Thursday, June 26.

FIRST DIVISION.

[Exchequer Cause.

CALEDONIAN RAILWAY COMPANY *v.* INLAND REVENUE (HASSALL).

Revenue—Income Tax—Railway Owned by One Company and Managed by Another—"Carrying on the Concern"—"Profits"—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 60, *Schedule A, No. III, Rule Third.*

Under an agreement scheduled in an Act of Parliament a railway company undertook to work and manage a line of railway owned by another company. The agreement was in perpetuity, and the "working" company had full control over the line and the rates and charges thereon. They were to retain 50 per cent. of the "gross revenue" as their remuneration for working the line; the remaining 50 per cent. was to be paid to the owning company, out of which it had to pay Government duties, feu-duties and other annual payments, compensation to tenants of lands, all rates, taxes, public and local burdens, interest, and salaries and other charges and expenses. In one year the working company paid £47,779 to the owning company as half of the gross revenue in terms of the agreement. The working company having been assessed to income tax upon that sum, *held*, in a stated case for appeal, that the working company was not liable to assessment under the Income Tax Act 1842, section 60, Schedule A, No. III, Rule Third, in respect that the sum in question was not profit in the sense of Rule Third in the hands of the working company, and that they were not "carrying on the concern" within the meaning of that rule.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 60, enacts—"(*a*) The duties hereby granted and contained in the said schedule, marked (A), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said duties, as if the same had been inserted under a special enactment." *Schedule A*—"(No. III) Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned, which are not to be charged according to the preceding general rule" (*i.e.*, No. I). ". . . The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited." *Third*—"Of . . . railways and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding. The duty in each of the last three rules to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits; and all such persons, corporations, companies, and societies respectively shall allow out of such produce or value a proportionate deduction of the duty so charged, and the said charge shall be made on the said profits exclusively of any lands used or occupied in or about the said concern."

The Caledonian Railway Company, *appellants*, being dissatisfied with a decision of the Commissioners for the Special Purposes of the Income Tax Acts assessing them to income tax upon £47,779 for the year ending 5th April 1918, in respect of the annual value or profits and gains of a railway owned by the Lanarkshire and Ayrshire Railway Company, and worked by the appellants under an agreement contained in Schedule B appended to the Lanarkshire and Ayrshire Railway Act 1884 (47 and 48 Vict. cap. clxxix), appealed by Stated Case in which on behalf of the Inland Revenue A. Hassall was *respondent*.

The *agreement* between the Lanarkshire and Ayrshire Railway Company, first party, and the appellants, second party, provided—"1. The first party shall without undue delay take the necessary steps for raising the capital authorised by their said Act, and on its being subscribed and paid up shall proceed to make, construct, and complete at their own expense, in a good, sufficient, substantial, and workmanlike manner, 'the railway' as a single line, and without the adoption of timber bridges, but upon land to be taken for a double line, with over-bridges for a double line, the whole of 'the railway.' The gauge shall be the same as the said Kilmarnock joint line of railway, and the limits of deviation shall not be greater (except with the consent of the second party) than those delineated on the deposited parliamentary plans or authorised by the general Acts relating to railways, except such deviations as may be necessary for the construction of the dock station and sidings at Kilwinning; the rails, chairs, and sleepers for the permanent way shall be of the weight and quality used, and shall be laid in the manner observed, on the Caledonian main line. The first party shall also construct or provide all necessary stations, stationmasters' houses, platelayers', gatekeepers', porters', pointsmen's, and signalmen's cottages, goods sheds, engine sheds, water tanks supplied with water, with the necessary works and arrangements for affording a permanent supply thereof, sidings, offsets, loading banks, turning tables, cranes at stations, weighing machines, stationary signals con-

nected and interlocked with the point handle levers and concentrated in signal cabins, all on the most approved system, wires, speaking telegraphic apparatus, apparatus for working the trains on the most approved block system, and all other furnishings and conveniences of the nature of fixtures for economically working and carrying on the traffic of 'the railway' before the same is opened for traffic, and to the satisfaction of the engineer of the second party for the time being, or in case of any difference of opinion between him and the engineer of the first party respecting the same, to the satisfaction of a competent neutral engineer to be named by the Board of Trade on the application of either party.

"2. The second party shall, subject to the sanction of Parliament, in perpetuity work and manage the traffic upon and maintain 'the railway,' and shall provide the locomotive power, rolling stock, and plant of every kind necessary for working the traffic of the same (first) as from the date of the opening for passenger traffic of 'the railway,' by authority of the Board of Trade, as regards working and management, and (second) as from twelve months thereafter as regards maintenance, and that always on the terms hereinafter mentioned. The second party shall work and manage the railway under the provisions of this article in a proper, safe, and convenient manner, and so as fairly to develop the traffic to, from, and on the railway.

"3. The second party shall have the power (save as hereinafter mentioned in this article) of selecting, appointing, suspending, or dismissing all officers, agents, book-keepers, booking and other clerks, servants, porters, carters, surfacemen, and others employed on and connected with the railway, or required for keeping in their general offices the accounts connected with the traffic of the same, or employed in superintending or directing or actually engaged in conducting the said traffic, and the said officers, agents, servants, and others above mentioned shall be paid by the said second party and shall be exclusively under their control, and the first party shall have the selection, appointment, and control of and shall pay the secretary or other officers required by them in the management of the capital, financial, and directional departments of their undertaking.

"4. The second party shall, to the exclusion of the first party, have the power of fixing all tolls, rates, and charges payable in respect of all traffic using the railway or any part thereof not exceeding the maximum tolls, rates, and charges authorised by Parliament, and shall collect and receive all revenues due and payable for and in respect thereof, and all other revenues of the first party (except transfer fees), and shall on the last day of every month, or as soon thereafter as reasonably practicable, make up a statement of the gross revenue during the preceding month, and render to the first party statements and abstracts of the same, and the proportion thereof due and payable to the first party as hereinafter provided shall thereupon be paid over to them or their treasurer or secretary, or such banker or other person as they shall direct and appoint.

"5. The gross revenues of the first party shall include (first) all receipts in respect of local traffic (that is to say, traffic which shall both arise and terminate on the railway of the first party) after deduction of the expense of cartage of goods and the expense of the collection and delivery of parcels, fish, and other traffic; (second) a mileage proportion of all receipts arising from through traffic (that is to say, traffic which is to pass over the railway of the first party or any part thereof, and which shall likewise pass over the railways of the second party or any part thereof, or over any other railways or any part thereof) after deduction therefrom of (1) terminals, which terminals shall belong and be paid to the companies respectively entitled thereto; and (2) any portion of such receipts as may be due to any railway or other company, or to any person or persons other than the parties hereto, who may be parties to the conveyance of such through traffic; (third) the terminals payable to the first party in respect of such through traffic, after deduction of the expense of the cartage of goods, and the expense of the collection and delivery of parcels, fish, and other traffic; and (fourth) rents for the use of any property of the first party and all other revenues of the first party to be collected and received by the second party under article fourth of this agreement. The second party shall be entitled to retain fifty per centum of such gross revenues as their remuneration for maintaining 'the railway' of the first party, and working and managing the traffic thereon, and collecting the said revenues, and shall pay over the balance to or for behoof of the first party in manner provided in the next article of this agreement.

"6. Out of the balance belonging to the first party as aforesaid, they, the first party, shall pay (first) Government duty; (second) all feu-duties or ground-annuals, or other periodical or annual payments (if any) payable in respect of any lands acquired by them or held on lease; (third) all compensation to tenants (if any) in respect of any lands acquired or injuriously affected by them, so far as not chargeable against the capital of the first party; (fourth) all rates, taxes, and public and local burdens of every kind payable in respect of the railway; (fifth) all interest upon money borrowed or owing by the first party, whether upon mortgage, debenture stock, or otherwise; (sixth) the expenses of the directional and financial management of the business of the first party, including the salaries of the secretary, treasurer, or other officers who may be employed by them in those departments, and such other charges and expenses as may be incurred on behalf of the first party."

The Stated Case set forth:—"(1) The Lanarkshire and Ayrshire Railway Company was incorporated under the Barrmill and Kilwinning Railway Act 1883 (sometimes hereinafter called 'the Act of 1883') under the name of the Barrmill and Kil-

winning Railway Company, and that name was changed to the name of the Lanarkshire and Ayrshire Railway Company by the Lanarkshire and Ayrshire Railway Act 1884 (sometimes hereinafter called 'the Act of 1884').

"Section 4 of the Act of 1883 provides for the incorporation of that company as a body corporate, with perpetual succession and a common seal, and with powers to purchase, take, hold, and dispose of lands and other property for the purposes of that Act, and to make the railway therein mentioned —and that railway is throughout this Case referred to as 'the Railway.' The Lanarkshire and Ayrshire Railway Company is the owner of the land or soil on which the lines, with proper stations, sidings, approaches, works, and conveniences connected therewith, have been made as authorised by their various Acts, and that Railway Company is henceforth in this Case referred to as 'the Owning Company.' Provision is made in the last expressly mentioned Act for a board of directors to manage the affairs of the Owning Company with the principal office thereof in Glasgow, and such principal office has ever since 1883 been registered at 186 West George Street, Glasgow, and the Owning Company in due course appointed a board of directors. The Act of 1883, the Act of 1884, and the Public Statutes incorporated therewith constituted the Owning Company a separate corporate body, with full powers to manage and to take charge of all its affairs. The Owning Company, instead of itself working and maintaining the Railway, entered into an agreement with the Appellant Company to work and maintain the Railway in perpetuity, and the precise terms of that agreement are contained in Schedule (B) of the Act of 1884, which agreement is for convenience hereinafter referred to as 'the working agreement.' . . . . . The appellant company works and maintains the railway on the terms and conditions embodied in the working agreement. (5) The management of its undertaking is carried on under the statutory elected board of directors and officers of the Owning Company, who have the absolute control and responsibility of such undertaking. The Owning Company alone has charge of and full control over the following matters, viz.—(*a*) Its debenture stock, £225,000; (*b*) its ordinary share capital, £535,350; (*c*) the borrowed money in connection with the said undertaking, which necessarily varies from time to time and at the date of the hearing was £322,598; (*d*) the payment of interest and dividends on those stocks and shares and borrowed money; (*e*) the payment of all public rates and taxes, imperial and local, and the general charges incurred in the management and carrying on of its undertaking known as the Lanarkshire and Ayrshire Railway Company; and (*f*) generally its whole financial affairs after the Appellant Company has accounted for the gross revenues of the railway under deduction of fifty per centum. The said gross revenues are ascertained under the terms of the working agreement after deduction by the Appellant Company of the various items of expenditure arising for deduction under clause 5 of the working agreement, or otherwise for maintaining the railway and working and managing the traffic thereon and collecting such revenue of the railway. (6) From time to time the directors of the Owning Company have to consider applications for additional sidings and other works in connection with the railway involving considerable expense and to decide thereon. The undertaking and the title-deeds of all lands vested in the Owning Company are in its own name. The Owning Company is entered in the valuation roll from year to year by the Assessor of Railways as the owner and occupier of the railway and is directly assessed as such by all rating authorities. (7) The printed accounts of the Owning Company for the year 1916 show that the Owning Company as part of its undertaking is in receipt of rents, feu-duties, and transfer fees, with which the Appellant Company has no concern whatever. (8) In the management, as aforesaid, of its whole undertaking the Owning Company has to promote and oppose bills in Parliament, sue and be sued in the courts of law, and in every other conceivable manner to act as an independent corporate body irrespective of the contractual arrangement with the Appellant Company to work and maintain the railway as aforesaid. . . . (11) The Appellant Company ever since the railway was open for traffic has maintained and worked and managed the traffic upon the railway, and has collected the revenues arising from the traffic upon the railway, and has otherwise carried out its obligations and received its remuneration in accordance with the provisions of the working agreement. (12) The annual value or profits and gains arising from the railway, however, form only a part of the money received by the Appellant Company on account of railways, inasmuch as the Appellant Company also works and manages the traffic upon and, *inter alia*, also maintains and provides locomotive power, rolling stock, and plant of every kind necessary for working the traffic upon several other railways the property of various owners, including the large railway owned by the Appellant Company which is generally known by the name of 'the Caledonian Railway.' The Appellant Company has been also assessed for the year in question in respect of the annual value or profits and gains arising from certain other such railways. (13) The accounts connected with the traffic of the railway are kept in the general office of the Appellant Company in accordance with article 3 of the working agreement. (14) The gross receipts from the traffic on the railway collected by the Appellant Company, the amount paid to the Owning Company, and the outlays incurred by the Appellant Company for the purposes of the railway, but exclusive of all capital outlay for original construction of the Railway and relative works and alterations and extensions thereof, and all interest thereon, have been brought to account *en bloc* in the

printed annual accounts of the Appellant Company. Under this system of keeping such accounts the various items under their appropriate headings of the expenditure of the Appellant Company, and relating as they do to all the railways (including the railway) so worked and managed as aforesaid by the Appellant Company, do not in these circumstances indicate how much of each such item falls to be appropriated to any one railway in particular of such railways. (15) The Appellant Company on 6th November 1917 furnished the Assessing Commissioners with a statement for the assessment of its profits for the year ending the 5th April 1918, which was as follows:—Annual profits £1,913,180; *Less* depreciation £1773—£1,911,407. The said sum of £1,911,407 was arrived at after specifically deducting, *inter alia*, the following item:—'Lanarkshire and Ayrshire Railway, £47,779.' That amount represents the sum paid by the Appellant Company to the Owning Company in terms of the working agreement, and the assessment which forms the subject of this Appeal is on that sum. . . . . In No. 9 [of the accounts of the appellants] under the heading 'Proposed appropriation of net income,' there is the following entry—'*Deduct*—Rent of and Guaranteed Interest on Leased and Worked Lines.' . . . 'Lanarkshire and Ayrshire Railway, £47,778, 11s. 4d.' The last-mentioned sum forms a part of the total deductions, amounting to £934,055, 8s. 10d. which were by the directors of the Appellant Company in such report proposed to be, and were in due course, sanctioned by the shareholders of the Appellant Company as fixed charges to be paid before appropriation of the balance in payment of various dividends. (16) On 28th May 1917 the Owning Company, in accordance with its annual custom, furnished the Surveyor of Taxes with a return of its annual profits, namely, £22,178, 15s. 7d., for the year ended 5th April 1917, accompanied by a statement showing how that sum was arrived at—such return and statement being so furnished in order that the Owning Company might be assessed accordingly for the year ending the 5th April 1918 on the same basis as in previous years—the said sum of £22,178, 15s. 7d. having been arrived at by bringing into account the total income of the Owning Company received from the Appellant Company and from every other source, and deducting the total expenditure of the Owning Company attributable to the year 1916 of the kind, some of which is referred to in clause 6 of the working agreement, but excluding the expenditure upon the maintenance and working of the railway, which had been included by the Appellant Company in its percentage for working the line under the working agreement. . . . . The revenue account No. 9 [of the Owning Company] includes miscellaneous receipts as well as the amount receivable under agreement with the Government in respect of control of railways. There has, however, not been any assessment made upon the Owning Company under the return made by them as aforesaid in respect of the whole or any part of the annual value or profits and gains of the railway for the year ending the 5th April 1918 by the Commissioners for Special Purposes, but they made an assessment upon that company for duties payable under Schedule E, in conformity with section 6 of the Income Tax Act 1860, for that year. (17) The assessment made upon the Owning Company for the year ended 5th April 1917 (taking that year as an illustration of the method of assessment, which the assessing Commissioners have however discontinued) was computed as follows:—

Receipts (less expenses of working, &c.)				£47,852	2 3
Expenditure (management, &c., as aforesaid)				8,721	11 0
				£39,130	11 3
Add—Rents not assessed, Schedule A	£359	11	8		
Less 50% for working (due to the Appellant Company)	179	15	10		
	£179	15	10		
Transfer fees	6	15	0		
				186	10 10
				£39,317	2 1
Deduct Bank Interest				16,359	6 1
Assessment (1916-17)				£22,957	16 0

The details of its receipts and expenditure were shown in the accounts of the Owning Company until up to and including the year 1913, which include the amount of gross revenues retained by the Appellant Company under clause 5 of the working agreement, but after that time such details were omitted from the published accounts of the Owning Company in consequence of the war under the authority of the Board of Trade."

The *opinion* and *decision* of the Commissioners was—"After considering the whole facts and arguments we were of the opinion (1) That the Appellant company was confusing that which constitutes the total net income of the Lanarkshire and Ayrshire Railway Company (which we have referred to as the Owning Company) from all its property (consisting of the railway plus other kinds of property) with that part of such income which constitutes the share of the Owning Company under the working agreement of the annual value or profits and gains of the railway. (2) That it was quite a fallacy to describe the assessment in dispute as being one made upon the receipts of the railway, when in fact it was an assessment made upon the actual sum representing the balance remaining in the hands of the Appellant Company of the annual value or the profits and gains of the railway for distribution to the Owning Company under the express terms of the working agreement. (3) That the income tax liability in respect of the other part of the annual value or profits and gains of the railway was legally covered by another assessment, which we find was made upon the Appellant Company. (4) That in consequence of the railway being worked and managed by the Appellant Company in necessary association with other railways also thus worked and managed

the accounts of the railway are not distinguishable item by item in the accounts of the Appellant Company, which accounts embrace not only the gross revenues and the expenses of the railway, but also the gross revenues and expenses of the other railways which we refer to, and it therefore is impossible for the assessing Commissioners or ourselves to find out and to assess on one sum the precise amount which would represent the annual value or profits and gains of the railway. (5) That none the less we are satisfied that by the methods adopted by the assessing Commissioners the full liability of the Appellant Company to income tax in respect of the 'annual value or profits and gains' of the railway is covered by (*a*) the assessment in dispute, and (*b*) the other assessment in combination, which other assessment is referred to in this clause at (3) above, and includes that part of such annual value or profits and gains the precise amount of which cannot be ascertained for the reasons above stated—both assessments here referred to having, however, been made on the Appellant Company. (6) That conclusive evidence is to be found in clauses 2, 3, 4, and 5 of the working agreement that the Appellant Company is the company on which the duty should be charged, as it falls within the definitions of the 'person, corporations, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in the receipt of the profits thereof, who are to be charged as set forth in the Third Rule, No. III, Schedule A, section 60, of the Income Tax Act, 1842.'

"Having regard to our opinion as above set forth, we decided the issue in favour of the Crown, and confirmed the assessment in dispute."

The *question of law* was, Whether on the evidence the determination of the Commissioners was correct.

Argued for the appellants—Admittedly, the £47,779 had been taxed not as rent, but as profits. It could not be taxed as profits of the appellants. They were a railway company and as such could only be taxed upon the whole profits of their whole undertaking upon a general account—Income Tax Act 1842, (5 and 6 Vict. cap. 35), Schedule A, No. IV, Rule First—*Highland Railway Company* v. *Special Commissioners of Income Tax* 1885, 13 R. 199, *per* Lord President Inglis at p. 204, and Lord Mure at p. 205, 23 S.L.R. 116. The appellants had already been taxed upon the profits of their whole undertaking, and the sum in question had been allowed as a deduction and it could not be taxed now as a separate item. No doubt if a landowner had leased the land over which the railway ran to them and ceded full possession, the appellants would have been bound to pay the tax upon the rent, but that did not arise in the present case. Further, even if the sum in question was taxable as profits, the appellants were not liable for the tax. They did not in the sense of Schedule A, No. III, Rule Third, "carry on the concern." The railway in question was the statutory undertaking of the Lanarkshire and Ayrshire Railway Company; it was their business to carry it on. The appellants had their own statutory undertaking to carry on, but even if the appellants could be said to carry on the railway for the Owning Company, Rule Third was still inapplicable, because the appellants were not in receipt of the profits of the railway. The profits of the railway as shown by the agreement was the sum paid to the Owning Company less its proper expenses. In the hands of that company the sum in question would have to bear considerable expenses, of which the appellants knew nothing, before it could be regarded as profits; that excluded the possibility of treating the sum in question like rent and deducting the tax at the source. An agent taxable under Rule Third would require to be in a position to make up a profit and loss account; here the appellants could not do so. The appellants were not parties or joint adventurers with the Owning Company, but if they were, the proper method of arriving at the taxable amount would be by means of a joint balance sheet. Further, the sum in question was purely artificial. There could be no question of lease, for there was no actual demise of the lands. The use of the words "receipts (net)" and "net income" in the appellants' accounts with reference to the returns from the railway in question was irrelevant, for those terms were used solely in order to comply with the provisions of the Railway Company (Accounts and Returns) Act 1911 (1 and 2 Geo. V, cap. 34). The contract between the appellants and the Owning Company really was one under which the appellants agreed to perform certain services for the Owning Company, and the sum in question was gross receipts *quoad* the Owning Company, less one-half, which was the remuneration of the appellants. Section 102 and Schedule A, No. V, Rules Ninth and Tenth, were referred to.

Argued for the respondent—The sum in question was profits in the sense of Rule Third and was assessable in the hands of the appellants as the corporation carrying on the concern. The sum in question was profits. Upon that the accounts of the appellants as now framed were conclusive. But apart from the accounts the sum in question was in fact profits, for any other charges against it were merely distribution charges. The appellants certainly carried on the concern—they were in full control and their right to so remain was perpetual. But if they were not the company carrying on the concern, they were the agents of the company which did so, and they had the direction and management of the concern, or at any rate they received the profits and were liable in payment of the tax on those profits before handing them to the Owning Company. Section 40 of the Income Tax Act 1853 (16 and 17 Vict., cap. 34) and *Mersey Docks and Harbour Board* v. *Lucas*, 1883, L.R., 8 A.C. 891, *per* Lord Selborne, L.C., at p. 903.

At advising—

LORD MACKENZIE—This is an appeal by the Caledonian Railway Company against

an assessment to income tax under Schedule A by the Special Commissioners on the sum of £47,779 for the year ending 5th April 1918 in respect of the annual value or profits or gains of the railway which is owned by the Lanarkshire and Ayrshire Railway Company. The Caledonian Railway Company work and manage the traffic upon and maintain the railway under an agreement which has statutory sanction in the Lanarkshire and Ayrshire Railway Act 1884. As regards the gross revenues of the Lanarkshire and Ayrshire Railway Company, which are defined by the agreement, it is provided that the Caledonian Railway Company shall "be entitled to retain fifty per centum of such gross revenues as their remuneration for maintaining 'the railway' of the first party (the Lanarkshire and Ayrshire Railway Company) and working and managing the traffic thereon and collecting the said revenues, and shall pay over the balance to or for behoof of the first party in manner provided in the agreement." What has been done in the year of assessment is that the Caledonian Railway Company have carried into their general account the whole of the gross receipts from the traffic on the railway collected by them. The expense of working has been set against the 50 per cent. provided as their remuneration. The total profits of the Caledonian Railway Company are stated in their general account at £1,913,180, and this was arrived at after specifically deducting, *inter alia*, the following item—Lanarkshire and Ayrshire Railway, £47,779. That amount is the sum which has been paid by the Caledonian Railway Company to the Lanarkshire and Ayrshire Railway Company in terms of the working agreement. The Caledonian Railway Company have been assessed on the basis of an account so made up. The present question is in regard to an assessment on this sum of £47,779 as being profits in the hands of the Caledonian Railway Company who, it is maintained, carry on the "concern" within the meaning of Rule III of Schedule A. This mode of assessment marks a change in the practice, which in past years has been to assess the one-half of the gross revenues which belonged to the Lanarkshire and Ayrshire Railway Company in the hands of that company, bringing out the amount thereof which was commercial profit by allowing the deductions set out in the account printed in article 17 of the Case. These are applicable to the year of assessment ending 5th April 1917, and illustrate the principle hitherto applied. The deductions reduce the figure of £47,852, 2s. 3d. to a net sum of £22,957, 16s. It was conceded that the change of practice arose in consequence of an entry in the Caledonian Railway Company's accounts under the heading "Proposed Appropriation of Net Income"—"Rent and Guaranteed Interest on Leased and Worked Lines . . . Lanarkshire and Ayrshire Railway, £47,778, 11s. 4d." The Solicitor-General argued that this was conclusive that the whole matter of profit must be looked at solely from the Caledonian Railway Company's point of view; that they carried on the whole "concern;" and that whatever remains in their hands after paying the expenses of working is profit. I am unable to take the view that an account kept in the form now prescribed by the Act 1 and 2 Geo. V, c. 34, has the effect sought to be ascribed to it. The expression "net income" in the account is not concerned with income tax but with Board of Trade purposes. The real question depends upon the proper construction to be put upon the working agreement. Do the Caledonian Railway Company carry on the "concern" within the meaning of Schedule A, Rule III? The contention for the Commissioners is that the Caledonian Railway Company is in the position of being a perpetual lessee, with exclusive right to work and maintain the railway and to fix rates and charges. It is contended that the Caledonian Railway Company are entitled to deduct all their expenses, but not the expenses of the Lanarkshire and Ayrshire Railway. This is in effect to treat the sum of £47,778 as a payment to the owner of the soil within the meaning of Rule III. There are, however, two railway companies, and the expression "concern" cannot be limited to what is worked by one of them. The Caledonian Railway Company do not carry on the whole "concern." The Lanarkshire and Ayrshire Railway Company have definite functions which are defined by the agreement. The Commissioners are seeking to take in the hands of the working company what belongs to the Owning Company. It is necessary, however, to bear in mind that the Lanarkshire and Ayrshire Railway Company are a railway company, and it must be ascertained what their profit is. The Caledonian Railway Company are not in a position to make up an account showing what the profit of the Lanarkshire and Ayrshire Railway Company is. They are not in possession of the materials. In order to be chargeable as an agent under the Third Rule, the agent must be agent for the whole concern, and as such in a position to make up a profit and loss account. As set out in the Case the Lanarkshire and Ayrshire Railway Company is carried on under a statutory elected board of directors and officers who have control of the financial side of the undertaking. Out of the balance of fifty per cent. of gross revenue which they receive they have to discharge, *inter alia*, the debts set out in article 6 of the agreement—Government duty, feu-duties, compensation to tenants, rates, interest on borrowed money, and expenses of directional and financial management. The Caledonian Railway Company hand over to the Lanarkshire and Ayrshire Railway Company one half of the gross revenue which in the agreement is described as gross revenue of the Lanarkshire and Ayrshire Railway Company and has throughout belonged to them. This sum cannot be regarded as profit in the hands of the Caledonian Railway Company within the meaning of Schedule A, Rule Third. Nor is it a sum which falls either under section 102 or the Act of 1853, section 40.

The result of this view is that the answer to the question of law ought to be, that on

the evidence this determination of the Commissioners is not correct.

LORD SKERRINGTON—The Caledonian Railway Company appeals against a determination of the Special Commissioners confirming an assessment to income tax on the sum of £47,779 for the year ending 5th April 1918, made upon the Appellant Company in respect of the annual value or profits and gains of the Lanarkshire and Ayrshire Railway, which is owned by the Lanarkshire and Ayrshire Railway Company but is worked by the Caledonian Railway Company on the terms and conditions embodied in a working agreement confirmed by Parliament. Though the fact is not stated in the Case, counsel on both sides admitted that the Caledonian Railway Company had been already assessed to income tax in respect of its profits from the Lanarkshire and Ayrshire Railway for the same year. This previous assessment proceeded upon a general account in which the Caledonian Railway Company debited itself with the amount of the gross revenues received by it from all the railways which it owns or works, including therein the sum of £95,558, being the gross revenue from the Lanarkshire and Ayrshire Railway received by the Caledonian Railway Company for the year in question. On the other side of this general account the Caledonian Railway Company claimed and was allowed deduction of the general cost of working all its railways (which items included, though they did not separately state, the cost of working the Lanarkshire and Ayrshire Railway). In addition the Caledonian Railway Company claimed and was allowed to deduct the sum of £47,779, being the one-half of the gross revenues of the Lanarkshire and Ayrshire Railway which, in terms of the working agreement, it was bound to pay over to the Lanarkshire and Ayrshire Railway Company. This deduction was claimed and allowed in conformity with the practice of previous years, according to which each railway company was assessed to income tax in respect of one-half of the gross returns from the Lanarkshire and Ayrshire Railway, but under deduction in the case of each company of its expenditure in performing the services or making the payments specified in the 5th and 6th articles of the agreement. It appears therefore that the assessment appealed against, and now for the first time imposed on the Caledonian Railway Company, is of the nature of an additional and corrective assessment intended to rectify a supposed error in a previous assessment relating to the same subject-matter. The Inland Revenue claims that the Caledonian Railway Company having been allowed in its general account deduction of all sums expended by that company in working the Lanarkshire and Ayrshire Railway must now pay income tax on the gross amount, viz., £47,779, which it is bound to pay over to the Lanarkshire and Ayrshire Railway Company. This contention was approved and the additional assessment was confirmed by the Special Commissioners. The Lanarkshire and Ayrshire Railway Company is not a party to the present proceedings. Accordingly, assuming the determination of the Special Commissioners to be right, it would be unsafe to express any opinion on the question whether the income tax now assessed for the first time on the Caledonian Railway Company in respect of the second half of the gross revenues of the Lanarkshire and Ayrshire Railway Company can when paid to the Inland Revenue by the Caledonian Railway Company be lawfully deducted by the latter company when settling accounts with the Lanarkshire and Ayrshire Railway Company, and if so, what remedy (if any) is available to the latter railway company in respect of its having been compelled to pay income tax upon an apparent profit of £47,779, whereas its actual profit for the year after deducting necessary revenue charges, such as Government duty, feu-duties, annual compensation to tenants, rates and local burdens, was obviously considerably smaller.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 60, Schedule A, No. III, enacts that the annual value of certain classes of properties, including "railways and other ways," shall be estimated according to the profits thereof for the year preceding, and that the duty on such annual value shall be charged on the person or society of persons, whether corporate or not corporate, "carrying on the concern," or on their respective agents who either have the direction or management of the concern or are in receipt of the profits thereof. This seems to be a reasonable scheme of taxation, because the person or body of persons chargeable with the tax possess either in an individual or in a representative capacity the information, documents, and business books which are required in order to the preparation of an accurate profit and loss account, on one side of which will be stated the gross revenue of the concern, and on the other side the expenditure which was necessary in order to earn it. The determination of the Special Commissioners proceeds upon the view that the effect of the working agreement between the two railway companies was to make the Caledonian Railway Company the company which alone must be regarded as "carrying on" the railway concern in question, whether for its own sole behoof or as agent for the two companies is immaterial. I am of opinion that this view of the effect of the agreement is erroneous. It is open to the double objection that, in the first place, it treats as profits from the carrying on of the Lanarkshire and Ayrshire Railway a sum of money which obviously is not profits but gross returns; and that, in the second place, it imposes a tax professedly in respect of the profits of the concern as a whole upon a corporation which neither in its individual nor in a representative capacity is able to prepare a profit and loss account applicable to the concern as a whole. If the Lanarkshire and Ayrshire Railway Company had chosen to conduct its business in the ordinary way it would have required, in order to carry on its railway concern and earn a revenue, to do a great deal more than (*a*)

maintain the railway, (*b*) work and manage the traffic thereon, and (*c*) collect its revenue —being the three services the performance of which the working agreement delegates to the Caledonian Railway Company. The Owning Company would in addition have had to pay annually in respect of its railway the items which are enumerated in the 6th article of the working agreement, viz.—(1) Government duty, (2) feu-duties, (3) compensation to tenants, (4) rates, taxes, and public and local burdens, (5) interest on borrowed money, and (6) directional and financial management expenses. Without these disbursements there could be no revenue from the railway and consequently no profits, though of course some of these items might not form good deductions in a question of income tax. It does not seem to me to be material that the Owning Company elected with the consent of Parliament to employ the Caledonian Railway Company to perform the services (*a*), (*b*), and (*c*) in return for a "remuneration" which was to be fixed at one-half of the gross revenues of the Owning Company estimated in the way described in the agreement, while the latter company became bound in its turn to the Caledonian Railway Company that out of the second half of the gross revenues it would annually make the payments (1) to (6). The effect of the Parliamentary agreement as I read it was to bring the "concern" of the Lanarkshire and Ayrshire Railway partly within the statutory undertaking of the Caledonian Railway Company with the result that the working company and the owning company acting separately and independently did between them all that was necessary in order to make the railway a revenue-producing subject, and divided that revenue equally between them, the profit earned by each company being the difference between one-half of the gross revenues of the concern on the one hand and its own share of the necessary expenditure as apportioned by the working agreement on the other hand. In my judgment the Lanarkshire and Ayrshire Railway is not carried on by a single railway company, as has been determined by the Special Commissioners, but by two railway companies acting not as joint adventurers and mutual agents but separately and each for its own interest in terms of the special statutory authority to that effect. I do not understand why the Special Commissioners concentrated their attention solely upon the services performed by the Caledonian Railway Company and ignored the equally essential co-operation of the Owning Company.

The Solicitor-General suggested in the course of his argument that the Caledonian Railway Company was in a position analogous to that of a tenant, and that the Owning Company was in a position analogous to that of a landlord. The agreement negatives this view. It is essentially a working agreement in accordance with which the Caledonian Railway Company performs certain services and retains one-half of the gross returns as its "remuneration." The other half of the gross returns which the Caledonian Railway Company is bound to pay over to the Owning Company is not money which once belonged to the former company. It is a part of "the gross revenues of the first party" (the Lanarkshire and Ayrshire Railway Company) collected and received by the second party (the Caledonian Railway Company) but "belonging to the first party" as its agreed-on share of the gross revenues.

For these reasons I am of opinion that the determination of the Commissioners was erroneous and that the appeal should be sustained.

LORD CULLEN concurred.

The LORD PRESIDENT was absent.

The Court reversed the determination of the Commissioners and remitted to them to discharge the assessment.

Counsel for the Appellants—Wilson, K.C. —T. G. Robertson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondent—The Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, June 28.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CHRISTIE *v.* CHRISTIE AND ANOTHER.

Process—Competency—Husband and Wife — Decree for Aliment for Joint Lives of Parties Granted in Action for Adherence, without Proof, Reserving Right to Apply at any Time to the Court — Decree for Custody of Children without Conclusions therefor.

In a sheriff court a wife and her child craved decree against the husband, (1) that he was bound to adhere to her and to ordain him to adhere, and for payment to her of £1 per week during the joint lives of her and her husband or until they should adhere to each other, and (2) for payment of 10s. per week to the child till the husband should provide the child with suitable maintenance or till the child could support himself. The parties lodged a joint minute settling the action upon the following terms:—"(*First*) that the defender pay to the pursuers £1 per week from and after 10th December 1917, (*second*) that the female pursuer should have the custody of the child . . ., (*third*) that the defender pay the pursuers' agent . . . the sum of £10, 10s. in name of expenses. . . ." The Sheriff-Substitute interponed authority to the joint minute, and (1) granted decree against the husband "for payment to the pursuers of aliment at the rate of £1 weekly during the joint lives" of the husband and wife and "until the further orders of the Court, reserving to either party at any time to apply to