

as that in which he is now employed. In so far as the difference is due to this general economic cause, the cases of *Black* and *Quilter* decide that it is not to be made a ground for an increased award of compensation. But a part of the difference must also be due to the incapacity of the appellant which was caused by his original injury, and it is the arbitrator's duty, as was determined by *Quinn* and *Fallens*, to ascertain what compensation is due on this ground. The arbitrator suggests that this matter is concluded by the agreement to take 4s. 7d. per week as partial compensation. I do not regard that agreement as binding the appellant to take this specific sum during all the time he may be partially incapacitated. The agreement, as I understand it, was to accept one-half of the difference between present and pre-accident wages. Change of circumstances, it is said, has increased the amount of that difference, and the sum due is therefore larger now than it was when the matter of compensation was last considered in February 1921.

The statement of Lord Dunedin in *Quinn* (at p. 67) appears to be exactly in point and to negative the views expressed by the arbitrator in his note. Lord Dunedin says—"The features are (first) partial incapacity found and compensation awarded; (second) suspension of the payment of compensation owing to the wages actually earned exceeding the pre-accident wage; and (third) wages actually earned falling below the pre-accident wage. The right to receive compensation for partial incapacity then revives, and the amount due in respect thereof necessarily involves inquiry as to what the man is competent to earn."

I am therefore of opinion that the question of law in this and the other stated cases which it rules should be answered in the affirmative.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Fenton, K.C.
 —Keith. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Dean of Faculty (Sandeman, K.C.)—Marshall. Agents—W. & J. Burness, W.S.

Tuesday, February 26.

SECOND DIVISION.
 COMMISSIONERS OF INLAND
 REVENUE v. FORREST.

Revenue—Income Tax—Capital or Income—Purchase of Shares with Dividend Accrued to Date—Whether Dividend Declared Formed Part of Income—Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), sec. 5 (3) (c).

A contract for the sale of shares in a limited liability company was contained in letters passing between the purchaser and the seller, in terms of which the

purchaser accepted an offer by the seller to sell the shares "at £1050, the odd £50 being to cover the portion of the dividend accrued to date." In computing the income of the purchaser for income tax purposes the purchaser claimed that the dividend subsequently paid in so far as it had accrued at the date of the purchase, having been purchased by him with his capital, did not fall to be included in the computation. *Held* that the whole of the dividend fell to be included.

The Commissioners of Inland Revenue having expressed their dissatisfaction with a determination of the Commissioners for the Special Purposes of the Income Tax Acts at Glasgow, as being erroneous in point of law, in an appeal by William Forrest of Knockinlaw, Kilmarnock, under the Income Tax Act 1918, the Special Commissioners stated a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland.

The Case set forth, *inter alia* :—"At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held at Glasgow on 4th December 1922, for the purpose of hearing appeals, Mr William Forrest, of Knockinlaw, Kilmarnock (hereinafter called the respondent) appealed against an assessment made upon him to super tax on the sum of £2343 for the year ended 5th April 1922, under the provisions of the Income Tax Acts relating to super tax.

"1. The following facts were admitted or proved :—(1) On 25th November 1919 the respondent purchased 100 shares of £10 each in William Forrest & Company, Limited for £1050, the odd £50 being paid to cover the portion of the dividend on the shares accrued prior to the purchase. (2) The offer to sell the shares was contained in a letter, dated 19th November 1919, from the secretary of the Royal Bank of Scotland to Messrs MacRobert, Son, & Hutchison, the respondent's solicitors. That letter is in the following terms :—'*Late Robert Forrest's Judicial Factory*.—Dear Sirs—We have your letter of the 17th inst. We shall be prepared to sell another 100 of the shares of William Forrest & Company, Limited, at £1050, the odd £50 being to cover the portion of the dividend accrued to date.' (3) The acceptance of that offer was contained in a letter, dated 25th November 1919, from Messrs MacRobert, Son, & Hutchison to the secretary of the Royal Bank of Scotland. That letter is in the following terms :—'*Wm. Forrest & Co., Ltd.*—Dear Sir—We are in receipt of your letter of 19th inst., and accept the offer therein contained. We shall be glad if you will send us the scrip to enable us to draw the transfer of the 100 shares which will be sold *cum* dividend.' (4) The yearly accounts of the company of William Forrest & Company, Limited, are usually made up to the 28th February in every year, and were so made up for the year ended 28th February 1920. (5) Upon the accounts of the company as so made up a dividend of 10 per cent. free of income tax was declared on

13th May 1920, and the dividend attributable to the 100 shares purchased by the respondent was £100 free of income tax, or £142 with the addition of income tax. This sum was received by the respondent on the 13th May 1920, and was included in his return for super tax for the year 1921-22. (6) In computing the income of the respondent for the year ended 5th April 1921 (upon which super tax for the following year falls to be assessed) the Commissioners making the assessment appealed against included the whole of the said sum of £142.

"2. It was contended on behalf of the respondent—(1) That the said dividend had as to part been purchased by the respondent with his capital; (2) that the said dividend was accordingly in part capital and not income of the respondent; (3) that the said dividend was apportionable; (4) that £50 free of income tax (or £71 with the addition of income tax) of the said dividend did not fall to be included in the computation of the respondent's income for the year ended 5th April 1921; and (5) that section 5 (3) (e) of the Income Tax Act 1918 was not directed to charge income not otherwise chargeable with super tax, but merely contained a rule for ascertaining the year within which income already charged with super tax should be included.

"3. It was contended on behalf of the Crown—(1) That the dividend was not purchased, as there was in fact no dividend declared which could be purchased; (2) that what was bought was the shares which were valued by the parties above par on account of the possibility of a dividend being declared; and (3) that the transaction was simply a capital transaction.

"4. We, the Commissioners who heard the appeal, decided that the said sum of £71 was not income of the respondent within the meaning of the section referred to, and after giving effect to certain agreed adjustments we amended the assessment to £2392 and determined the appeal accordingly."

The *question of law* was—"Whether the respondent is entitled to exclude the said sum of £71 from the computation of his income for the year in question?"

Argued for the appellants—The question should be answered in the negative. A dividend had no existence until it was declared. The company had declared the dividend in question to be a dividend, and accordingly it could be nothing else than a dividend. In computing income for income tax purposes capital expenditure for the purpose of earning profits was not a proper deduction—*Ounsworth v. Vickers Limited*, [1915] 3 K.B. 287; *City of London Contract Corporation v. Styles*, 1887, 2 T.C. 239; *Royal Insurance Company v. Watson*, [1897] A.C. 1, per Lord Halsbury. L.C., at p. 6; Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), sec. 5 (1) and (3) (c).

Argued for the respondent—The question should be answered in the affirmative. In the present case the sale of the shares was made in terms of a special contract which placed a price on the contingent dividend. The dividend in part had been purchased by the respondent with his capital. A person

was only liable to tax if he was beneficially entitled to the income in question. That could not be said of the respondent in the present case—*Williams v. Singer*, [1921] 1 A.C. 65. Automatic deduction at the source was not an assessment—*Duncan v. Inland Revenue*, 1923 S.C. 388, 60 S.L.R. 226, per Lord Cullen at p. 395 and p. 229. Section 5 (3) of the Income Tax Act 1918 did not provide that where a person had been charged with income tax without having been assessed all the equities were elided.

LORD JUSTICE-CLERK (ALNESS)—The respondent in this case bought 100 £10 shares in a certain company on the 25th of November 1919. The price he paid was £1050, the odd £50 being, as the letter passing between the parties bears, "to cover the portion of the dividend accrued to date." That is a familiar but a frequently unexpressed transaction. The respondent claims that a part of the dividend which was paid upon these shares in May 1920 is to be treated not as income but as capital in respect of the transaction referred to.

It appears from the case that income tax was deducted at its source from the dividend, amounting to £142, payable upon the shares to which I have referred. That in itself is of course not conclusive. It further appears from the case that the £142 received by the respondent was included by him in his super-tax return. That again is of course not conclusive. But apart altogether from what the Inland Revenue authorities deducted, and apart altogether from the return which the respondent made, it appears to me that the contention which the respondent maintains is unsound. What is that contention? What does it involve? It involves that the sum payable by way of dividend in May 1920 upon these shares—a sum *prima facie* consisting of the income upon the shares—changes its character as by the touch of a conjuror's wand and becomes capital, simply and solely because of the enhanced price which the respondent says he paid for these shares some months previously. For that proposition I am unaware of any authority. To say that the respondent purchased the dividend upon the shares is, I think, inaccurate. He bought the shares with their potentialities whatever they were. There was then no dividend in existence. He paid a certain and arbitrary price for these shares, and that is the whole transaction. Mr Watson again and again referred in his ingenious argument to the construction of the contract between the parties. As I ventured to say at one stage in the argument, to me it appears that that is to begin at the wrong end. The question which arises between the respondent and the Inland Revenue arises at the moment when the dividend was paid on these shares in May 1920. That dividend was then *prima facie* income upon the shares, and what Mr Watson has to make out, in my view, is that he is entitled to set off against that income certain capital expenditure which he made months previously, to the effect of divesting that income of its revenue

character and of clothing it with a capital character. I am unaware of any authority which warrants that operation. It is urged by the respondent that the dividend had, as regards a part of it, been purchased by him with his capital. As Mr Fenton pointed out, dividends are usually purchased with capital, and that argument does not, it seems to me, carry the respondent any further. In short, this appears to be an attempt on the part of the respondent to attach to a very familiar operation quite unfamiliar, unwarranted, and highly inconvenient revenue consequences. That attempt, in my opinion, has failed, and I accordingly suggest to your Lordships that the question which is put to us should be answered in the negative.

LORD ORMDALE—I concur. I agree with your Lordship on both points—the matter of the contract and also the matter of this dividend. It seems to me that the transaction between the buyer and the seller was just a very ordinary transaction, and it was in its form as well as in its nature a capital transaction, the buyer paying out so much of his capital and receiving in return therefor certain shares. The value of the shares had to be determined as a matter of bargain between the parties, and the purchaser thought that it was not unreasonable that he should pay something over par for them because of the possibility—not the certainty but the possibility—of a dividend six months afterwards being paid upon the shares so purchased by him. As regards the form of the contract, it may be that there is here expressed in the seller's letter, or in the two letters passing between the parties, what is ordinarily implied. But it seems to me that Mr Watson in his very interesting but I think too subtle argument has failed to show, as your Lordship put it, how this sum payable by way of dividend which was *prima facie* income changed its character and became capital.

LORD HUNTER—I also think that the question put to us ought to be answered in the negative. The respondent contends that in his return for super tax for the year 1921 he is entitled to make a deduction of the sum of £71. That £71 consists of half of the dividend which he received in the year 1920 in respect of 100 shares which he held in the firm of William Forrest & Company. The shares were his. The dividends were his, and from the dividends the income tax payable in respect of the dividends was deducted by the company from the amount payable to the respondent. No contention has been put forward to the effect that the respondent was not liable in the payment of income tax upon those shares. Well, how does the matter stand upon the statute? The Act of 1918 which provides for the payment of super tax says, section 5, sub-section (1)—“For the purposes of super tax the total income of any individual from all sources shall be deemed to be the total income of that individual from all sources for the previous year.” Then in the third sub-section of the same section there is this provision—“In estimating the income of

the previous year for the purpose of super tax—(c) Any income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable, and any deductions allowable on account of any annual sums paid out of the property or profits of the individual shall be allowed as deductions in respect of the year in which they are payable, notwithstanding that the income or annual sums, as the case may be, accrued in whole or in part before that year.” It appears to me that in some way or other the Income Tax Commissioners have failed to give effect to a perfectly clear statutory provision, and from the Stated Case I do not understand exactly how they found themselves enabled to give effect to the contention of the respondent. In the argument presented to us great stress was laid upon the contract and the terms of the contract under which the respondent purchased these shares. The purchase seems to have been effected in the year 1919, and in terms of the letter concluding the bargain the purchase was for 100 shares at the price of £1050 with what I cannot help thinking was an accidental proviso to the effect that the odd £50 covered “the portion of the dividend accrued to date.” How the fact that the contract was couched in those terms could have any effect upon the proper method of ascertaining the amount of the tax payable by the respondent I am at a loss to understand. The contract when it is examined appears to me to be in essence and substance just the ordinary contract which is effected where a purchase of shares is made upon the Stock Exchange at a time shortly before a dividend falls to be declared. The sum admittedly is larger than it would be if a dividend had just been paid and had gone to the seller of the shares, but that does not to my mind in the slightest degree affect the liability of the purchaser either to pay income tax upon the dividends on the shares which he has purchased, or to calculate in the return he makes for super tax the whole amount of the dividend which he has received in the year previous to that in respect of which he makes the return. On the whole matter I think the case is a simple case and ought to be answered as your Lordship suggested.

LORD ANDERSON—I agree. I think the Commissioners have gone wrong here in the decision they arrived at, and it seems to me that their error is made quite plain if the nature of the transaction which the respondent entered into in the year 1919 is kept in view. What Mr Forrest then did was to make what is known as an industrial investment—that is to say, he invested 1000 guineas of his means in the purchase of 100 shares of an industrial company. Now when an investor enters into a transaction of that sort he does two things with his money. In the first place he buys a share of the assets of the industrial concern proportionate to the number of shares which he has purchased, and in the second place he buys the right to participate in any pro-

fits which the company make in the future. Now when a transaction of this nature is entered into during the currency of the financial year of the industrial concern it is obvious that what happens is this, that not only is a part of the assets purchased outright, but that a chance is bought as well—a chance of sharing in any profits which may be made during the currency of that financial year; and that is just what the respondent bought on this particular occasion. And it matters not in my judgment whether it is expressly stated that a part of the purchase price is paid in respect of the chance which I have alluded to, or whether that is not expressed, because if it is not expressed it is ordinarily implied, and there is no doubt that that is the nature of the transaction. Now what the respondent maintains, as I understand his position, is this, that at the end of the financial year when the chance which had been purchased had materialised and a dividend was declared and paid, a part of the purchase price which was given for that totality should be deducted or set off against the sum which he received as dividend. It seems to me that if we assent to a contention of that sort we shall not only be revolutionising Stock Exchange practice but I think we shall be upsetting the established practice of the Inland Revenue authorities and deciding against the general terms of the Act of Parliament. We shall be offending, as Mr Fenton plainly pointed out, against the well-settled practice of Inland Revenue law in accordance with which capital expenditure which, as Mr Fenton put it, has not earned profits may not be deducted from profits in estimating the amount of tax which is due. Accordingly it seems to me that this case is quite clear, and that we ought to sustain the appeal and answer the question of law as contended for by the Crown.

The Court answered the question of law stated in the Case in the negative, reversed the determination of the Commissioners, and decreed.

Counsel for the Appellants—Fenton, K.C.—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Counsel for the Respondent—J. C. Watson. Agents—Fyfe, Ireland, & Company, W.S.

VALUATION APPEAL COURT.

Saturday, February 2.

(Before Lord Hunter, Lord Sands, and Lord Ashmore.)

W. VERNON & SONS, LIMITED v. ASSESSOR FOR GREENOCK.

Valuation Cases—Appeal—Competency—Appeal on Question other than Value—Lease—Renunciation—Notice of Correction of Entry in Valuation Roll—Refusal of Assessor to Accept Notice.

Valuation Cases—Value—Lease for Ninety-nine Years—Yearly Rent or Value—Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 6.

A firm of grain merchants contracted with a harbour trust to erect a grain mill to the value of £50,000 upon a piece of ground belonging to the trust. They entered upon a ninety-nine years' lease of the ground, in which they undertook to pay a rent for the ground of £125 until the mill was completed, and thereafter, or 'at latest after the expiry of three years, the rent was to be £750. It was also provided that the lessees were to relieve the harbour trustees of all public and parochial burdens and assessments. Under a minute of agreement dated 24th July and 2nd August 1923, and before the mill had been erected, the trust, in consideration of a sum of £20,000, accepted a renunciation of the lease as from Whitsunday 1923. The assessor made up the valuation roll in terms of the Valuation Acts on 15th August 1923, entering the former lessees as proprietors in respect of their lease being for more than twenty-one years, and also as tenants and occupiers, no intimation having at that date been received by him of the lease having been cancelled. The ex-lessees intimated to the assessor on 7th September 1923 that the lease had been cancelled, and requested him to remove their names from the valuation roll, which he declined to do, on the ground that notice of the cancellation had not been given to him until after the roll had been made up. The Valuation Committee on appeal confirmed the assessor's decision. On an appeal, held (1) (following *British Linen Company v. Assessor for Aberdeen*, 1906, 8 F. 508, 43 S.L.R. 442) that no appeal was competent to the Valuation Appeal Court to alter the description of the lessees as proprietors and tenants and occupiers of the subjects; (2) further, that in view of the fact that the lease was one for more than twenty-one years the proper rent of the subjects was not necessarily the rent under the lease, but the rent at which the subjects in their actual state might be reasonably expected to let, and that in the circumstances of the present case this should be £125 plus the amount of public and parochial burdens and assessments.

At a meeting of the Valuation Committee for the burgh of Greenock held at Greenock on 21st September 1923, W. Vernon & Sons, Limited, formerly of 4 Lloyd's Avenue, Fenchurch Street, London, but now of Broad Street House, London, appealed against the following entry of the assessor in the valuation roll for the said burgh for the year 1923-24, viz.—

| Description. | Situation. | Proprietor. | Tenant. | Fen. Duty. | Rent. | Lease |
|--------------|---------------------------------------|--|---------------|------------|-------|----------|
| Ground | James Watt Dock, East Hamilton Street | W. Vernon & Sons, Ltd., Lloyd's Avenue, Fenchurch Street, London | Proprie- tors | Nil | £507 | 99 years |