a constitutional impropriety. They have power—and in my opinion such a power in such a case should be exercised—to accelerate procedure, but so far as the parties to these proceedings are concerned neither of them ever asked the Court even for an early hearing.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants — Duffes—Thom. Agents—Bruce & Stoddart, S.S.C., Leith—E. B. Gee & Company, London.

Counsel for Respondents — T. Graham Robertson, K.C.—Patrick. Agents — Dunlop, Gibson, & Mair, Glasgow — Alex. Morison & Company, W.S., Edinburgh — Beveridge & Company, Westminster.

Friday, November 3.

(Before Lord Dunedin, Lord Atkinson, Lord Sumner, Lord Wrenbury, and Lord Carson.)

NORTH BRITISH RAILWAY COMPANY *v.* INLAND REVENUE.

(In the Court of Session, February 17, 1922 S.C. 247, 59 S.L.R. 258.)

Revenue — Income Tax — Salaries Paid without Deduction of Income Tax — Amount of Assessable Salary—Office or Employment Held under Railway Company—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 146—*Income Tax Act* 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedule E—Income Tax Act* 1860 (23 *and* 24 *Vict. cap.* 14), *sec.* 6.

The Income Tax Act 1860, sec. 6, enacts that the Commissioners for Special Purposes shall assess the duties payable under Schedule E in respect of all offices or employments of profit held under any railway company, . . . "and the said assessment shall be deemed to be and shall be an assessment upon the company, . . . and it shall be lawful for the company . . . to deduct and retain out of the fees, emoluments, or salary of each such officer . . . the duty so charged in respect of his profits and gains."

A railway company under a contractual obligation with its officers paid their salaries without exercising its right under section 6 of the Income Tax Act 1860 of deducting the tax from the salaries. *Held* (*aff.* the judgment of the First Division) that the amounts paid by the company in respect of income tax of its officers formed part of the income of the officer for income tax purposes, and that the company was assessable not only on the salaries actually paid, but also on the sums paid as income tax.

The Case is reported *ante ut supra.*

The company appealed.

At delivering judgment—

LORD DUNEDIN—This appeal has to do with an income tax assessment for the year ending 5th April 1919.

By the Income Tax Act of 1860 it is provided in section 5 that assessments for income tax on a railway company shall be made by the Special Commissioners in lieu of the General Commissioners who are debarred from making any such assessment.

Section 6 of the same Act is in these terms — "VI. In like manner as aforesaid the Commissioners for Special Purposes shall assess the duties payable under Schedule E in respect of all offices and employments of profit held in or under any railway company, and shall notify to the secretary or other officer of such company the particulars thereof, and the said assessment shall be deemed to be and shall be an assessment upon the company, and paid, collected, and levied accordingly; and it shall be lawful for the company or such secretary or other officer to deduct and retain out of the fees, emoluments, or salary of each such officer or person the duty so charged in respect of his profits and gains."

There are certain officials of the appellant company whose salary is fixed at a specified sum in cash, the company at the same time coming under contractual obligation to make no deduction in respect of the income tax paid by them in terms of the said section.

A test case was taken. The Special Commissioners assessed the income tax on such a sum as would when the income tax thereon was deducted leave a sum equal to the sum in cash which the company paid to the officials.

A Case was stated for the opinion of the First Division of the Court of Session, in which the above-mentioned facts were set forth and the following question for the opinion of the Court stated:—"Whether the sum paid by the appellants as income tax in respect of the salaries of their officers, and not deducted from the salaries paid to such officers, is part of the officers' income for income tax purposes?"

The First Division of the Court of Session affirmed the determination of the Commissioners. Appeal has now been taken to your Lordships' House.

Turning back to the sixth section of the Act we find that the first duty of the Commissioners is to assess the duties payable under Schedule E in respect of offices and employments held in or under the railway company. That necessarily sends us to Schedule E. Schedule E, which is to be found in the Act of 1853, imposes the duties "for or in respect of every . . . employment of profit," and by Rule 1, which is contained in section 146 of the Act of 142 and is applicable to Schedule E of the Act of 1853, "the duties . . . shall be payable for all salaries, fees, wages, perquisites, and profits whatsoever arising by means of such office."

Now each office must be dealt with separately. It is obvious that if the official here in question were asked what profits whatsoever do you get from your office, his answer would have to be, "I get *x* pounds

in cash and I get the income tax due in respect of my salary paid by the company." It would therefore be on the aggregate of these two sources of profit that the duty would have to be calculated. Now it is true that when that is done the duty so assessed is by the second part of the clause in section 6 made to be an assessment on the company; it has to be laid on and paid by the company—the official himself has no concern with it. Most of the appellant's argument was rested on the fact that this was a company debt and not the official's debt; and it was contended that the company could not be asked to pay an assessment on an assessment. The fallacy of this argument consists in ignoring the fact that though this is a company debt the measure of that debt is not any liability of the company, but is what would be the liability of the official under Schedule E if that liability were not transferred to the company by the section; and the concluding words of the section are strictly accurate when, dealing with the power given to the company to deduct from the salary of the official the sum they have had to pay, they characterise the duty as so paid in respect of his—*i.e.*, the official's—profits and gains.

The appellant further attempted to urge that the decision appealed against practically took away from the company the option given by the section to deduct or refrain from deducting. It does no such thing. The power to deduct was necessary in order to deprive the official of the contention that the debt being made a company debt there could be no right to make him pay by way of deduction what was not his debt. And if the company chooses to deduct—in cases where they have not as here bound themselves by contract not to do so—it follows that the official's total emolument is the conditioned salary of x pounds from which the income tax was deducted. Then if, as here, they elect not to deduct, they are by their action making it that the total emolument of the official is not only the cash salary but also the sum necessary to maintain that cash salary at its undiminished figure.

For these reasons I am of opinion that the judgment appealed from is right, and that the appeal should be dismissed with costs.

Towards the end of the argument a point was mooted as to whether the calculation of the amount payable as tax was correct; the question is not really open, for in the Case it is stated that the appellants admit that upon the assumption that they were wrong on the general question the assessment was correct. I shall therefore express no opinion on the point.

LORD ATKINSON—The facts have been already stated. Section 146 of the Income Tax Act of 1842 (5 and 6 Vict. cap. 35) provides that the duties thereby granted contained in Schedule E shall be assessed under the rules thereto following, which rules are to be deemed and construed as part of the Act.

Under the first of these rules these duties are to be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in Schedule E, or to whom the annuities or stipends mentioned in the schedule shall be payable for all salaries, fees, wages, perquisites, or profits whatever accruing by reason of such offices, employments, or pensions, after deducting the amount of the sum or sums payable or chargeable on the same by virtue of any Act of Parliament where the same shall have been really and *bonâ fide* paid and borne by the party to be charged.

The case of *Beaumont* v. *Bowers* (1900, 2 K.B. 204) illustrates what is the nature of the sums to which these last words of this rule apply. Beaumont was the clerk of the guardians of a poor law union. Under the provisions of the 12th section of the Poor Law Officers Superannuation Act of 1896 he contributed annually for the purposes of the Act a sum of £15, 10s., which was deducted from his salary. He claimed and was held to be entitled to deduct this contribution from the sum on which he was assessed for income tax under this rule. The officer was apparently under this section compelled to make this contribution if he was to derive any benefit from the superannuation fund.

In *Hudson* v. *Gribble* and *Bell* against *Gribble* (1903, 1 K.B. 517) the decision in *Beaumont* v. *Bowers* was criticised and its soundness doubted, and it was held that deductions made in respect of a contribution to a superannuation fund agreed to as part of the terms of the employment of an officer of a corporation did not come within these words of the section, even though the corporation framed the superannuation scheme constituted by it in exercise of statutory powers.

These deductions were held to be a voluntary payment by the officer and should not be deducted from the sum at which he was assessed for income tax. The case of *London County Council* v. *The Attorney-General*, 1901, referred to in argument in the last-mentioned case, was wholly irrelevant, and Lord Macnaghten's well-known judgment in that case has no application to this case; but *Hudson* v. *Gribble* does, I think, establish that if the Railway Company had, before the Act of 1860 was passed, arranged with the officers of their staff employed for profit as part of the terms of their hiring that to spare those officers the inconvenience of being each visited by a Revenue officer to collect the amount of the income tax for which they were respectively liable the company would pay in one sum all the income tax for which the staff collectively were liable, and would set off against the salary of each officer the sum paid on his behalf to the Revenue, the entire salary of the officer would have been assessed for income tax. No deduction would have been allowed for the tax so paid by his employer on his behalf. I think the same result would have followed even if the company either from benevolence, or for any other motive, declined to set off the amount they had paid for or on behalf of an officer in discharge of an officer's statutory liability, because in truth the sum paid by the company is not a sum outside of the officer's

salary or independent of it, but is a part of his salary, and if the employer did not set off this sum against the employee's salary, the latter would simply pocket his full salary, his debt to the Revenue having been paid by another, not by himself, that is all.

Now it appears to me that the Act of 1860 does little more than embody in a statutory form such an arrangement as I have mentioned. The duties payable under Schedule E in respect of all offices and employments of profit held under the company are to be assessed, but the only duties assessed and charged under Schedule E are (1) the duties annually charged on persons having, using, or exercising the offices or employments of profit mentioned in the schedule. And that charge is measured in this way—it is to be payable for all wages, fees, perquisites or profits whatsoever accruing in respect of or by reason of such officer, &c. . . . Each assessment in respect of such office or employment to be in force for one year. The amount with which officers are charged and for which they are assessed must be ascertained for the purposes of the Act of 1860, else the retention from or the deduction from their salaries never could be properly made. It would be a mistake in my view to hold that the officer is not assessed. He must be assessed, for it is the duty charged in respect of his profits and gains that is to be retained or deducted. Then for the purpose of the collection the sums due by those officers of the company, their separate assessments, are deemed to be an assessment of the company—one assessment—and to be paid and collected accordingly. By this last provision the company is thus made responsible for the debts, thus lumped together, of their individual officers, and obliged to pay them, and then they can by *retaining* out of or deducting from what they owe to each officer, recoup themselves for their outlay in this respect. Whether the company avails itself or not of the means provided by statute to enable it to recoup itself for its outlay in paying the debts of its officers is its own concern. Its action in that respect cannot, in my view, affect prejudicially the rights of the Revenue. The sums paid by the company to satisfy the debts which those officers respectively owed to the Revenue remain part of the profits and gains those officers derive from the offices they respectively hold and are liable to be assessed to income tax, just as the amount of the income tax deducted by a railway company from the dividends it pays its shareholders is part of the income of those shareholders. In truth the whole scheme of the statute is to apply the common and convenient method of deducting income tax at the source. I accordingly think that the question submitted in the case as stated for the opinion of the Court was rightly answered by the First Division of the Court of Session.

The appeal, I think, fails and should be dismissed with costs.

LORD SUMNER—I agree that the appeal fails.

LORD WRENBURY—This case was argued upon the sections of the Income Tax Acts 1842, 1853, and 1860, and not upon the corresponding sections of the Income Tax Consolidation Act of 1918.

Under the First Rule of Schedule E of 1842 the assessment is to be made upon the person having the office or employment "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions." Under the Income Tax Act 1860, 6, the persons to make the assessment are the Special Commissioners, and they are to assess the duties payable under Schedule E in respect of offices and employments of profit held under a railway company (this being the assessment to be made under Schedule E of 1842) and are to notify the secretary of the company, "and the said assessment shall be deemed to be and shall be an assessment upon the company and paid, collected, and levied accordingly," and it is to be lawful for the company to deduct out of the salary of the officer the duty charged "in respect of his profits and gains." These last words are material.

The assessment therefore remains as regards its amount the same as it was under the Act of 1842, and is to be deemed something which it is not, viz., an assessment on the company, and being so deemed is to "be an assessment upon the company" and be paid accordingly. The result is that the company becomes debtor for that which would otherwise have been—and seemingly under the Act of 1842 still is—the debt of the officer and which is measured by the profits and gains of the officer.

In the case before us "the Railway Company are under contractual obligation to the officer that they will not exercise their statutory discretionary right to deduct tax from his salary." In other words, having paid the tax on his income they will not charge him with it. The question is what are the "profits and gains" for income tax purposes of an officer employed upon those terms?

If the salary which the officer is to receive net is £100, the "salaries, fees, wages, perquisites, or profits whatsoever" which form the reward of his service are the £100, and the contractual benefit that when the company has paid the tax due for his income tax (whose payment is imposed upon the company by the statute) they will not deduct it against him as they might. This is a further valuable consideration or profit accruing to the officer by reason of his office, and is a factor in arriving at his assessable income for income tax purposes. His total "profits and gains" are the aggregate of these sums. The appellants say that by such an assessment the Revenue takes tax on tax—certainly, so it does. But everyone who pays 5s. in the pound income tax pays tax not only on the 15s. which he retains, but also on the tax of 5s. which he has to pay. The question for the opinion of the Court is therefore to be answered by saying that the sums paid by the appellants as income tax on the officer's profits

and gains form part of the officer's income for income tax purposes. It follows that this appeal must be dismissed with costs.

LORD CARSON—I concur.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Graham Robertson, K.C.—Hon. Geoffrey Lawrence. Agents — James Watson, S.S.C., Edinburgh — Lewin, Gregory, & Anderson, Westminster.

Counsel for Respondents — Attorney-General (Sir Ernest Pollock, K.C.) — Lord Advocate (Murray, K.C.) — Hills—Skelton. Agents—Stair A. Gillon, Solicitor for Scotland of the Board of Inland Revenue—J. H. Shaw, Solicitor for England of the Board of Inland Revenue.

COURT OF SESSION.

Wednesday, November 1.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

MURRAY *v.* PORTLAND COLLIERY COMPANY, LIMITED.

Workmen's Compensation—Revival of Compensation as for Partial Incapacity — Strike Causing Unemployment—Failure to Obtain Employment on Termination of Strike—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (1) (*b*) *and* (3).

A miner who had been injured by an accident arising out of and in the course of his employment was awarded compensation in respect of partial incapacity, and thereafter obtained light work. His wages in this capacity subsequently rose till they exceeded the maximum he could claim under the statute, and the compensation was consequently suspended. A strike having ensued which resulted in the pit being flooded the man lost his work. After work in the pit had again been started, but before his turn came to be taken back, he applied for renewal of compensation. The arbitrator, on the ground that the man's loss of wages was due to economic causes and not to physical incapacity, refused an award *in hoc statu*, but awarded compensation as from the date when his previous light work should be resumed. *Held* that in respect that the incapacity of the workman caused by the accident still continued, the man's right to compensation was not terminated by the supervening of a period of unemployment in his normal trade.

Observed per Lord Hunter and Lord Constable that the state of the labour market was a circumstance that the arbitrator was entitled to take into consideration in assessing the amount of compensation.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in the Sheriff Court at Kilmarnock between John Murray, miner, Kilmarnock, *pursuer and appellant*, and the Portland Colliery Company, Limited, coalmasters, Hurlford, *defenders and appellants*, the Sheriff-Substitute (DUNBAR) at the request of both parties stated a Case for appeal, which at the joint request of the parties his successor in office (W. J. ROBERTSON) finally adjusted and signed.

The Case stated—"1. On 23rd February 1917 the pursuer, who was a miner in the employment of the defenders, when at work underground in the defenders' nursery pit, Kilmarnock, sustained a compound fracture of both bones of his right leg, and in consequence was a patient in the hospital for twelve weeks, when his leg was operated upon. As a result of the accident the pursuer has now only a limited use of his right ankle joint. There is shortening of the leg and he walks with the aid of a stick. No further improvement of the leg can be expected, and he has been permanently incapacitated for his former work as a miner. 2. The pursuer's average weekly earnings prior to his accident were £2, 7s., and compensation at the rate of £1 per week, with the additions under the Workmen's Compensation War Additions Act, was paid by the defenders from said 23rd February 1917 until the 25th May 1918, after which date, the defenders having given him light work on the surface, paid him partial compensation until 15th May 1920. 3. Thereafter in consequence of increases in wages granted to all mine workers the pursuer's weekly earnings equalled or exceeded what he made before the accident, and as a result the defenders ceased paying him any compensation. This state of matters, in which the workman acquiesced, continued till 31st March 1921. 4. On 1st April all the defenders' employees ceased work by reason of the national strike, which lasted till 3rd July. As a result of the strike the pit became flooded, and has to be restored to working order before mining can be resumed. 5. The work of restoration is still proceeding and the men are being taken back gradually, but the pursuer's job is not yet open. 6. The defenders have offered to reinstate the pursuer in his former light employment as soon as it matures, but it is not known when this may be. It was agreed that the weekly wage at present attached to that grade of employment is £1, 8s. 7. Prior to his accident the pursuer had on three different occasions during periods of dulness in the mining industry worked as a mason's labourer to various builders in Kilmarnock, and for such labour there has been since 1st April 1921 a reasonable demand. For this class of work the pursuer was totally incapacitated as a result of his accident. A fellow surface worker at the same pit as pursuer found employment as a plasterer at a weekly wage of £4, 8s. The pursuer was classified as unfit in the list of unemployed made up for the Kilmarnock Unemployment Bureau, at which and other places he had been seeking employ-