REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL DEALING WITH QUESTIONS OF INTEREST IN SCOTS LAW.

HOUSE OF LORDS.

Friday, April 30, 1920.

(Before Lords Cave, Atkinson, Shaw, Wrenbury, and Phillimore.)

DUKE OF NORTHUMBERLAND *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue — Excess Mineral Rights Duty — Sum on which Duty is Payable—Method of Computation — Deduction of Income Tax — Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 43, *sub-secs.* 1 *and* 2.

For the purpose of ascertaining the amount upon which excess mineral rights duty is to be charged under section 43 of the Finance (No. 2) Act 1915, the rate of income tax to be deducted from both sums brought into comparison is that current for the accounting year and no other.

Decision of the Court of Appeal (1919, 2 K.B. 200) *affirmed.*

Appeal from an order of the Court of Appeal (SWINFEN EADY, M.R., WARRINGTON and SCRUTTON, L.JJ.), reported 1919, 2 K.B. 200, reversing in part an order of SANKEY, J., reported 1918, 2 K.B. 573, and restoring an assessment made by the respondents for excess mineral rights duty.

The *facts* appear from their Lordships' judgment—

LORD CAVE — This appeal arises from a difference as to the amount upon which excess mineral rights duty is payable by the appellant under section 43 of the Finance (No. 2) Act 1915. That section provides, omitting certain words which have no application to the present case, as follows: —"(1) Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves . . . varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty . . . an amount equal to fifty per cent. of that excess. (2) The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer. . . . The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent so far as variable according to price were based on the average prices governing the payment of the rent in that year." The words "in that year" at the end of sub-section 2 refer, as was pointed out in *Murray* v. *Inland Revenue Commissioners* (1918 A.C. 541), not to the accounting year, but to each of the three years immediately preceding the first accounting year, and the effect of the section (stated shortly) is that duty is to be paid upon the difference between the amount actually received for royalties in respect of the accounting year, and the amount which would have been so received in respect of that year if the output had remained the same and the selling prices had been equal to the average prices in the selected pre-war years. In other words, duty is to be paid upon so much of the royalties for the accounting year as is due to a rise in prices since the commencement of the war. In saying this I leave out of account the proviso to sub-section 21 of the Finance Act 1917, which has no application to the present case.

The late Duke of Northumberland, the predecessor in title of the appellant, was the owner of certain mines and seams of coal in the Blucher and Throckley areas in the county of Northumberland, and had demised them to the Throckley Coal Company, Limited, at royalties which varied according to the selling price of coal. Early in the year 1917 the Commissioners of Inland Revenue served upon the Duke a notice of assessment to excess mineral rights duty in respect of the rent or royalties received from those mines for the accounting year ending in September 1916, such notice being accompanied by a statement which showed that in arriving at the sum assessed the Commissioners had deducted both from the rent received in respect of the accounting year and from the pre-war standard of rent as ascertained for the purposes of the section income tax at the rate current in the accounting year—that is to say, at the rate of 4s. in the pound. The Duke appealed against the assessment to a referee appointed under the Finance (1909-10) Act 1910 on the ground that in ascertaining the pre-

war standard of rent income tax should have been deducted not at the rate current in the accounting year but at the rate current in the average pre-war year, and the referee after argument so decided. A petition of appeal having been presented to the High Court the decision of the referee was affirmed by Sankey, J., but on the case being taken to the Court of Appeal that Court took a different view, and on the 9th April 1919 made an order as follows:—"The Court doth determine that income tax is to be deducted before arriving at the amount of excess liable to excess mineral rights duty under section 43, sub-section 1, of the Finance (No. 2) Act 1915, and that in arriving at the pre-war rent values under sub-section 2 the rate of income tax to be deducted is the rate current for the accounting year, and doth order that the original assessment made by the petitioners be restored." Against that order the present appeal was brought.

In the course of the arguments before Sankey, J., and the Court of Appeal it was contended on behalf of the Commissioners that on the true construction of section 43 no deduction whatever should have been made for income tax, and that the comparison to be made under the section is between the gross amount received for royalties in respect of the accounting year and the gross amount which would have been so received upon the hypothesis prescribed by the section. This contention was rejected both by Sankey, J., and the Court of Appeal, their decision being based partly upon the frame of the lease in this particular case, and partly upon a previous decision of the Court of Appeal relating to mineral rights duty—*Anglesey (Marquis of)* v. *Commissioners of Inland Revenue*, 1913, 3 K.B. 48. Against this part of the decision of the Court of Appeal no appeal has been lodged by the Commissioners, who were content to have their assessment confirmed, and your Lordships are therefore not called upon to express any opinion upon that part of the case. This being so, I assume for the purposes of this appeal that it is proper to deduct income tax from both sums brought into comparison for the purposes of the section, and that the only question is at what rate tax should be deducted.

Now upon this point I cannot entertain any doubt. Section 43 directs that for the purpose of ascertaining the excess royalties assessable to duty a comparison shall be made between two sums—that is to say, first, the amount of the royalties payable in respect of the accounting year, and secondly, the sums to which the royalties for the same accounting year would amount if the royalties for the year were based on the average prices of the selected pre-war years, and that if the former sum exceeds the latter, duty is to be paid on the difference. In this calculation nothing is to turn on the profits which were, or on any hypothesis which would have been, made in any of the pre-war years. Each factor in the comparison is to be based on the actual output of the accounting year, and although the second factor is to be ascertained on the hypothesis that the average pre-war prices remain unaltered, the result is treated as the hypothetical rent for the accounting and not for the pre-war year. It follows that in both branches of the comparison you are still in the accounting year. The tax paid on the first factor in the calculation—the actual royalties for the accounting year—must of course be at the rate current in that year, and the tax treated as paid on the second factor—the hypothetical royalties for the same accounting year—must in my opinion be at the same rate. The result is that the tax to be deducted on both sides must be that of the accounting year and no other.

For these reasons I am of opinion that the decision of the Court of Appeal is right, and accordingly that this appeal fails and should be dismissed with costs.

LORD ATKINSON—I concur.

LORD SHAW—I agree with the opinion expressed in the Court below by Scrutton, L.J. I am not concerned with the precedent which so naturally exercised that learned Judge's mind. With regard to that precedent I will only respectfully adopt his language referring to the *Anglesey* case, where he says—"I should have thought that the whole amount of the rent was payable to the landlord and was paid to the landlord, but was paid by discharging a matter which otherwise might have been obtained from the landlord if he had been assessed directly."

This House is of course not bound by that authority, and as to it I desire expressly to say that I give no opinion as to whether it was or was not correctly decided. I make this reservation because the case upon it *pro et contra* has not been fully argued at your Lordships' bar, and further, in my view that precedent does not truly bear upon the issue—a quite different issue—which is now before your Lordships' House.

The issue now before us substantially refers, as your Lordship on the Woolsack has just said, to the construction of certain words occurring towards the close of subsection 2 of section 43 of the Finance Act 1915. Your Lordship has read those words, and I do not do so again, but my view of the situation created by those words is simply this—We are not concerned, and are expressly told by the statute not to be concerned, with the amount of gross rent or with the amount of net rent, with the amount of rent receivable or received, payable or paid. We are expressly directed in administering the statute to adopt a notional rent which is fixed upon a certain basis.

Now that notional rent is by no means remote from ordinary figures or experience. It has nothing unusual or unreasonable about it, and the best way to test it is to apply it to one ton. If the output of the pit were one ton, what the statute directs is that you should take that one ton of output and compare the royalties—post-war royalties—upon it with the royalties which were paid upon one ton in the pre-war year. Having thus obtained the surplus or excess of the later as against the earlier you have

a certain number of shillings and pence, and that figure for one ton is the excess profit under the statute. The statute then proceeds directly to inform you that the way to work the notional rent is simply to multiply that excess profit on the one ton by the output of the pit in the accounting year. Having performed that simple act of multiplication you obtain the notional excess profit which is the subject of the duty.

In that way all difficulty and trouble disappear. You take an arithmetical process conducted according to the directions contained in the last words of section 43 of the Act of 1915, and you thus obtain directly the excess which is the subject of the tax. Fifty per cent. of that accumulated difference then becomes the property of the Revenue under the Statute of 1915.

LORD WRENBURY — The order under appeal in this case is one by which the Court of Appeal determined two matters. They determined, first, that income tax is to be deducted before arriving at the amount of excess liable to excess mineral rights duty under the Act. They determined, secondly, that in arriving at the pre-war rent values under sub-section 2 the rate of income tax to be deducted is the rate current in the accounting year. In respect of the former of those there is no cross-appeal before your Lordships, and I think for good reason.

I have had an opportunity of looking into the decision of the Court of Appeal in *Lord Anglesey's* case (1913, 3 K.B. 48), to which I was a party. In my judgment that decision is right. The key to the decision is found in the opening sentence, it which it is pointed out that the property tax is by the statute not imposed upon the lessor. The statute makes it a debt of the lessee, and enacts that he may deduct it from the rent payable by him to the lessor if he deducts it at the time directed by the statute. In paying it therefore the lessee is not making payment on behalf of the lessor; he is paying his own debt, and the statute provides that in respect of the rent due under his lease he shall be discharged if, to take the figures in *Lord Anglesey's* case, he pays, not the £150, which is the contractual rent, but the £141, 5s., which is the differential sum.

With all respect to my noble and learned friend Lord Shaw, I must make a comment upon the passage in the judgment of Scrutton, L.J., which he cited. That passage runs thus:—The Lord Justice says—"If I approached the matter free from authority, I should have thought that the whole of the rent was payable to the landlord and was paid to the landlord, but was paid by discharging a matter which otherwise might have been obtained from the landlord if he had been assessed directly." He never could have been assessed directly, and that was the express ground of the decision in *Lord Anglesey's* case. The Lord Justice's words are obviously to be understood as qualified by the words in the sentence immediately preceding, namely, "if the statute had been different." In fact the lessor could not have been assessed directly, and the lessee when he paid the property tax was not paying his lessor's debt—he was paying his own debt. The operation of the statute was that if he paid his own debt then the contractual debt was reduced by the amount which he was compelled to pay under the statute. In other words, the joint effect of the contract and the statute was that the rent payable and paid was not the rent reserved by the contract but the differential sum, being the difference between the rent reserved by the contract and the property tax which was the debt of the lessee.

If it were necessary to pursue the matter further there is another ground which arises upon the language of this particular lease, and it is this—The obligation under the lease in par. 82 is that it is "agreed and declared that all and singular the rents hereinbefore reserved shall be paid free and clear of" a number of things which are mentioned, "and all other deductions whatsoever, except the landlord's property tax." The obligation therefore is to pay the balance of the contractual sums after deduction of the property tax. The contractual rent payable here, therefore, is not the whole calculated sum but the differential sum—the difference between the amount arrived at by calculation of the royalties and the amount of the property tax.

It is not necessary to pursue this matter further, for the learned Attorney-General has said that if the income-tax deduction is in each case of the two calculations to be made at the rate prevalent in the accounting year he does not dispute that matter, and inasmuch as the House is of opinion that that proposition is true the question does not arise. The main contention of the Attorney-General, which in my opinion is right, is this—He says that all the relevant facts of the accounting year are to be left undisturbed except those which concern the calculation of the royalties as dependent upon prices. In my judgment that is right. One of those facts is that in the accounting year the rate of tax was so many shillings in the pound. That is to be left undisturbed. The tonnage of the accounting year is to be taken as the basis of the two calculations—the one made upon the footing of such royalties as emerge from the fact that in the accounting year prices were such as they were in fact in that year, and the other made upon the footing of such royalties as would emerge if the prices had been such as they were in the average of the selected years. The differential sum is that upon which the duty is to be calculated. This is the effect of the order under appeal. I think that is right, and that this appeal should be dismissed.

LORD PHILLIMORE — I concur with the observations and conclusions of the noble Viscount upon the Woolsack. I have one observation to add. The apparent difficulty in this case was created by the decision of the Court of Appeal in the cases of the *Duke of Beaufort* and the *Marquis of Anglesey* cases.

I agree with the submission on behalf of the Commissioners that those cases do not affect the decision at which the House should

now arrive. At the moment I see no reason why the decision of the cases referred to should not be correct, but then no argument has been offered to the contrary, so I reserve my opinion. Supposing that decision to be sound, it is nevertheless the case that the Legislature has directed that for the purpose of determining excess mineral rights duty the comparison between the two years shall be upon rates so far as variable according to price and not so far as variable according to two factors — price and income tax. Supposing the decision to be incorrect, the argument is then *a fortiori*. It is suggested that in this event the assessment made by the Commissioners is illogical, but, as the Attorney-General has pointed out, this is not so. The assessment has been made according to the usual practice so as not to subject the taxpayer to double taxation.

Appeal dismissed.

Counsel for the Appellant—Sir J. Simon, K.C. — Disturnal, K.C. — Micklethwait. Agents—May, How, & Chilver, Solicitors.

Counsel for the Respondents — Sir G. Hewart, Att.-Gen. — Sheldon. Agent — Solicitor of Inland Revenue.

HOUSE OF LORDS.

Thursday, May 13, 1920.

(Before the Lord Chancellor (Birkenhead), Lords Finlay, Cave, Atkinson, and Shaw.)

COMAN *v.* GOVERNORS OF ROTUNDA HOSPITAL.

(ON APPEAL FROM THE COURT OF APPEAL IN IRELAND.)

Revenue—Income Tax—Assessment under Schedule D—Profits from the Letting of Rooms Belonging to a Hospital—"Concern in the Nature of Trade"—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35) *secs.* 60, 61, *Schedule A, No. VI*; *sec.* 100, *Schedule D, Cases* 1 *and* 6, *sec.* 105—*Income Tax Act* 1853 (16 *and* 17 *Vict cap.* 34), *sec.* 2, *Schedules A and D.*

The respondents owned the Rotunda Hospital and certain attached property known as the Rotunda Rooms and Vaults, from the letting of which, provided with light and heat and the necessary furniture, they derived the revenue which the appellant sought to assess under Schedule D of the Income Tax Acts. The respondents claimed that these profits were included in the assessment under Schedule A, and were therefore exempt from taxation under Schedule D. *Held* that the respondents carried on "an adventure or concern in the nature of trade" which was assessable under Schedule D.

Grove v. *Young Men's Christian Association*, 4 Tax Cas. 613; *Religious Tract and Book Society of Scotland* v. *Forbes*, 33 S.L.R. 289, 23 R. 390, 3 Tax Cas. 415; and *Carlisle and Silloth Golf Club* v. *Smith*, 1913, 2 K.B. 75, *approved and followed.*

Maugham v. *Free Church of Scotland*, 30 S.L.R. 666, 3 Tax Cas. 297, *distinguished.*

Appeal from an order of the Court of Appeal (RONAN and MOLONY, L.JJ., O'CONNOR, M.R. *diss.*) dated the 28th February 1919, affirming an order of the King's Bench Division (GIBSON, MADDEN, and KENNY, JJ., CAMPBELL, L.C.J., *diss.*) dated the 28th February 1918, on a Case stated under 43 and 44 Vict. cap. 19, section 59, by the Commissioners for the Special Purposes of the Income Tax Acts, holding that the decision of the commissions referred to in the Case was erroneous in law.

The facts are fully stated in the judgment of the Lord Chancellor.

LORD CHANCELLOR (BIRKENHEAD)—This is an appeal from an order of the Court of Appeal in Ireland, dated the 28th February 1919.

The Commissioners for the Special Purposes of the Income Tax Acts had on an appeal by the present respondents held that they were liable to be assessed to income tax under Schedule D in respect of their profits from letting the Rotunda Rooms, Dublin.

The respondents appealed by way of Case stated to the King's Bench Division (Revenue Side) and that Court by order dated the 28th February 1918 reversed the decision of the Commissioners, and this reversal was affirmed on appeal to the Court of Appeal.

The assessments in dispute are four in number and relate to the four years ending the 5th April 1915. The facts proved or admitted at the hearing before the Special Commissioners are set out in the Case stated and the documents annexed to it.

The respondents are a corporation incorporated in the year 1756 for the purpose of conducting a hospital for poor lying-in women. The letters-patent appear to be in the nature of an exemplification. They are dated 1766, when George II had been dead six years. From internal evidence the incorporation appears to have been by letters close dated the 26th July 1756. The date, the 2nd December 1756, given by the parties and most of the judges is without any warrant.

The hospital is at present a maternity and gynecological hospital, and as such is clearly a charity. The hospital is managed in accordance with the charter and by-laws made under the authority of the charter and an Irish Act (25 Geo. III, cap. 43) and also certain resolutions passed from time to time by the governors and collected together.

The premises occupied by the respondents at Dublin consists of the hospital, the Rotunda Rooms, and the Rotunda Gardens. The vaults under the building are separately let. The hospital and the rooms are connected by an internal passage way, but it does not appear that the rooms are used for any hospital purpose save that of earning profits which are applied towards the main-