erect buildings in a street in Glasgow showed an attempt to evade the provisions of the Glasgow Police Act for the existence of a certain free space for light and air in front of windows in buildings to be erected, the Court *affirmed* the decision of the Dean of Guild refusing to pass the plans and to grant warrant to erect the proposed buildings.

The Glasgow Police Act 1866, sec. 370, enacts—"Except as after mentioned, it shall not be lawful for any proprietor to let, or for any person to take in lease, or to use or suffer to be used for the purpose of sleeping in, any apartment . . . unless there be in front of at least one-third of every window in such apartment, including any turnpike road or public or private street or court, a free space equal to at least three-fourths of the height of the wall in which it is placed, measuring such space in a straight line from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon such wall."

Peter Glass, proprietor of certain subjects on the west side of North Street, Springburn, Glasgow, presented a petition in the Glasgow Dean of Guild Court craving a warrant to erect certain buildings thereon. The ground plan produced showed two kitchens on the ground flat to the back, which the petitioner proposed to use as sleeping apartments, and each of which had a window. A line drawn in terms of the Act from these windows, if placed normally in the line of the back wall, would not pass through the free space required by the Act, but would be interrupted by buildings belonging to another property. To obviate this the petitioner broke up the back-wall into three parts, the centre being withdrawn several feet from the main wall, and placed the two windows at the angles thereby formed at the corners of the rooms, so that a line drawn from them would pass through the requisite amount of free space.

No appearance was made for the conterminous proprietors.

The Dean of Guild pronounced this interlocutor:—"Finds that the petitioner's plans do not show in front of the windows of the sleeping apartments on the ground flat to the back of the proposed tenement the amount of free space required by section 370 of the Glasgow Police Act 1866, and therefore refuses to grant the lining craved until said objection has been removed, either by an amended plan giving the said required free space in front of said apartments, or by the petitioner undertaking that the same shall not be used as sleeping apartments, and decerns.

"*Note.*—The angling or placing of the windows in the corner of the two kitchens (to be occupied as sleeping apartments) on the plan of the ground floor, instead of normally in the line of the back wall, is clearly an attempt to evade the provision of section 370 of the Police Act, and as the free space in front of one of said kitchens is about a fifth less than that which the Act provides for, while in front of the other of said kitchens the free space is much less, the Court cannot consent to pass the plans in their present state."

The petitioner appealed, and argued—He was entitled to build to the very verge of his property as long as he did not evade the Act. All he had done here was to adopt an effective mode of utilising the light.

Authorities—*Blakeney* v. *Rattray's Trustees*, July 10, 1886, 13 R. 1157; *Smellie and Another* v. *Struthers*, May 12, 1803, M. 7588.

The Court affirmed the judgment of the Dean of Guild.

Counsel for Appellant — Galbraith Miller. Agents—F. J. Martin, W.S.

Wednesday, March 9.

SECOND DIVISION.

MUNRO'S TRUSTEES *v.* MUNRO AND OTHERS.

Trust—Assumption of New Trustees—Trusts Act 1861 (24 *and* 25 *Vict. cap.* 84), *sec.* 1—*Marriage-Contract.*

The Trusts Act 1861, sec. 1, confers upon gratuitous trustees, "unless the contrary be expressed" in the trust-deed, power to assume new trustees. In a marriage-contract executed prior to 1861 the spouses (1) reserved to themselves power, by any joint-deed, or to the survivor of them, to appoint new trustees in the place of those dying, resigning, or becoming incapacitated, and (2) they gave power to their trustees, "after the death of the survivor of them" to assume new trustees in similar circumstances. In 1886, during the lifetime of the survivor, the original trustees, with a view to the resignation of two of their number, assumed two additional trustees.

Held that the assumption was invalid, the exercise of the power which the Act conferred being excluded by the marriage-contract as long as one of the spouses survived.

William Prince Munro died at Edinburgh on 8th June 1885, survived by his widow. No children were born of the marriage. By an antenuptial contract of marriage which was entered into between him and his wife, Ann Gray or Munro, on 30th October 1860, he provided that in the event, which happened, of no children being born of the marriage, his estate was, at the death or second marriage of his wife, who was