public, or in the exercise of any authority on behalf of the public, committed to the defenders. An illustration would be supplied by the use of the car in connection with an outing provided by the defenders for employees. Acts done in the execution of an Act of Parliament, or in the discharge of public duty or the exercise of public authority, within the meaning of the Public Authorities Protection Act, are acts done in and for the service of the public. But many acts may be done by a public authority which though covered by their powers are not done in and for the service of the public. This distinction has been found to be decisive in this Court on the applicability of limitations upon the right of action in the analogous case of section 166 of the Public Health (Scotland) Act 1897, in *Baker* v. *Glasgow Corporation* (1916 S.C. 199, 53 S.L.R. 183), and it was found to be equally so by the House of Lords in *Bradford Corporation* v. *Myers* ([1916] 1 A.C. 242) with reference to the very question which now arises for decision here. It follows that if a public authority wishes, in the event of its success in an action to which it stands defender, to avail itself of section 1 (*b*) of the Public Authorities Protection Act 1893, either (1) it must be in a position to point to an averment by the pursuer which establishes the necessary connection between the act done and the execution of its Act of Parliament, or the discharge by it of some public duty, or the exercise of some public authority, or (2) it must itself aver, and if necessary prove, facts and circumstances relevant to establish such connection. In the present case neither of these requirements is complied with, and I think therefore that the decree for expenses should remit the defenders' account for taxation in the ordinary form as between party and party.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur.

The Court applied the verdict, assoilzied the defenders, and found them entitled to expenses in ordinary form.

Counsel for the Pursuer—Wark. Agents J. & J. Galletly, S.S.C.

Counsel for the Defenders—Leadbetter. Agents—Bell, Bannerman, & Finlay, W.S.

Tuesday, June 29.

SECOND DIVISION.

[Exchequer Cause.

CROOKE *v.* INLAND REVENUE (EASSON).

Revenue—Excess Profits Duty—Exception—"Profession"—Portrait Photography—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 39.

The business of portrait photography is not a profession within the meaning of the exception from liability to excess profits tax contained in section 39 (*c*) of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89).

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), Part III, beginning with section 38, deals with *Excess Profits Duty*. Section 39, enacts — "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 . . . (*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, . . ."

William Crooke, Edinburgh, *appellant*, being dissatisfied with a decision of the Commissioners for the General Purposes of the Income Tax Acts at Edinburgh, confirming an "assessment to excess profits duty made upon him on account of the profits arising from the business of photographer carried on by him at 103 Princes Street, Edinburgh, as follows—Accounting period 12 months to 30th June 1916, excess profits £240, duty £144; accounting period 12 months to 30th June 1917, excess profits £97, duty £68; accounting period 12 months to 30th June 1918, excess profits £208, duty £166"—as being erroneous in point of law, took a Case, in which the Surveyor of Taxes, on behalf of the Inland Revenue, was *respondent*.

The Case set forth—"The assessments were made under section 38 of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), section 45 of the Finance Act 1916 (6 and 7 Geo. V, cap. 24), and section 20 of the Finance Act 1917 (7 and 8 Geo. V, cap. 31). Appeals against the assessments were intimated on the ground that the business was exempt from Excess Profits Duty under section 39 (*c*) of the Finance (No. 2) Act 1915.

"1. The following *facts* were admitted or proved—(1) Mr Crocke appears in the valuation roll for the year 1917-18 as the tenant of a studio at the address mentioned, at a yearly rental of £270. (2) The business carried on is the business of portrait photographer. (3) In all cases, unless Mr Crooke is absent from his studio, photographs are taken by himself personally. When he is away the customer is given the option of postponing until Mr Crooke is able to be present. (4) The accounts of the business for the three years to 30th June 1918 show, *inter alia*, as follows:—

Year to 30th June.	1916.	1917.	1918.
"Wages paid - -	£791	£929	£956
"Purchases and trade expenses - - -	515	609	826
"Value of furniture and fittings at the end of the year - -	1411	1411	1411
"Stock of frames, mounts, appliances, &c. - - - - -	827	789	853

(5) The capital employed in the business computed for Excess Profits Duty purposes

as shown by the accounts is as follows—As at 30th June 1916, £1850; as at 30th June 1917, £1984; as at 30th June 1918, £1874.

"2. Mr D. W. Robb, solicitor, Edinburgh, on behalf of the appellant, *contended*—(*a*) That the appellant's business was a profession within the meaning of section 39 (*c*) of the Finance (No. 2) Act 1915, and in respect that portrait photography for its successful execution requires qualities analogous to those of an artist. The appellant had the necessary and personal qualifications for conducting the business, and he himself was entirely responsible for the artistic part of the work. On his personal capacity and the personal reputation which it has gained for him, the success of the business entirely depended; it would deteriorate, and its profits would disappear or be largely diminished if the appellant with his personal qualifications should not continue to be engaged in taking the photographs. (*b*) That the business was one in which no capital expenditure was required, or only capital expenditure of a comparatively small amount. Cameras and printing machinery were all that was requisite for the business; and the rent of the rooms, the decoration thereof, and a staff of assistants were extraneous to the business. The profits of the business resulted from the appellant's artistry and skill, and not from the amount of capital employed. It was conceded by the appellant that there might be photographic businesses which were not so personal in their nature, such, for example, as a business carried on by employees in various towns under one well-advertised name.

"3. The Surveyor of Taxes (Mr A. Easson) contended—(*a*) That the business was not exempt from Excess Profits Duty under section 39 (*c*) of the Finance (No. 2) Act 1915. (*b*) That the business was not a profession. (*c*) That the profits were mainly derived from the preparation and sale of an article in the production of which the services of assistants were largely used. (*d*) That the dependence on the personal qualifications of the person by whom the business was carried on was no more than the similar dependence of the business of an ordinary merchant on the personal qualifications of the person buying and selling. (*e*) That the capital expenditure was comparatively large. (*f*) That the case was analogous to the purely business side of publishing a magazine — *Commissioners of Inland Revenue* v. *Maxse*, (1919) 35 T.L.R. 348, 120 L.T.R. 680. (*g*) That the case was distinguishable from the case of *The Commissioners of Inland Revenue* v. *North & Ingram*, [1918] 2 K.B. 705.

"4. The Commissioners, after due consideration of the facts and arguments submitted to them, *refused* the appeal."

Argued for the appellant—The question in the case was more than a mere question of fact. The appellant's occupation fell within the exception contained in section 39 (c) of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 39). The appellant's occupation was a profession. The term "profession" had been gradually amplified and the appellant's occupation clearly fell within the definition of that term laid down by Scrutton, L.J., in *Inland Revenue Commissioners* v. *Maxse*, [1919], 1 K.B. 647, at p. 657. The appellant's profits could not be separated into professional and business profits—see argument of Sir E. Pollock in *Inland Revenue Commissioners* v. *Maxse* (*cit.*), at p. 649. The really distinguishing point between the appellant's profession and a business was that the profits of his profession depended on his personal skill and aptitude. His was not a business involving sale or trade. There was enough in the case to indicate that the profits of the appellant's business were mainly dependent on his personal qualifications, and the capital expenditure was of a comparatively small amount — *Inland Revenue Commissioners* v. *North & Ingram*, [1918], 2 K.B. 705. The decision in *Hugh Cecil* v. *Inland Revenue Commissioners*, (1919), 36 T.L.R. 164, was too sweeping and accordingly was of doubtful authority.

Argued for the respondent—*Prima facie* the question in the case was a question of fact, and there was enough in the case to support the Commissioners' findings. The appellant's business was not a profession within the meaning of section 39 (c) of the Finance (No. 2) Act 1915 (*cit. sup.*), because (1) the taking of a photograph was a purely mechanical operation, which, while the skill and artistry of the operator might command a higher price for the photograph, contained nothing which amounted to the element of professional skill required under the statute; (2) the capital employed in the appellant's business was not of a "comparatively small amount," for it was almost £2000. In *Hugh Cecil* v. *Inland Revenue Commissioners* (*cit. sup.*) the grounds of exception were much stronger than in the present case and yet the appellant was held liable to pay the tax. The ratio of the decision in *Christopher Barker & Sons* v. *Inland Revenue Commissioners*, [1919], 2 K.B. 222, applied to the present case. In *Inland Revenue Commissioners* v. *Maxse* (*cit. sup.*) the appellant's skill as a journalist was the predominant feature.

LORD JUSTICE-CLERK (SCOTT DICKSON)—In this case the facts submitted to us are very meagre, and it is not so easy to ascertain what is the precise question of law which the Commissioners have remitted to us, though one can figure several. As I indicated in the course of the argument I think it would be useful if the Commissioners in stating a case were also to go the length of saying what the point of law is that the appellant desires to raise.

The question here depends on the construction of the 39th section of Finance (No. 2) Act 1915. That section provides that with certain exceptions all trades or businesses carried on in the United Kingdom shall be subject to what is called excess profits duty. Included among the exceptions is "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."

Now Mr Crooke's energy is expended on what is a business—that of a portrait photographer. It is, however, contended that this business is a profession within the meaning of section 39 (*c*) of the Act, and we are asked therefore to hold that it is within the exception provided in that section. Assuming that to be a question of law, I do not find in the case any facts stated that would enable us to determine it at all.

The point that is mainly relied upon is that Mr Crooke is a portrait photographer. I do not think that carries us any length at all. But the appellant seeks to make out a special case by saying that all his photographs are taken by himself personally, and that when he is away the customer is given the option of going away and coming back when he is present. We are not told whether the option is taken advantage of, and if so, to what extent. Even at the best it only comes to this, that Mr Crooke does nothing except what any and every photographer must do. He must pose his subject, he must arrange his camera, and he must seize the proper moment for closing the shutter. I have no doubt he does all these things very much better than the great bulk of photographers; but after all, every photographer has to do everything that Mr Crooke does, and he does it to the best of his ability—be that great or small. If, therefore, we decide this case in the way desired by the appellant we would simply be deciding that every photographic artist who takes portrait photographs, as a great many of them do, must fall within the exception. I am unable to reach such a conclusion purely on a construction of the statute and without a fuller knowledge of the facts. I find in this case no facts which distinguish Mr Crooke's position from that of other photographers so far as this statute is concerned.

The cases referred to other than that of *Hugh Cecil*, 36 T.L.R. 164, do not seem to me to have any bearing upon this question. In the case of *Commissioners of Inland Revenue* v. *North and Ingram*, [1918] 2 K.B. 705, the Court took the view that every schoolmaster is a professional man carrying on a profession. In the same way Mr Maxse, [1919] 1 K.B. 647, in so far as he got relief, was clearly a professional man carrying on a profession. In the case of *Hugh Cecil* v. *Inland Revenue Commissioners*, Mr Justice Rowlatt had before him the very point we have here to decide, with this great difference that the facts there were stated much more fully than they are in this case. I think it would be impossible for us, with a far more meagre statement of facts before us, to come to any other conclusion than that which was reached by Mr Justice Rowlatt in the case of *Hugh Cecil*. That judgment is not binding upon us, but the reasoning of Mr Justice Rowlatt seems to me to be sound, and I adopt it. Although my judgment mainly proceeds upon the very scanty disclosure of facts which we have got here, I cannot see how even a fuller disclosure of facts would have affected the result. I am of opinion that we cannot interfere with the judgment of the Commissioners, and that we should dismiss the appeal.

LORD DUNDAS—I am quite of the same opinion. I can see no good reason for interfering with the decision of the Commissioners.

I cannot find in this case any evidence that this business is a profession within the meaning of section 39 of the Act of 1915. The appellant's counsel admitted that not all businesses of this kind can claim to be professions. They contended, however, that there was enough in the facts, admitted or proved, to warrant us in holding that this business came within the third exception. They founded on findings (2) and (3) of the findings in fact. The second finding, however, does not carry one any length, because, as your Lordship has said, most photographers of this class take portraits. The third shows that Mr Crooke is personally attentive to his business, but we are not told, and do not know in what way the option given to the customers is usually or universally exercised. I cannot think that these facts are enough to warrant us in reaching the desired conclusion. I say so without wishing in any way to disparage the artistic merits of Mr Crooke's photography.

One of the English judges in a case quoted observed that all professions are businesses, but that all businesses are not professions — *Christopher Barker & Sons*, [1919] 2 K.B. 222, Rowlatt J., at p. 228. I cannot think that the element of skill by itself can turn a business into a profession. The case of *Hugh Cecil*, 36 T.L.R. 164, was founded on as a direct precedent in favour of the Crown. In that case evidence was actually led of the high artistic quality of the work in question, but still Mr Justice Rowlatt decided against the photographer. His decision of course is not binding upon us, but it seems to me, as at present advised, to be sound. I do not, however, proceed upon that judgment, but acting on my view of the statute and of the law on the facts which we have before us I am for refusing this appeal.

LORD SALVESEN—I agree in the proposed judgment. I think the true question here is whether the appellant exercises a profession within the meaning of section 39 of the Act. If he exercises a profession, I think, perhaps, the facts stated would justify us in holding that the profits are mainly dependent on his personal qualifications, and that there is little capital expenditure required, or rather that the capital expenditure is of comparatively small amount.

My difficulty in holding that Mr Crooke is exempt under this clause is that I do not think we can hold that he exercises a profession. I have great sympathy with the view which was expressed by his counsel, because one knows that there is all the difference in the world between artistic photography, especially portrait photography, and the common photography which is practised by anyone who can handle a camera. But if we were to hold

that the art of photography is a profession it would practically amount to this, that every country photographer who takes portraits would be exempt, because his profits would be mainly dependent on his personal qualifications, and he would have little capital employed in the business. I am not able to reach that result. I therefore hold that while the success of the business of this particular gentleman depends on his artistic qualities, still it is a business and not a profession in which he is engaged.

The Court dismissed the appeal and affirmed the determination of the Commissioners.

Counsel for the Appellant—Chree, K.C. — Graham Robertson. Agents — J. & J. Galletly, S.S.C.

Counsel for the Respondent—Lord Advocate (Morison, K.C.)—Candlish Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

VALUATION APPEAL COURT.

Saturday, February 7.

(Before Lord Salvesen, Lord Mackenzie, and Lord Cullen.)

RICHMOND *v.* ASSESSOR FOR LANARKSHIRE.

Valuation — Value — Consideration other than Rent—Derelict Properties—Mode of Valuation.

Prior to August 1914 the local authority had obtained a closing order applying to certain miners' cottages, but owing to the scarcity of houses in the district the order was held in suspense. In 1918 the owners let the cottages to colliery merchants under conditions including—that the colliery merchants would keep the houses wind and water tight when necessary where the defects were caused by ordinary wear and tear, and that the landlords should not be bound to incur any expenses whatever in connection with the houses or pertinents. The tenants sub-let the houses to various tenants at a *cumulo* rent of £1099, 17s.; the rent they paid to the landlord was £850. *Held* (1) that the obligation of repair undertaken by the tenants was a consideration other than rent, and consequently the subjects should not be entered in the valuation roll at the rent in the lease; (2) that the proper mode of reaching the value to be entered was, not to take the amount of the sub-rents, but to value the consideration other than rent and add that value to the rent; but (3) that as no materials for valuing the tenants' obligation to repair had been furnished by them to the assessor, he was entitled to treat that obligation as indefinite and to enter the subjects at the amount produced by the sub-lets.

David Richmond, C.A., judicial factor on the trust estate of John Forrest, merchant, Shotts, *appellant*, being dissatisfied with a decision of the Lands Valuation Committee for the Middle Ward of the County of Lanark in an appeal by him against certain entries in the valuation roll proposed by the Assessor for Lanarkshire, *respondent*, took a Case.

The *entries* in the valuation roll were:—

Description and Situation of Subject.		Proprietor.	Tenant.	Occupier.	Annual Value of Dwelling-House.	Feu-duty or Ground Annual.	Yearly Rent or Value.
Descrip-tion.	Situation.						
Outwith village of Shotts—							
2228 Houses	Peden's Place, Muirhead, West Benhar, Harthill	Trustees of John Forrest, *per* W. B. Thomson & M'Lean, writers, Wishaw	A. & G. Anderson, 53 Waterloo Street, Glasgow	Same			£87 0
					Reduced on appeal to		85 0
[*Here followed a detailed list of the houses, their occupiers, and the rent paid by them.*]							
Village of West Benhar—							
3606 Houses		Do.	Do.	Same			£1041 1
					Reduced on appeal to		1014 17

[*Here followed a detailed list of the houses, their occupiers, and the rent paid by them.*]

The Case stated—"The following *facts* were admitted or held by the Committee to be proved or within the knowledge of the Committee—1. The appellant is the judicial factor on the trust estate of the late John Forrest, merchant, Shotts, and as such is proprietor of the subjects referred to in the entries from the valuation roll above quoted, which subjects are known locally, and are hereinafter referred to by the general name of 'West Benhar Rows.' 2. West Benhar Rows consist of a collection of cottages or miners' rows, which have for many years been occupied by miners and others engaged in the local collieries. 3. Prior to the outbreak of war in August 1914 the District Committee of the Middle Ward District of the county of Lanark had obtained from the Sheriff Court of Lanarkshire at Airdrie a closing order under the Public Health (Scotland) Act 1897, ordering the houses in West Benhar Rows to be closed as uninhabitable, but owing to the extreme scarcity of houses for the working classes in the locality the order had been suspended from time to time, and was still in suspension for the year ending Whitsunday 1920, subject to the right of the Middle Ward District Committee of the County of Lanark to close twenty of said houses at any time prior to said term at the date of the appeal. 4. Prior to Whitsunday 1919 the individual houses in West Benhar Rows had been let by the proprietors to separate tenants. 5. In the autumn of 1918 certain negotiations took place between the appellant's agents Messrs William B. Thomson & M'Lean,