No. 443.—IN THE HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—2ND JUNE, 1920.

COURT OF APPEAL.—9TH AND 10TH FEBRUARY, 1921.

HOUSE OF LORDS.—23RD AND 24TH FEBRUARY, AND 13TH MARCH, 1922.

GREAT WESTERN RAILWAY COMPANY, ON BEHALF OF W. H. HALL, CLERK TO THE GREAT WESTERN RAILWAY COMPANY, *v.* BATER (SURVEYOR OF TAXES).[1]

Income Tax—Office or employment of profit—Income Tax Act, 1853 (16 *and* 17 *Vic. c.* 34), *Section* 2, *Schedule E; Income Tax Act*, 1842 (5 *and* 6 *Vic. c.* 35), *Section* 146, *Schedule E, Third Rule, and Income Tax Act*, 1860 (23 *and* 24 *Vic. c.* 14), *Section* 6.

Held, *that Mr. W. H. Hall, a clerk on the permanent staff of the Appellant Company, did not hold under the company a public office or an office of a public nature, or exercise a public employment of profit or an employment of profit of a public nature, within the meaning of Schedule E of the Income Tax Acts.*

CASE.

STATED under the Taxes Management Act, 1880, Section 59, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on the 2nd day of January, 1919, for the purpose of hearing Appeals, the Great Western Railway Company (on behalf of W. H. Hall), hereinafter called the Appellant Company, appealed against an assessment to Income Tax under Schedule E in the sum of £175 for the year ending 5th April, 1918, made upon them under the provisions of the Income Tax Acts in respect of an office or employment of profit held in or under the Appellant Company by the said W. H. Hall.

1. No dispute arises in this case upon the question of the amount of salary paid by the Appellant Company to W. H. Hall, the sole question for the determination of the Court being whether the Appellant Company has rightly been assessed on behalf of W. H. Hall under Schedule E of the Income Tax Acts.

2. W. H. Hall entered the service of the Appellant Company in the year 1897 at the age of about fourteen years as an office boy, and was employed in the Divisional Superintendent's Office at Swindon. In February, 1899, he was appointed a lad clerk, and in 1901 a clerk in the service of the Appellant Company. Prints of the conditions upon which he was so appointed are annexed to and made part of this case.[2] Mr. Hall was so appointed at an

(1) Reported (K.B.D.) [1920] 3 K.B. 266; (C.A.) [1921] 2 K.B. 128; (H.L.) [1921] 2 A.C. 1.

(2) Omitted from the present print.

annual salary payable every 28 days on the basis of 28/365ths of the annual amount, but in practice an interim payment on account, approximating to one-half of a month's salary, is made at the expiration of the first 14 days of each period of 28 days. There is not and never has been any written Agreement as to the amount or times of payment or increase of rate of salary, but Mr. Hall has enjoyed the benefit of a practice instituted since his appointment under which the salary of a clerk is increased by annual increments of £5 until a salary of £100 is reached, beyond which amount advances are dependent upon merit and the nature of the post occupied. W. H. Hall's salary during the year in question was at the rate of £130 per annum, plus a war bonus of £45. His employment may be terminated by either party upon a month's notice, and, failing such notice, the employment continues and would not be required to be renewed by either party. Pay is granted to Mr. Hall for each day of the year, including holidays, and in the case of sickness he receives full pay for the first twenty-eight days and five-sixths for the period of six months after the expiration of twenty-eight days.

He became a member of the Superannuation Fund on the 13th February, 1899, and when on the 1st July, 1908, the Superannuation Scheme was substituted for the Superannuation Fund, Mr. Hall continued membership of the Superannuation Scheme from that date, and will, on attaining the age of 60 and being still in the employment of the Appellant Company, be entitled to a pension in accordance with Rule 6, para. (*b*), of the Superannuation Scheme of the Appellant Company. A print of the rules of the Great Western Railway Superannuation Scheme is attached to and forms part of this case.(1)

3. On behalf of the Appellant Company it was contended that the intention of the Income Tax Acts, as shown in the wording of the Schedule itself, is to charge under Schedule E, Public Offices or Employments of Profit and annuities, pensions or stipends payable by His Majesty or out of the public revenue of the United Kingdon, except annuities charged to the duties under Schedule C, and that, although it may be there are words in Rule 3 under Schedule E which might seem to include members of the staff of a railway company, the reference in that Rule to offices or employments of profit held under any company must be read in the light of the words at the commencement and at the end of the Rule defining its scope, viz., "all public offices and employ-" ments of profit of the description hereinafter mentioned within Great Britain" . . . "and every other public office or employment of profit of a public "nature." Even assuming the principal officers of a railway company could be held to fall within the scope of Schedule E, the junior members of the staff holding no definite appointments in the service could not be so included. In this connection reliance was placed upon the decision in the case of *The Attorney-General* v. *Lancashire and Yorkshire Railway Company* [(1864) 2 H. and C. 792], and reference was made to the fact that clerks in the Appellant Company's service who are engaged at weekly wages are assessed under Schedule D, and it was contended that a clerk in the position of W. H. Hall had no more permanency of employment than officers, clerks or engine drivers engaged at weekly wages who are assessed under the rules applicable to Schedule D, and that the fact that he was entitled to a month's notice to terminate his employment was not sufficient ground for making any distinction between him and them.

We were asked, in the above circumstances, to hold that Mr. Hall was entitled to be assessed under the rules of Schedule D on an average of his

(1) Omitted from the present print.

emoluments for the past three years and that the Appellant Company was not liable to be assessed under Schedule E in respect of his salary.

4. The Respondent contended on behalf of the Crown (*inter alia*) that the Appellant Company was a company or society within the meaning of the Third Rule, Schedule E, Section 146, of the Income Tax Act, 1842; that the Income Tax Act, 1860 (23 & 24 Vict. cap. 14), expressly provides that the Commissioners for the Special Purposes shall assess the duties payable under Schedule E in respect of all offices and employments of profit held in or under any railway company, and the said assessment shall be deemed to be and shall be an assessment on the Company, that the case of the *Attorney-General* v. *The Lancashire and Yorkshire Railway* dealt only with manual workers and gave no decision affecting clerks; that W. H. Hall holds an office or employment of profit within the meaning of the above sections, and that the Appellant Company are therefore rightly assessed under Schedule E.

5. The Third Rule of Schedule E, Section 146, of the Income Tax Act, 1842, says:—

> "The said duties shall be paid on all public offices and employments "of profit of the description hereinafter mentioned within Great Britain, "any office belonging to either House of Parliament" . . . "any "office or employment of profit held under any ecclesiastical body, whether "aggregate or sole, or under any public corporation or under any company "or society, whether corporate or not corporate" . . . "and every "other public office or employment of profit of a public nature."

6. We, the Commissioners who heard the Appeal, were of opinion that the contentions put forward on behalf of the Crown should succeed, and we therefore confirmed the assessment.

The Appellant, immediately upon the determination of the Appeal, declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a case for the opinion of the High Court pursuant to the Taxes Management Act, 1880, Section 59, which case we have stated and do sign accordingly.

MARK STURGIS } Commissioners for the Special Purposes of the Income Tax Acts.
P. WILLIAMSON }

October 31*st*, 1919.

Windsor House,
83, Kingsway,
London, W.C. 2.

The case was heard before Mr. Justice Rowlatt on the 2nd June, 1920, when judgment was delivered in favour of the Respondent, with costs.

Sir Lynden Macassey, K.C., and Mr. Geoffrey Lawrence appeared as Counsel for the Appellants, and the Solicitor-General (Sir Ernest Pollock, K.C., M.P.) and Mr. R. P. Hills as Counsel for the Respondent.

JUDGMENT.

Rowlatt, J.—In this case the question is whether a man named Hall, who is a clerk in the service of the Appellants, the Great Western Railway Company, is to be assessed to Income Tax under Schedule D or whether the assessment is to be laid upon the Appellants, as has been done, under Schedule E, upon

the footing that Hall is the holder of an office or employment within that Schedule. This man appears to be a clerk on the permanent staff of the railway company. He has been in their employment for some 20 years and more. He has received annual increments to his wages or salary until they reached £100; and after that figure is reached, according to the statements in the case, further emoluments depend upon the merits of the particular person and upon the work he is called upon to do; and his merits and the work which he has been called upon to do have been such that he is now in receipt of £130 a year. He belongs to the Benevolent Fund of the company, or whatever it is, and so on. He is one of their permanent clerical staff. Beyond that the case does not help me much. I am told that he is what is called a fourth grade clerk, that is to say, there are two or three grades above him in the office of the Running Superintendent, or whatever the branch of the administration is.

Now the question is as to whether he holds a public office or employment of profit under Schedule E in Section 2 of the Income Tax Act, 1853. But it does not depend entirely upon that section, because the Rules under Schedule E in the Act of 1842 have also to be looked at.

Now the Third Rule says that "the duties shall be paid on all public offices "and employments of profit of the description hereinafter mentioned within "Great Britain; (*videlicet*)," and after giving a great many offices, many of which are undoubtedly public offices in every sense of the word, it comes to mention "any office or employment of profit held under any ecclesiastical "body, whether aggregate or sole, or under any public corporation, or under "any company or society, whether corporate or not corporate," the word "public" not being introduced before "office or employment of profit" in that particular collocation.

Then by the Income Tax Act, 1860, it was provided that in the case of railway companies, by Section 6, "the Commissioners for Special Purposes "shall assess the duties payable under Schedule E in respect of all offices and "employments of profit held in or under any railway company" and so on. So that Section 6 of the Act of 1860 recognises the fact that there are public offices or employments held under railway companies. And although it does not add, of its own operation, to Schedule E, it proceeds upon the footing that under Schedule E there are public offices or employments held under railway companies.

Looking back again to the words I have quoted from the Third Rule of the Act of 1842, one is driven to the conclusion that a public office or employment of profit within the meaning of the Schedule does not mean an office or employment which has duties direct to the public. Apart from those provisions which I have read it is quite clear from what was accepted by the House of Lords, to put it no higher, in the case of *Tennant* v. *Smith*,[1] that a man in the position of a bank manager, such as the bank manager in question, was holder of a public office or employment within the meaning of this Schedule although he, of course, had no duties direct to the public, unless he had, as I am bound to say it occurred to me he might have, the duty of superintending the payment of gold against notes in Scotland. I cannot believe it turned on any such narrow point as that; and it seems to me therefore that the word "public" very nearly disappears from this definition. It may be it disappears because under the "*videlicet*" as the Solicitor General argued, in Rule 3 in the

[1] 3 T.C., 158.

Act of 1842, there comes a mention of offices and employments of profit under companies without the word "public." But at any rate the word "public" practically disappears, I think, anyhow as it has been applied, because I do not know what a public office is, unless it is an office which involves duties to the public. If there are no duties to the public in the officer, I confess I do not know what is the meaning of a public officer. What publicity there is about a bank manager I do not know.

But it is contended that this man—and this is the real point—is not the holder of an office or employment of profit at all. It is said that he is just one of the clerks, one of a number of clerks. I gather that is the case, although I have not got it specifically stated in the case before me. It is said that that is not the sort of position that is meant by this Schedule, and it is pointed out that under Rule 1 in the Act of 1842 the assessment is to be made for a year in respect of the office—and in the case of a railway company upon the railway company of course—and it shall be in force for a whole year and levied without any new assessment notwithstanding a change had taken place in the office or employment of the person having or exercising the same. In this case that would not have effect because it would be on the railway company. Then it is pointed out that in the case of a man dying or leaving the office, he is responsible for the proportion of arrears and the proportionate part of the current year.

Now it is argued, and to my mind argued most forcibly, that that shows that what those who use the language of the Act of 1842 meant, when they spoke of an office or an employment, was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders; and if you merely had a man who was engaged on whatever terms, to do duties which were assigned to him, his employment to do those duties did not create an office to which those duties were attached. He merely was employed to do certain things and that is an end of it; and if there was no office or employment existing in the case as a thing, the so-called office or employment was merely an aggregate of the activities of the particular man for the time being. And I think myself that that is sound. I am not going to decide that, because I think I ought not to in the state of the authorities, but my own view is that the people in 1842 who used this language meant by an office a substantive thing that existed apart from the holder. If I thought I was at liberty to take that view I should decide in favour of the Appellants, but I do not think I ought to give effect to that view because I think it is really contrary to what was proceeded upon in substance in the *Lancashire and Yorkshire case* in 1864 (1) and one ought not lightly to depart, of course, from a course of business proceeded upon in matters of this kind. It seems to me—so far as I can extract what happened in that case from the two different reports which give entirely different versions even of the judges who delivered judgment—as far as I can see, in that case it was taken as common ground on the side of the railway company and on the side of the Crown that permanent officials of a clerical kind would be officers—when I say officers I mean people under Schedule E—as opposed to mere labourers or weekly wage earners such as porters, engine drivers, and the like. I cannot help thinking that if this had arisen in 1864 it would have been conceded on all sides that this man was to be dealt with under Schedule E, and I suppose that practice has continued ever since. Therefore, thinking that I am following in substance what is the authority, I dismiss this appeal with costs.

(1) *Attorney-General* v. *Lancashire and Yorkshire Railway Company*, 10 L.T. 95.

An appeal having been entered against the decision in the King's Bench Division, the case was heard before the Master of the Rolls (Lord Sterndale) and Scrutton and Younger, L.JJ., in the Court of Appeal on the 9th and 10th February, 1921, when Mr. Disturnal, K.C., and Mr. Geoffrey Lawrence appeared as Counsel for the Appellant, and the Solicitor-General (Sir Ernest Pollock, K.C., M.P.) and Mr. R. P. Hills as Counsel for the Respondent.

Judgment was delivered on the latter day in favour of the Respondent, with costs.

JUDGMENT.

The Master of the Rolls.—This case, like many others under the Revenue Acts, is difficult because of the, I will not say loose but general, phrasing of the provision with which we have to deal. It is Rule 3 of Schedule E to Section 146 of the Income Tax Act of 1842, and it says this :—" The said duties " shall be paid on all public offices and employments of profit of the description " hereinafter mentioned within Great Britain ; (*videlicet*) any office belonging " to either House of Parliament, or to any court of justice, whether of law or " equity, in England or Scotland, Wales, the Duchy of Lancaster, the Duchy " of Cornwall or any criminal or justiciary or ecclesiastical court, or court of " admiralty, or commissary court, or court-martial ; any public office held " under the civil government of her Majesty, or in any county palatine, or " the Duchy of Cornwall ; any commissioned officer serving on the staff, or " belonging to her Majesty's army, in any regiment of artillery, cavalry, " infantry, royal marines, royal garrison battalions, or corps of engineers or " royal artificers ; and any officer in the navy, or in the militia or volunteers ; " any office or employment of profit held under any ecclesiastical body, whether " aggregate or sole, or under any public corporation, or under any company " or society, whether corporate or not corporate ; any office or employment of " profit under any public institution or on any public foundation, of whatever " nature or for whatever purpose the same may be established ; any office or em- " ployment of profit in any county, riding, or division, shire or stewartry, or in " any city, borough, town corporate, or place, or under any trusts or guardians " of any funds, tolls, or duties to be exercised in such county, riding, division, " shire, or stewartry, city, borough, town corporate, or place ; and every " other public office or employment of profit of a public nature."

Now it would seem at first sight that the word " public " is running throughout that rule, and in the judgment given by the learned judge, Mr. Justice Rowlatt, he says that the word " public " has dropped out in the course of years. I cannot agree with that, but I think what is true is that the word " public " has been interpreted in a very much more liberal sense than at first would perhaps seem to be its meaning, especially if I may take the case before Lord Justice Bankes sitting as a judge of first instance of *Berry* v. *Farrow* ([1914] 1 K.B. 632), where, although the matter wasnot before him absolutely for decision, the learned judge expressed the opinion that a man who was the managing director of a firm called Berry's Non-Skid Motor Company, Limited, which carried on no business and at the office of which he only attended on very few occasions, was taxable under Schedule E and, therefore, if the word " public " is still applicable, it is obvious that it has been interpreted in a very wide way indeed.

The words with which we have to deal here are " any office or employment " of profit held under any public corporation or under any company or society

" whether corporate or not corporate." What we have to deal with is a clerk in the employment of the Great Western Railway Company. I should think that at the time this Act was passed in 1842 there were not a great many companies, and most of them were companies, statutory or chartered companies and companies of considerable public importance. Of course, now there are numberless companies, and therefore the question has become a very much more important one when it arises as to the meaning of the words I have read :— " office or employment of profit held under any company or society whether " corporate or not corporate." Whether it would be better in these days, when there are so many cases of this description of persons in the employment of companies, for the Legislature to define more clearly what is intended by " office or employment of profit under a company " is a matter for Parliament to consider. I can only say, as it stands, it seems to me a problem of the most extraordinary difficulty to say what really was meant by the words ; and where it is a question of taxation, it is always well that a person should be able to know clearly whether he is taxable or whether he is not. The position of, I will not say, this Appellant, because the Great Western Railway Company are the Appellants, but the position of the person in respect of whom the assessment was made, is stated in the Case. He entered the service of the Appellant Company in the year 1897 as an office boy and was employed at Swindon. In February, 1899, he was appointed a lad clerk, and in 1901 a clerk in the office of the Appellant Company. Then it gives the conditions. " He was appointed at an annual salary payable every 28 days on the basis " of 28/365ths of the annual amount, but in practice an interim payment on " account, approximating to one-half of a month's salary, is made at the expira- " tion of the first 14 days of each period of 28 days. There is not and never " has been any written agreement as to the amount or times of payment or " increase of rate of salary, but Mr. Hall has enjoyed the benefit of a practice " instituted since his employment under which the salary of a clerk is increased " by annual increments of £5 until a salary of £100 is reached, beyond which " amount advances are dependent upon merit and the nature of the post " occupied. Mr. Hall's salary during the year in question was at the rate of " £130 per annum plus a war bonus of £45. His employment may be ter- " minated by either party upon a month's notice and failing such notice the " employment continues and would not require to be renewed by either party. " Pay is granted to Mr. Hall for each day of the year including holidays, and " in the case of sickness he receives full pay for the first 28 days and 5/6ths " for the period of six months after the expiration of 28 days." Then there is annexed to the case a form of application by which he undertakes to become a member of the Great Western Superannuation Fund. There are in fact either two funds or two divisions of the fund, one for the salaried employees, and one for those employees on wages, and he, of course, comes under what is called the superannuation scheme for, I think it is called, the salaried staff. Every person is entitled to some benefit, being a man whose name is included in the register of the salaried staff. We were also told in the course of the argument that he was a fourth-class clerk, but it does not really matter what grade of clerk he is for the purpose which we have to decide, I mean in law ; I do not know how it may be in fact. It was contended on behalf of the Appellants that he does not hold an office or employment of profit under the Company which can be taxed under this Schedule, in the first place because it is not a public office or employment. As I have said it seems to me in the case to which we have been referred that the word " public " has been interpreted in such a wide sense that it is not possible to accept that argument as

a matter of law. The test which was put and which is most relied upon is this: it is said you must have an office or an employment apart from the officer or the employee in this sense, that although if the officer or employee dies or goes away or leaves, the office remains, and it must be something that has to be filled up, and therefore there must be a continuity in that sense. It certainly is an attractive argument, but when one comes to apply it, it seems almost impossible to apply as an absolute definition, and it is difficult to say when you have an establishment of clerks, although the establishment may be subject to alteration from time to time, that when anybody dies or leaves there is not a vacant clerkship; it may be that the number may be altered from time to time, but until it is altered there is the vacancy which is always spoken of as a vacancy in a clerkship. Of course, that applies more to cases where the establishment is limited by either a Treasury Minute or a Minute of a Government Department or the resolution of a company in general meeting or something of that description, but that does not seem to be a test which you can possibly apply to every sort of office or employment. It does not seem to me to be disputed that a manager or an assistant manager would be an office or employment under this Section, but it is always open and perfectly competent to the company—it is not practically competent of course to a railway company, but it is always competent as a matter of power to an ordinary company—to abolish its managership, or abolish its assistant-managership or to say:—We will go on with a manager without an assistant manager; then the assistant-managership does not remain by itself as a separate entity; there is no such thing. I cannot see how that can be applied as a conclusive test in all cases; nor do I see how some of the tests or any of the tests contended for by the Crown can be applied as absolute tests in all cases. It is said he must be on the permanent staff. Well, the permanent staff, of course, does not mean that they cannot get rid of him, but it means the permanent establishment as contrasted with the temporary staff taken on from time to time. I do not think that could be applied in every case. It is also said he is on the salaried staff and not on the wage-earning staff. I do not think that can be applied as a test in all cases, nor do I think that the exact nature of the work can be a test. Although we are not told exactly what the nature of the work of the clerk is, we must take it that it is ordinary clerk's work, which I suppose we are expected to understand; and it is not disputed that some of the employees of the Railway Company come within this provision. On the other hand, I do not think it is disputed, and in fact since the case of *Attorney-General* v. *The Lancashire and Yorkshire Railway Company* [1] it cannot be disputed until that case is overruled, that many of the employees of the Railway Company do not come within this provision, people like those men spoken of there, engine drivers, porters, and so on; but neither the Great Western Railway Company nor the Crown have been able to suggest any fixed point at which the line is to be drawn except the one that has been suggested by the Great Western Railway Company, that a man must be holding an office or a position which remains there an office or position, although the particular holder for the time has gone. That, as I have said, I do not think can be applied to all cases. It comes back, as it seems to me, to the somewhat unsatisfactory and inconclusive result that one has to arrive at in all these cases where there is a large tract which it is not possible to say exactly is on one side or on the other of the line. It comes to be then a matter which has to be decided upon the inference that is drawn from a considerable number of

(1) 2 H. & C. 792.

circumstances; in fact it comes back to be a question of fact. It is an unsatisfactory conclusion at which to arrive, because I should wish, if I could, to be able to lay down some rule which would be a guide in the division of this staff into taxable and non-taxable people under Schedule E, but I do not see my way to do it; I do not think it possible.

Now, the Commissioners having the contentions of both parties before them and the last contention being on the part of the Crown that W. H. Hall holds an office or employment of profit within the meaning of the above Section, have stated that they are of opinion that the contentions put forward on behalf of the Crown should succeed. Now, I think that comes to a finding of fact that this man was such an officer and I cannot see my way to say that there was no evidence on which they could possibly draw that inference and come to that conclusion and, unless I can say there is no evidence on which they could possibly come to the conclusion, I cannot interfere with their decision. I know that it is an unsatisfactory state of things that the Court finds itself unable to lay down any guiding rule which would avoid questions of this description coming before the Commissioners again, and I have looked very carefully and tried very hard to find some interpretation of this Section by which I can arrive at a conclusion that will lay down such a rule, but I find myself unable to do so, and therefore the conclusion that I have come to is that I cannot dispute the findings of the Commissioners, and therefore the Appeal must be dismissed with costs.

Scrutton, L.J.—I agree with the Master of the Rolls that this is a difficult case, and I also agree that our decision is not, I think, very satisfactory even to ourselves. That results from the fact that the Income Tax Acts are being worked under a system of considerable antiquity which in many respects has not been amended by Parliament. All employees whose income reaches a certain amount, which has varied from time to time, are taxable either under Schedule E or under Schedule D. Whether they come under one schedule or the other has certain consequences, which I do not profess to enumerate exhaustively, but some of them are:—If they come under Schedule E, they are taxed on the income of the year of assessment and if they come under Schedule D, they are taxed on the average of the preceding three years' income, if there is such an average; and that if they come under Schedule D, they are assessed directly and must fight out their battles with the Income Tax people by themselves, but if they come under Schedule E, they are assessed through their employer who has to pay to the Income Tax authorities and then deduct from his employee. Naturally under those circumstances it may make a difference to a man whether he is put under Schedule D or whether he is put under Schedule E.

Now Schedule E itself taxes public offices or employments of profit. I do not know whether, looking at it by the light of nature, you would ever say that a fourth class clerk in the Running Department of the Great Western held a public office or employment of profit. But Parliament has not stopped there, because it has interpreted the schedule by rules, and the Third Rule applying to Schedule E is:—"The said duties shall be paid on all public "offices and employments of profit of the description hereinafter mentioned "... and every other public office or employment of profit of a public "nature." That appears to amount to a statutory declaration that at any rate some of the people employed by the persons hereinafter mentioned do hold public offices and employments of profit. When you go down the long list of persons hereinafter mentioned, after passing through a number of what

are clearly public offices—Courts of Justice, the Army, the Duchy of Cornwall, and so on and so on—you come to "any office or employment of profit held "under any ecclesiastical body, whether aggregate or sole, or under any public "corporation, or under any company or society, whether corporate or not "corporate," and that seems to me clearly to amount to a statutory declaration that companies may have persons employed under them who hold public offices or employments of profit. It also seems to be quite clear from Section 6 of the Act of 1860 that the Legislature thought that railway companies might have people under them who held offices and employments of profit, who were to be assessed under Schedule E. At the time, 1842, when this Rule was drawn up, as far as I know there was not any Companies Act and there were no limited companies, but there were certain statutory companies established by statutes, such as railway companies—probably the Great Western was one of them—and there were certain corporations of great antiquity and dignity established under charter, such as the Hudson's Bay Company, service in which was a kind of aristocracy of employment with old traditions going back to the time of the Stuarts; and what has happened is that on a Rule drawn up at that time, when companies were very few and very large and very important, there has grown up a system under which any number of companies for all sorts of small purposes have come into existence, and the puzzle is to apply the Third Rule of Schedule E to the new state of things. One has had already in two or three cases, in the last two or three years, to comment on the fact that under an Act drawn up when there were practically no companies, you have to settle all sorts of problems about a great mass of companies which were not contemplated when the Act was drawn, and this is one of the difficult cases.

Now we have the guidance of one decision which, as far as I gather, neither party to this litigation has sought to object to or say it is wrongly decided, a case in which the question of people employed by the Lancashire and Yorkshire Railway Company came before the Court in 1864, where the Court held that people at weekly salaries, who might be described as workmen and artisans, such as engine drivers and porters, did not come within Schedule E. The language which Baron Martin uses is:—"We think Schedule E extends "only to offices or employment under corporations which are of a public "nature, and not to workmen or artisans like engine drivers, porters and "labourers." That appears to decide that not every person employed by a company comes under Schedule E. But when you ask why not, I am afraid you do not get very much light as to what is the boundary line between those people employed who do come under Schedule E and those people employed who do not come under Schedule E. "Workmen or artisans like engine drivers, "porters and labourers" rather suggests that it has something to do with the importance or dignity of the work they are doing under the company, at a time when it was not thought very dignified to be doing manual labour, an idea which is perhaps not so strongly held as it used to be. Something is made of the time at which the salary is paid, whether weekly or annual. Again that seems rather to point to a question of the degree of the importance of the position held under the company. Something is made of the question whether there is an office which may be said to be vacant and which will wait to be filled until someone is placed in it. Again that seems to be very much a question of degree.

Now, in this case the Commissioners, having looked at the position of the gentleman in question, whom I cannot help having a suspicion the Great

Western Railway Company selected because he was not a very important person and they thought they had a chance of winning with him, find that he is one of the salaried staff of the company, apparently at a yearly salary paid monthly with an advance fortnightly, that he has rights under a pension fund, and that he has a certain amount of permanent position, and on that they have said :—" We find that he does hold an office or employment of profit " under a company." Now can this Court possibly say that there is no evidence upon which they could say that ? Before the Court could say that it would have to lay down a clear definition of the characteristics which were necessary for an office or employment of profit, a task which I personally find utterly beyond me. Can I possibly say under these circumstances that the Commissioners were wrong in thinking that this gentleman, with these characteristics, did hold an office or employment of profit under a company ? In my view I cannot possibly say that he does not. I cannot possibly say that there is no evidence upon which they could find that he does. I do not profess for a moment that this will be satisfactory to the parties who have come to this Court. I do not suppose for a moment that it will afford any guide to the Commissioners, though it may afford them some sense of security in future appeals. All I can say is, it would be very desirable if Parliament would tackle the question of what exactly they now mean in the present state of companies by this schedule. I observe that the Commission which has reported on suggested amendments of the Income Tax Acts has advised that every employee be put under Schedule E, assessed on that year's income, and have his tax levied through his employer. That is a matter for Parliament and not for this Court. If that amendment is adopted, it will do away with the difficulties which arise in this case. But it is not for this Court to express any opinion as to whether that amendment should or should not be adopted. All that this Court can say is that on this appeal they cannot see that as a matter of law the Commissioners have gone wrong. On the facts it is for the Commissioners alone to decide, and if they have not gone wrong in law it is not for the Court to express any opinion.

Younger, L.J.—I also can arrive at no other conclusion than that which has been stated by my Lord and the Lord Justice, and I agree that this Appeal must be dismissed, with costs.

An appeal having been entered against the decision in the Court of Appeal, the case was argued before Lords Buckmaster, Atkinson, Sumner, Wrenbury and Carson in the House of Lords on the 23rd and 24th February, 1922, when judgment was reserved. Mr. Disturnal, K.C., and the Hon. Geoffrey Lawrence appeared as Counsel for the Appellant, and the Attorney-General (Sir Gordon Hewart, K.C., M.P.), the Solicitor-General (Sir Ernest Pollock, K.C., M.P.) and Mr. R. P. Hills as Counsel for the Crown.

Judgment was given on the 13th March, 1922, against the Crown, with costs, reversing the decision of the Court below, their Lordships deciding (Lord Buckmaster dissenting) that W. H. Hall did not hold, in his capacity as a clerk in the service of the Appellant Company, a public office or an office of a public nature or exercise a public employment or an employment of a public nature within the meaning of Schedule E of the Income Tax Acts.

JUDGMENT.

Lord Buckmaster.—My Lords, the question raised upon this Appeal is whether the Appellants, the Great Western Railway Company, are liable to pay Income Tax upon the salary earned by Mr. W. H. Hall, who is a clerk in their employment. The facts are not in dispute. Mr. Hall entered the service of the Appellants in 1897, at the age of 14 years, as an office boy. In 1899 he was appointed a lad clerk, and in 1901 a clerk in the service of the Company. His salary as a clerk is estimated at a yearly sum, and during the period in question was at the rate of £130 per annum, together with a war bonus of £45. Although the salary is annual, it is payable every 28 days on the basis of $\frac{28}{365}$ ths of the total amount, and in practice the payment is made once a fortnight. His service is liable to termination by a month's notice on either side, and in case of sickness he is entitled to receive full pay for the first 28 days and five-sixths for the period of six months after the expiration of the 28 days. He is also a member of a superannuation scheme under which he will, on attaining the age of 60 (provided he be still in the Company's service), be entitled to a pension. During the year in question, which ended on the 5th April, 1918, his employment would be correctly described as being that of a clerk in the Superintendent's Office of the Appellant Company at Swindon. The Appellants were assessed to Income Tax under Schedule E in the sum of £175 for this year, the ground of the assessment being that they were liable because Mr. Hall held an office or employment of profit under the Company. The question is whether under Schedule E of the Income Tax Act that assessment was properly made, or whether it should have been assessed directly upon Mr. Hall.

It is unnecessary to describe again the method by which Income Tax is imposed under the Statutes of 1842 and 1853, nor is it profitable to lament the confusion which those provisions create. Schedules D and E are the ones relevant for the present consideration; and although alphabetically D precedes E, it is agreed that for purposes of the Income Tax the alphabetical order must be reversed and D must be read as following instead of preceding the other letter. Schedule E provides that the duties shall be annually charged on the persons using or exercising the offices or employments of profit mentioned in the Schedule for all salaries, fees, wages, perquisites or profits accruing by reason of such offices, and the third rule of the Schedule, which is the most important for the present purpose, runs in the following words:—"Third—The said duties "shall be paid on all public offices and employments of profit of the description "hereinafter mentioned within Great Britain; (*videlicet*) any office belonging "to either House of Parliament, or to any Court of Justice, whether of law or "equity, in England or Scotland, Wales, the Duchy of Lancaster, the Duchy of "Cornwall, or any criminal or justiciary or ecclesiastical court, or court of "admiralty, or commissary court, or court-martial; any public office held "under the civil government of Her Majesty, or in any county palatine, or the "Duchy of Cornwall; any commissioned officer serving on the staff, or belonging "to her Majesty's army, in any regiment of artillery, cavalry, infantry, royal "marines, royal garrison battalions, or corps of engineers or royal artificers; "any officer in the navy, or in the militia or volunteers; any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, "or under any public corporation, or under any company or society, whether "corporate or not corporate; any office or employment of profit under any "public institution, or on any public foundation, of whatever nature or for "whatever purpose the same may be established; any office or employment "of profit in any county, riding, or division, shire or stewartry, or in any city,

" borough, town corporate, or place, or under any trusts or guardians of any " fund, tolls, or duties to be exercised in such county, riding, division, shire, " or stewartry, city, borough, town corporate, or place ; and every other public " office or employment of profit of a public nature ". The Income Tax Act of 1860 provides for assessment on the railway company of profits or gains, and by Section 6 it enacts as follows :—"6. In like manner as aforesaid the Commis- " sioners for Special Purposes shall assess the duties payable under Schedule E " in respect of all offices and employments of profit held in or under any railway " company, and shall notify to the secretary or other officer of such company " the particulars thereof ; and the said assessment shall be deemed to be and " shall be an assessment upon the company, and paid, collected, and levied " accordingly : and it shall be lawful for the company or such secretary or other " officer to deduct and retain out of the fees, emoluments, or salary of each such " officer or person the duty so charged in respect of his profits and gains." There is no dispute, therefore, that the railway company is liable to be directly assessed in respect of certain payments made by them to their employees, and the question is whether the occupation of Mr. Hall renders them liable in respect of his remuneration. For the Appellants it is contended that they are not, for this reason : that it is impossible to read the third branch of Schedule E without seeing that the word " public " governs all the offices and employments that are therein mentioned. The word is found at the beginning of the rule ; and though it is omitted before the phrase " any office or employment of profit " held under any company or society ", yet the rule concludes with the words " every other public office or employment of profit of a public nature ", and effect cannot be given to those words without assuming that all the preceding provisions are similarly qualified by the word " public ". It is then said that the occupation of Mr. Hall cannot possibly be regarded as public, and that consequently he is liable to be assessed under Schedule D and the Company is free from assessment under Schedule E.

Did the third rule stand alone, I think this argument would admit of no answer, but it must be accepted that the Statute of 1860 has expressly declared that a railway company is to be directly assessed in respect of all offices or employments of profit held in or under them, and this leads to one of two results, either all offices or employments of profit under the railway company are liable, or a certain qualified number are, which have to be designated as " public ". I find myself unable to accept this latter interpretation because I cannot see how any one office held under a railway company is more public than another. The real meaning of a public office is an office the payment for which is not provided out of a private fund, and, directly it is assumed that an office or employment of profit under a railway company may be public, the distinctive value of the word is destroyed. Further, if the offices and employments of profit can be divided so that some are preferably regarded as public and others not, then the Act of 1860 made no change in the position, since for the public offices and employments of profit the company were already liable under the third rule. To my mind it follows that the only meaning attributable to that rule is that all offices or employments of profit under the railway company are within the scope of the Act of 1860, as they are in terms stated to be.

It is then pointed out with great force that as long ago as the decision of *Attorney-General* v. *The Lancashire and Yorkshire* case, which is reported in many reports, of which 2 H. and C., page 792, is sufficient for purposes of reference, engine drivers, porters, and labourers were held to be outside the Statute, and yet none the less each of the men employed on these classes of work would

normally hold an employment of profit. It is indeed difficult to know how any branch of service can be excluded upon the view I take as to the meaning of the section, but, even if I differed from the earlier decision, I should not hesitate to accept it as an authority now, having regard to the subject matter of the dispute and the length of time that has elapsed during which the practice established has been obeyed. It becomes, therefore, necessary to see whether there is anything to distinguish the employment of Mr. Hall from that of, for example, the engine driver. It certainly cannot be found in the amount of his salary, and yet there are marked distinctions between the two services which have an important bearing upon the point. It may be difficult to draw a distinction between salary and wages; in substance and essence there is none, and yet wages do imply a daily or a weekly payment, or a payment by the job, and not, as in the case of Mr. Hall, a fixed annual sum calculated by the year and only paid at frequent intervals for purposes of convenience. Again, although Mr. Hall's work is not permanent seeing that he can be dismissed at a month's notice, yet the circumstances associated with it point to a view, accepted by both parties, that it will continue. The provision as to sickness is a notable instance, and so also is that with regard to the pension fund. Whether he holds the "office" of a clerk I hesitate to say, but he is definitely in the employment of the Company on terms other than that of a weekly wage, and these are, I think, the distinctions that justify the Crown in their contention that the railway company is liable to be assessed directly, and not Mr. Hall. This conclusion is, I think, strengthened by observing that deduction of Income Tax at the source in respect of weekly wages is impracticable, but it is relatively easy in the case of a yearly salary. There are no cases in which this point has been determined but two, *Tennant* v. *Smith* (1) ([1892] A.C. 150) and *Berry* v. *Farrow* ([1914] 1 K.B. 632), in which it has been assumed, though in neither case was its determination or assumption necessary for the determination of the case.

I do not pretend that the opinion I hold rests on any firm logical foundation. Logic is out of place in these questions, and the embarrassment that I feel is increased with the knowledge that my views are not shared by other Members of the House, but this fact is not surprising. It is not easy to penetrate the tangled confusion of these Acts of Parliament, and though we have entered the labyrinth together, we have unfortunately found exit by different paths.

Lord Atkinson.—My Lords, the Commissioners for the Special Purposes of the Income Tax Acts have in this case adopted a mode of framing the case they have stated which is, I think, both objectionable and embarrassing. Their determinations of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come: and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs. With their rulings upon questions of law it is entirely different. The Court of Review is quite entitled, indeed, I think, bound, to overrule their decisions if they think them erroneous. What I have many times in this House protested against is the attempt to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be effected by styling the finding on a mixed question of law and fact a finding of fact. What is the proper construction of a statute, or of any other printed or written document, is a question of law. In this case the Appellants

(1) 3 T.C. 158.

contend for one construction of Rule 3 of Schedule E of the Income Tax Act of 1842, if not as well of the 5th and 6th Sections of the Income Tax Act of 1860. The Respondents contend for another and different construction of each of these enactments, certainly of the first. Their respective contentions are set forth in paragraphs four and five of the Case Stated. The conclusion at which the Commissioners arrive is thus stated: "We the Commissioners who have heard "the Appeal were of opinion that the contention put forward by the Crown "should succeed, and therefore we confirmed the assessment". But that must mean that they have decided (1) that the construction of the above-mentioned statutes contended for by the Crown was their true construction, and (2) that the facts which they held were proved were enough to bring this case of Hall's within this Rule 3, Schedule E, so construed. If they had stated clearly what was their conclusion upon the first matter, your Lordships could overrule these if you considered them in error, while, however much you might disagree with their conclusion on the second matter, you could not disturb it if you found that there was sufficient evidence before them to sustain this conclusion. It is essential, therefore, that the Commissioners should, when stating a case, clearly set forth the conclusions of law at which they have arrived, and separate and distinct from these the conclusions of fact at which they arrived. That is the proper and convenient course to follow. Any other only leads to embarrassment. I cannot agree that the question in dispute between the parties in this case is, as is apparently held by the Court of Appeal, merely a question of fact. One has first to construe those puzzling enactments, Schedule E, Rule 3, of the Act of 1842, and then Section 6 of the Act of 1860, and having arrived at their meaning determine whether the facts proved bring Mr. Hall's case within them.

I do not think the expressions found in this Rule 3, namely, "public offices" and "employments of profit", or "public employments of profit", whichever it be, are synonymous expressions. I think they are used to denote two different things. It is by no means easy, however, to define or describe what is the difference between those things. The rule opens with the words:—"The said "duties shall be paid on all public offices and employments of profit of the "description hereinafter mentioned within Great Britain (*videlicet*)." All that follows is, in my view, an enumeration of the several things which are of the class mentioned, namely, public offices and public employments of profit, or employments of profit of a public nature, whichever it be. The last two lines of the rule show, I think, that this must be so. There are found the significant words "and "every other public office or employment of profit of a public nature". The offices referred to in the rule must, therefore, be public offices, and the employments of profit must be either public employments of profit or, what is very much the same thing, "employments of profit of a public nature". The first rule of Schedule E throws a little light upon the proper construction of the third rule. It provides that the duties (*i.e.*, the tax) shall be annually charged upon the persons respectively having, using or exercising the offices or employments of profit mentioned in Schedule E, or to whom the annuities, pensions or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites or profits whatsoever accruing by reason of such offices, employment or pensions, after making the deduction named. Then comes a provision confined entirely to the offices and employments already mentioned. It runs thus:—"Each assessment in respect of such offices or employments shall be in "force for one whole year, and shall be levied for such year without any new "assessment, notwithstanding a change may have taken place in any such "office or employment, on the person for the time having or exercising the same." That is, the tax for the year shall be assessed upon the person holding the office

or exercising the employment at the time the assessment is made. A proviso is then introduced adjusting, when the change contemplated has taken place, the burden of the tax between the persons who together have filled the office or exercised the employment during the entire year of assessment. It runs thus :— " Provided that the person quitting such office or employment, or dying within " the year, or his executors or administrators, shall be liable for the arrears due " before or at the time of his so quitting such office or employment, or dying, " and for such further portion of time as shall then have elapsed, to be settled " by the respective Commissioners, and his successor shall be repaid such sums " as he shall have paid on account of such portion of the year as aforesaid." Thus the entire year of assessment seems to be treated as a unit of service, and the salary as a unit of recompense, not an aggregate of a number of smaller sums payable at different times and each recompensing the service rendered during an independent fraction of the year. Again, the word " successor " is very significant. It seems to indicate continuity of the office or employment, and also to indicate the existence of something external to the person who may hold the one or exercise the other. Employment of profit, if it be not identical with office, is thus treated as something closely akin to it.

I fully concur in the opinion happily expressed by Mr. Justice Rowlatt in the following passage of his judgment :—" Now it is argued, and to my mind argued " most forcibly, that that shows that what those who used the language of the " Act of 1842 meant when they spoke of an office or employment, was an office " or employment which was a subsisting, permanent, substantive position, " which had an existence independent from the person who filled it, which went " on and was filled in succession by successive holders ; and if you merely had " a man who was engaged on whatever terms to do duties which were assigned " to him, his employment to do those duties did not create an office to which " those duties were attached. He was merely employed to do certain things, " and there is an end of it, and if there was no office or employment existing in " the case as a thing, the so-called office or employment was merely the aggregate " of the activities of the particular man for the time being. I think, myself, " that is sound, but I am not going to decide it, because I ought not to on the " state of the authorities. My own view is that the people in 1842 who used " that language meant by an office a substantive thing that exists apart from the " holder". Railways are not named in the catalogue of subjects to which Rule 3 applies. Section 6 of the Act of 1860 is designed, I think, to remedy this omission. It provides, in a clumsy way, that the Commissioners for Special Purposes shall assess the duties payable under Schedule E in respect of all offices and employments of profit held under any railway company. But the only duties assessed on offices or employments of profit under Schedule E are those assessed on public offices or employments of profit which are either " public " or of a public nature, and the effect of Section 6 of the later Act is on this point, I think, merely to write into this third rule the words " railway " company ". No doubt the section goes on to provide that the duties payable in respect of these offices and employments shall be assessed upon and paid by the railway company, and by them deducted from the fees, emoluments, or salary of each such officer or person. A method is thus devised for, as it were, deducting the tax at the source. The authorities to which your Lordships have been referred do not afford much assistance. In the *Attorney-General* v. *Lancashire and Yorkshire Railway Company* (2 H. and C. 792), the question actually decided was not at all identical with that raised in the present case. That case came before the Court as a special Case Stated for its opinion. The opening

lines of the first paragraph of the case set forth the relevant facts. The company stated that they had in their employment for the purposes of their business many officers, clerks, and servants; that of these some are engaged at fixed annual salaries payable in some instances by quarterly payments, in other instances by monthly payments, that their engagements were terminable by either party giving to the other in some instances a year's notice, in other instances a half-year's notice, in other instances a quarter of a year's; that failing such notice these engagements would continue and would not require to be renewed by either party in order to prevent them coming to an end.

The third paragraph of the case runs as follows :—" The Defendants, however, although willing to comply with the requisition (*i.e.*, the requisition " made under Section 6 of the Act of 1860) as regards such officers, clerks and " servants as are engaged at annual salaries, have refused to comply with it in " respect of those engaged at weekly wages". And the question for the decision of the Court is in paragraph 5 stated to be " whether the Defendants are liable " to be assessed under Schedule E in respect of their officers, clerks or servants " so engaged as aforesaid at weekly wages as well as in respect of those engaged " at annual salaries ". The head note of the case in this report is not quite accurate. It is expressly stated in the report, however, that the judgment of the Court was delivered by Baron Martin. At page 810 he said :—" This is a " special case for the opinion of the Court. The question is whether the Defend- " ants are liable to be assessed under Schedule E of the Income Tax Act " (5 & 6 Vict. c. 35) and succeeding statutes in respect of engine-drivers, porters " and labourers engaged at weekly wages. The Defendants have persons in " their employment as engine-drivers, porters and labourers engaged at 40*s.* per " week and upwards, and if their wages during the year amount to £100 they " are liable to Income Tax". He then quotes the sixth section of the Act of 1860 (23 & 24 Vict. c. 14, Section 6), and says :—" if the duties upon such persons " as the engine-drivers, porters and labourers of the company are not payable " under Schedule E, the Defendants are entitled to the judgment of the Court " and we are of opinion that the duties are not payable under Schedule E, but are " payable under Schedule D". From the use of the word " we " it would appear clear that the learned Baron was delivering the judgment of the Court. Further on in his judgment he is represented as saying :—" The third rule of Schedule E " enacts that duties mentioned in this schedule shall be paid on any public " offices and employments of profit of the description mentioned, viz., offices " belonging to the Houses of Parliament, Courts of Law and Equity, offices in " the Army, offices of profit under any corporation and a variety of others, and " finally every other public office or employment of profit of a public nature. " We think Schedule E extends only to offices or employment under cor- " porations which are of a public nature, and not to workmen or " artisans like engine-drivers, porters and labourers. They hold no public " office whatever, and in our opinion are within Schedule D and not within "Schedule E." The report of this case in 33 L.J.Ex. 163 is different. It represents Chief Baron Pollock as having delivered the first judgment and Baron Martin the second. The former learned judge is represented to have used the following words in reference to Rule 3 of Schedule E :—" The rule says : ' The " ' said duties shall be paid on all public offices and employments of " ' profit of the description hereinafter mentioned' ", and then gives a long list of offices in the Houses of Parliament, in the Courts of Justice, under Civil Government or in any County Palatine, under any ecclesiastical body whether aggregate or sole, or under any public corporation or society whether corporate or not corporate, under any public foundation in any county or riding, and

concludes with the words :—" every other public office or employment of profit " of a public nature ". He then proceeds to deal with Schedule D, and winds up his judgment with the following passage :—" The foundation " of my judgment is this, that the provision under which we are asked " the question whether the Defendants are liable to be assessed for this " class of servant (that is to say, the third rule of Schedule E for charging duties), " gives a description of the office and distinctly throws the liability to pay the " tax upon persons who are employed in an office of employment of profit of a " public nature, and I am of opinion, therefore, that the Defendants are not " liable to be assessed under Schedule E in respect of such demands". The judgment of Baron Martin in this report is substantially to the same effect as in the other report : Baron Channing and Baron Piggot are represented as concurring.

In *Tennant* v. *Smith* (1) ([1892] A.C. 150) the question raised for decision was entirely different from that raised in the present case. It was this. The Appellant was a manager of the Bank of Scotland at Montrose. He was obliged by reason of his office to live on the bank premises. For this privilege he did not pay any rent, but was unable to let the portion of the premises which he occupied. By the Customs and Inland Revenue Act, 1876 (39 & 40 Vict. c. 16), it was provided that any person assessed to Income Tax who proves that his total income from all sources is less than £400 shall be entitled to be relieved from the duty on £120 of such income. The question for the opinion of the Court on a special Case Stated was whether the yearly value of the Appellant's privilege of free residence on the bank premises could, or could not, be brought into account in estimating his income from all sources. The House decided that it could not be brought into account for this purpose. That was the sole and only question upon which any decision was asked or given. Lord Halsbury, indeed, indicated that the case could not come within Schedule E as the " perquisites " and " profits " mentioned in Rule 1 of Schedule E are to " be payable", and that the occupation of a house was irreconcilable with these words. Lord Macnaghten, at page 163, expressed the opinion that Schedule E only applied to money payments and payments convertible into money. Lord Morris, at page 165, expressed an opinion to the same effect, no doubt. Lord Watson, at page 159 (2), says :—" I am willing to agree with your Lordships that income arising " from employment as a bank manager is assessable under Schedule E in all cases " where the bank which employs him is a company or a society, whether cor- " porate, or incorporate, as specified in that rule ". The companies and societies, however, specified in the Rule, are, in my view, only those to which the words " public office or employment of profit of a public nature " apply. This expression of opinion of Lord Watson cannot, I think, be extended to companies or societies which do not satisfy these conditions. In *Berry* v. *Farrow* ([1914] 1 K.B. 632) Mr. Justice Bankes (as he then was), when trying a case without a jury, at page 637, expressed an opinion that a person who had been appointed manager of a limited liability company, whose registered office was in the City of London, was assessable under Schedule E. In *Fergusson* v. *Noble* (7 Tax Cases, 176) the Appellant, a detective officer in the employment of the Police Department of the Corporation of the City of Glasgow, was allowed a sum of £11 14*s.* 3*d.* for clothing, and claimed that this sum was improperly included in a sum of £194 10*s.* 0*d.*, the amount he received, on which Income Tax was assessed. It was held that the allowance was a payment accruing to this constable by reason of his office and was assessable for Income Tax under Schedule E. No

(1) 3 T.C. 158. (2) 3 T.C. at p. 167.

point was raised as to whether the detective was a public officer or not, or whether he exercised an employment of profit or not within the meaning of Rule 3 of that Schedule.

The next question, by no means an easy one to answer, is: Does Hall's case come within Rule 3 as so construed? He began life as an office boy at 14 years of age. He was then employed in the Divisional Office at Swindon. In February, 1899, he was appointed a lad clerk, and in 1901 a clerk. His salary was annual, payable every 28 days on the basis of 28/365ths of the annual amount, but in practice about half this sum was paid every 14 days. There never had been any written agreement between Hall and the Appellant Company providing for the amount of the salary, its possible increases, or its time of payment. A practice had been introduced since he entered the service of the Company by which the salaries of a clerk were increased by annual increments of £5 till they reached £100 per annum. After that, advances depended on merit, but the actual salary of Hall during the year in question was £130 per annum or 50*s.* per week. An added war bonus of £45 brought it up to £175 per annum, or something less than £3 7*s.* 4*d.* per week, and he was thus liable to Income Tax. His employment as clerk might be terminated by a month's notice given by either party, failing which notice the employment continued and would not be required to be renewed by either party. Hall was paid this salary during his holidays, and in case of sickness he was paid at this full rate for the first 28 days of his illness and 5/6ths of the full rate for six months from the expiration of these 28 days. Much reliance was placed by the Solicitor-General on behalf of the Respondents on the condition necessary to be fulfilled by a clerk on entering the service of the Company, and also on the provisions of the superannuation scheme established by the Company, of which scheme Hall became a member. According to the rules, a candidate must be between 18 and 30 years of age, must be a good writer and expert calculator. His salary, the amount of limits of which are not named, has to be regulated by his efficiency and general knowledge and conduct. He must on appointment hold himself in readiness to proceed to duty immediately on being summoned to whatever station or place may be directed. He must, if required, learn Pitman's or some other system of shorthand. If he should leave the service without giving previously the month's notice stipulated for, all pay then due to him was to be forfeited; and he was liable to immediate dismissal without any notice for incompetency, misconduct, or dishonesty. And he must have a certificate from a medical man that he is free from any infirmity of body or mind, and is of sound constitution and in good health. It is obvious that as far as these conditions disclose the duties of such a clerk they must be performed in his office, and are due to his employers alone. He does not, apparently, come in contact with the public in any way, or owe any duties to, or do any service for, any of its members, no more than does a bookkeeper in a merchant's counting house. His salary is, as things now go, small, and his only necessary mental equipment is that he should be an expert calculator. It is not stated whether he has ever been required to learn shorthand or to use a telegraph instrument, or whether he can write shorthand or use such an instrument. The provisions of the superannuation scheme do not afford any real assistance. Those persons who are eligible as members of it are (*a*) members of the superannuation fund and (*b*) every person under 40 years of age whose name is included on the register of "the "salaried staff" kept by the company, and is not a member of the other provident society of this company, or of any superannuation or pension fund to which the company subscribes. Each member must pay to the scheme

3 per cent. upon his actual income. No definition of "salaried staff" is given, but in the third paragraph of the rules of the scheme a distinction is drawn between "officers" and "clerks". It provides that the directors of the company may admit to membership of the superannuation scheme any "salaried "officer or clerk under 40 years of age who may be employed on a railway "leased to or worked by the Appellant Company". Such being the nature of Hall's qualifications, employment and duties, I am unable to come to the conclusion that he holds in the service of the Appellant Company a public office or an office of a public nature, or exercises a public employment of profit or an employment of profit of a public nature within the meaning of Schedule E, Section 2, of the Income Tax Act of 1853, and Rule 3 of Schedule E, to the 146th Section of the Income Tax Act of 1842. No doubt, he is paid an annual salary, not a weekly wage, but that fact, though important, is not at all crucial.

I am of opinion, therefore, that the Appellant Company has not been rightly assessed on behalf of W. H. Hall under Schedule E of the Income Tax Acts, that the decision appealed from was erroneous, and should be reversed, and the Appeal be allowed with costs here and below.

Lord Sumner.—My Lords, as it is only through Section 6 of 23 and 24 Victoria, Chapter 14, that the Great Western Railway Company can be taxed in respect of Mr. Hall's earnings, it is with that section that we must begin. Its effect is that such of the duties payable under Schedule E as are payable in respect of Mr. Hall's office or employment of profit, if any, in or under the Company shall be assessed on and paid by the Company, subject to its right to deduct out of the fees, emoluments or salary of the officer or person the duty so charged in respect of his profits or gains. Next we gather from Schedule E that, if the Crown is to succeed, Mr. Hall must be an officer or person enjoying an office or employment of profit in or under the Company, which must yield him fees, emoluments or salary, out of which the Company can deduct the duty charged on them in respect of his profits or gains. The proposition is one of some complexity. Section 6 itself implies that, whatever Schedule E covers, some of the offices or employments of profit which it covers, if not all, can be such offices or employments as are held under a railway company. Accordingly, if all offices and employments under Schedule E have to be such that they can be called "public", in the sense in which Schedule E uses that word, then it follows that there are some offices or employments held under a railway company which are public in that sense, but whether they are many or few, and what they are, and whether Mr. Hall holds one of them, are questions which this Section does not help us to answer.

Let us now turn to Schedule E. Under its first paragraph the persons charged are those who have, use or exercise the offices or employments of profit mentioned in the said Schedule, and the duties are to be charged for all salaries, fees, wages, perquisites or profits whatsoever accruing by reason of such offices or employments. Having been thus charged, the duties are to be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain, *videlicet*, five named groups (I cannot call them species) of offices and employments, and every other public office or employment of profit of a public nature. It seems to me that the structure of paragraph 3 of Schedule E, beginning as it does with "all public offices", &c., and concluding with "every other public office", implies on the ordinary principles of construction that every office or employment in the five groups, whether the word "public" is expressed or not in immediate connection with

it, is and must be a public office or employment in whatever quality such publicity may consist. I am aware that in *Tennant* v. *Smith* (1), Lord Watson, whose authority stands unsurpassed, seems to have held a contrary opinion, but this point was not the issue which the House then was called on to decide, and no other noble and learned Lord expressed that view. I do not discuss the point further, for, after all, publicity is just as vague a *differentia* of the species to which it is contended that Mr. Hall belongs, as any other, and the difficulty of the case is that it is defined by a number of *differentiæ*, all of which are exceedingly indefinite. There is, however, a little more to be gathered from Schedule E. The office or employment must be something capable of being so assessed that the assessment can be in force for one whole year, and that, notwithstanding that a change may have taken place in it, the duty can be levied for such year without any new assessment on the person for the time having or exercising the same. If the person on whom the assessment is levied (who evidently is in this case the officer and not the Company which employs and is assessed in respect of him) dies within the year or quits his office, the prescribed adjustments involve that he should have, or might have, a successor in that office or employment. The other paragraphs of the schedule throw an even less direct light on its meaning in the present connection, but such as it is I think it is of no assistance to the Crown, but rather the contrary. They need not, however, be minutely examined.

My Lords, one sometimes gets help in construing such provisions from considering the practical objects which they may be supposed to serve. The object of the sixth section of the Act of 1860 is plain enough. It is to throw on the railway company work which would normally be performable by the officers of the Inland Revenue ; to save the Crown the cost and uncertainty of collecting the tax directly from the subject chargeable by enabling it to be charged on another subject which is not really liable at all. The excuse is that it is easier for the company to recoup itself than for the Crown to collect the tax direct. In substance, though not in name, the arrangement taxes the company to the extent of the cost of the collection ; and this, as always, requires, or is supposed to require, the use of clear words of charge ; but the burden is passed to the company in this instance in terms that for Income Tax law are quite unusually clear. The obscurity is in the terms of the original charge. As for the object of Schedule E, at least in connection with any such office or employment as Mr. Hall can possibly hold, I confess it is beyond me. Provided his emoluments are sufficient to be taxable at all, if he escapes from Schedule E, he comes under Schedule D, and in either case he suffers the same rate of tax. The differences in computation and assessment between the two schedules, if they affect his case, are not such as to assist in the application of Schedule E to it. I will begin by picking out of Schedule E the terms most favourable to the Crown and divorcing them as far as possible from any context that might weaken their effect, and I will then inquire whether, when applied to the facts found by the Commissioners, they bring Mr. Hall's case legally within the Act of 1860. Does Mr. Hall hold, under a company corporate, any office or employment of profit, public or not public, but such that salaries, fees, wages, perquisites or profits accrue to him by reason of it, and such that, if he should die within the year of assessment, he would have a successor who could be made to pay any arrears of duty due before the time of his death, subject to being recouped for his payment by Mr. Hall's executors ? This appears to be the question. The Commissioners have found what Mr. Hall's position is in fact. He is

(1) 3 T.C. 158.

and has been since boyhood a clerk in the service of the Great Western Railway Company. He is about 39 years of age. He receives a "salary", an annual salary, payable by fortnightly instalments, which in the year in question was altogether £175. At first it mounted by small annual increments, but, since it reached £100 a year, further advances have depended on merit. There is no written agreement, but the employment continues till it is terminated by a month's notice on either side. He receives it equally during limited periods of holidays and sickness as when he is at work. He discharges clerical duties not otherwise specified; and has to do so wherever required. He might have been called on to learn shorthand and telegraphy. Whether he has been so called on we do not know. In plain language he is in a situation as a clerk at a modest salary. Nothing is stated as to the total number of other clerks employed, or of those in his grade. We are not told whether their work is uniform or fluctuating, or whether their number is fixed or variable. He is a member of the superannuation scheme so long as he remains with the Company, and in the ordinary course will be pensionable some day. At present he is in the Divisional Superintendent's Office at Swindon, whatever that involves, and he is called a member of the "permanent" staff, and enjoys such permanency, I suppose, as a month's notice allows. My Lords, to say that Mr. Hall holds an "office" seems to me to be an abuse of language, and to say that his employment is one "of profit" is pompous and obscure; but it may be one "of profit" notwithstanding. At any rate I would not on that ground say that he is not within the language of Schedule E.

The finding of the Commissioners in my view turned on a particular interpretation of the effect of the decision in the case of the *Attorney-General* v. *The Lancashire and Yorkshire Railway*(1). In a form now common, which, however, neither does justice to the Commissioners' own great experience and acumen, nor gives to the Courts all the information to which they are entitled, the Case Stated says that the Commissioners were of opinion that the contentions put forward on behalf of the Crown should succeed, and the most material of those contentions was that the above-named case dealt only with manual workers and gave no decision affecting clerks, and that Mr. Hall holds an office or employment of profit within the meaning of the schedule. The Solicitor-General expressly accepted the authority of that case, which, indeed, has been unquestioned for nearly sixty years. What, then, does it decide? No doubt it is true that the issue raised related only to persons engaged at weekly wages. The railway company was at the time willing to be assessed as regards such of their officers, clerks and servants as were engaged at annual salaries, and the question for the Court was only "whether they were liable to be assessed under "Schedule E in respect of their officers, clerks or servants, who are engaged at "weekly wages, as well as in respect of those engaged at annual salaries." The decision of the Court, however, was not that the railway company was liable to be assessed on clerks as such, or on all employees not engaged in manual labour. The submission to be assessed in respect of clerks bound nobody but the company in question, and it decides nothing. What the Court decided was expressed in the words of Baron Martin:—"We think Schedule E "extends only to offices or employment under corporations, which are of a "public nature, and not to workmen or artisans, like engine-drivers, porters "and labourers". My Lords, I think the Commissioners were wrong in law in the view they took of this decision. Its real significance is that Schedule E, in spite of its almost unlimited form of expression and of the mention in it of

(1) 2 H. & C. 792.

wages and employment, really is limited and that manual wage-earners at any rate fall outside its lower limit. Others, though not workmen or artisans, may do so, too: the case says nothing to the contrary. The area of the Schedule is stated to be confined to offices or employments under corporations, which are of a public nature, and the reason given for the exclusion of manual workers is not the character of their work or the mode of calculating their remuneration, but the fact that "they hold no public office whatever". Where a decision which limits the right of the Crown has long been unquestioned, far more practical weight attaches to this consideration of lapse of time than would have been the case had the decision been the other way. In these contests the subject is always at a great disadvantage. Decisions in favour of the Crown may often go unchallenged not because their correctness is generally recognised, but because no private person can face the cost of disputing them. Decisions to the contrary effect stand in a very different position. The Crown is always very ably advised, in Revenue as in other matters, and for an appeal against the doubtful ruling affecting Income Tax the funds can always be found. Personally, I think the judgment of Baron Martin was right, but it has stood so long that I should adopt it in any case without further remark and should do so not merely in the view of it accepted by Mr. Solicitor but in the wider and, as I read it, the correct view, which I have above expressed.

Various tests have been suggested by which to determine the application of Schedule E to particular cases, and they may be shortly examined. The Act of 1860 involves that some offices under a railway company are, or may be, public. One can understand this of a general or a traffic manager, of a locomotive superintendent, a secretary or a whole-time solicitor, of the station-masters of sundry great stations, or the managers of sundry terminal hotels. Mr. Hall, however, is in no way such a public character nor does he hold any office at all. He merely sits in one. I think we can infer enough as to his work to be able to say truly that it is scarcely less manual than an engine-driver's, though it is less laborious, and that certainly it is not much more mental. His responsibility is incomparably less; the call on his moral and intellectual faculties can hardly be greater. It is true that he is said to be on the permanent staff, but an engine-driver is not a person who is here to-day and gone to-morrow, except in the course of his employment, and, if liability to a month's notice is consistent with permanency, so may be the obligation to accept one of a week. It is not found as a fact that there is any continuity about the particular place that Mr. Hall fills. I can understand that there is some continuity in the case of the station-master of a particular station or the signalman in a particular box, for someone must always be available to do the work of that place, though I am far from saying that signalmen or station masters are therefore within Schedule E but, for anything that appears in the case, Mr. Hall is simply one of a general reserve of clerical workers. He has to go where he is told, and is a unit in a staff, which may expand or contract at need, for anything we know to the contrary. The Commissioners, relying on an erroneous view of the *Lancashire and Yorkshire* case (1), have not found these facts.

Attention is drawn to the point that Mr. Hall is engaged at what is styled an annual "salary", though he actually gets his money fortnightly. I cannot see the importance in this connection of the mere name given to his remuneration, or of its description and computation by the year rather than by any shorter period of time. There is more to be said for the distinction, that what

(1) *A.G. v. Lancashire & Yorkshire Railway Co.*, 2 H. & C. 792.

Mr. Hall received is a salary, while the persons excluded from Schedule E in the *Lancashire and Yorkshire* case were paid wages. It is, however, a purely arbitrary distinction and so indefinite as to be really accidental. For economic purposes it is convenient to treat wage-earners as a class, and for political purposes the receipt of a salary is often supposed to involve a different point of view from that which attaches to the earning of wages, but the first term really refers more to the nature and conditions of the manual work done than to the remuneration paid for it, and the second denotes social aspirations rather than any Revenue category. Fashions change fast in this matter, and many a man or woman, who took wages without objection thirty years ago, receives a salary now of no greater amount than the same service would command under the old name. Again, it is said that for the purpose of an annual assessment an annual salary is, and weekly wages are not, the appropriate sums to be dealt with under it. This depends not on the time unit but on the assumed permanence or fluctuations of the sums paid from time to time within the period of assessment. An income earned at piece rates or varying with the amount of overtime is, no doubt, less susceptible of accurate annual assessment than a salary, which is changed, if at all, only once a year, but the problem is only one of estimating in advance with subsequent adjustment. From the departmental point of view I should have thought that such receipts are just the income which is the more difficult to assess and adjust, and which therefore, should, if possible, be collected through the employer. At any rate, a salary of so much a year would be much less difficult to assess and collect under Schedule D than the other. Nor is the language of Schedule D of any real assistance. It is suggested that, as D catches employments not within E, and as those employments, so caught, are spoken of as extending to every employment by retainer in any character whatever, even though annual, the consequence must be that any employment not by retainer must fall within E. I doubt if this is so, but, if it is, I think that Mr. Hall's employment is by retainer though annual, for he is not engaged to do a definite thing, to get it done in his own time and in his own way, but to do things of a definite class, as and when he is required, being paid whether his efforts are always required or not. I do not doubt that the Appellants keep him pretty fully occupied, but, if work were slack and for a day or two he had little or nothing to do, his salary would run on and he would be entitled to his remuneration, because he would be retained to do the work required. In my opinion his situation is not an office or an employment of profit, and no one would think of calling it so; it enjoys neither publicity nor continuity; and it is not distinguishable from that of the engine-driver in any respect that falls within the meaning of Schedule E. I think the Commissioners decided on a wrong view of the law and not merely as a question of fact, and that the appeal should be allowed. I will only add that I regret this decision, for it will, I fear, lead to persons escaping tax which they ought to pay, because they cannot be traced by the Inland Revenue officials, or can be got at only at a disproportionate expense, but it is our duty only to interpret these Acts and not to amend them, much as we may recognise that they stand in need of amendment.

Lord Wrenbury.—My Lords, there is in this case much that is difficult, but one thing seems to me quite plain, and that is that the question here is not, as the Court of Appeal thought, a question of fact. It was for the Special Commissioners to find and state all the facts respecting the nature of the office or employment as to which the question arises. It was not for the Court to question those facts in any way. But the question for the Court was whether, upon those facts, Mr. Hall held an office or employment of profit *within the*

meaning of the Act. That is a question of law. What does the Act mean? What is the true construction? It is impossible to escape deciding that question of law by saying that the Act is so slovenly and so unintelligible that it is impossible satisfactorily to ascertain and declare its meaning. If it were competent to a Court of Law to censure the Legislature, or if any useful purpose could be served by censuring the Legislatures of 1842 or 1853, no censure could be too strong, I think, for having expressed an Act, and that a taxing Act, in language so involved, so slovenly and so unintelligible as is the language of the Acts of 1842 and 1853. But there it is. A Court cannot say it means nothing and cannot be construed at all. The Court must, as best it can, arrive at some meaning of the language which bears upon the particular case before it for decision, although it may be, as I think it is, impossible to declare in general terms the true meaning so as to guide and control in the future a decision upon other facts. As a member of the Joint Committee of both Houses to which was referred the Consolidation Bill which is now the Income Tax Act, 1918, I strove to find some way in which we could deal with the language of confusion and unintelligibility of the Acts to be consolidated. It was, however, impossible to do so. The Committee had only to consolidate and could not substitute plain words to express a plain meaning without going beyond the limits of consolidation. The Act of 1918 therefore reproduces the old language with all its faults and has done little more than improve matters a little by some rearrangement. If Parliament had the time, which it has not, the law of Income Tax, which now so vitally affects the subjects of the Realm, ought as speedily as possible to be expressed in a new Statute which should bear and express an intelligible meaning.

There is a second point upon which I hold a clear opinion. In my judgment the third Rule of Schedule E of 1842 is to be so read as that the whole of it shall be taken as controlled by the word "public". What "public" means is another matter. I hold that the third Rule is to be read as if the word "public" were throughout repeated. My reasons for that opinion are as follows. The Rule opens with the words "public offices and employments of profit of the description hereinafter mentioned (*videlicet*)" and concludes with the words "and every other public office or employment of profit of a public nature". Between this beginning and this conclusion are enumerated five groups of words. In the second group the word "public" is introduced before the word "offices". In the first, third, fourth and fifth it is not. In the second, where the word "public" is introduced there are enumerated several offices which certainly are public offices and it may well be that all of them may be correctly so described, so that the word "public" would seem to be superfluous. In the first, where again the offices are public in their nature, the word "public" is not used. This seems to me to be mere slovenly expression and to indicate that whether the word "public" is in or out makes no difference in the character of the "public offices and employments of profit of the description hereinafter mentioned" referred to in the initial words. The fifth includes any office or employment of profit in any county or in any city or in any place. Such words cover and include any and every office or employment of profit whatsoever, and unless the word "public" be supplied they fail to define in any way whatsoever the office or employment which is to fall within Schedule E. The initial words which I have quoted indicate that all those which are "hereinafter mentioned" are "public offices and employments of profit". The concluding words, by the words "other public office or employment of profit of a public nature", indicate that all that precede are of that character. It is to be noted that a "public nature" is here attached to the employment of profit. The

Solicitor-General accepted the view that the adjective " public " in the phrase " public offices and employments of profit " qualifies not the word " offices " only but the words " employments of profit " also, a view that is strengthened by the fact that the concluding words are " employment of profit of a public " nature". Having regard to those concluding words which I have cited, he could scarcely do otherwise. He is driven then to say that the words following the word " videlicet " are some of them not called " public " and are not " public", and that the initial words mean " public offices hereinafter mentioned " (videlicet) " certain offices which are not public. This does not commend itself to my judgment. Further, the rules, of which Rule 3 is one, are rules for dealing with that which is enacted in Section 1 of the Act of 1842 and Section 2 of the Act of 1853. The words are for all material purposes the same in both Acts. The words in Section 2 of the Act of 1853 are as follows :—" For and in " respect of every public office or employment of profit and upon every annuity, " pension or stipend payable by Her Majesty or out of the public revenue of the " United Kingdom, except annuities charged to the duties under the said " Schedule C, and to be charged for every twenty shillings of the annual amount " thereof". These duties are by Section 5 of the Act of 1853 to be assessed under the regulations of 1842. The regulations therefore are regulations as to the assessment of duty upon " every public office or employment of profit". And if "public " is to be read as qualifying both an office and an employment, there is no ground whatever for saying that " public " is not to be read throughout the third Rule.

Having said so much as to the construction of the Act, I pass on to inquire whether Mr. Hall's office or employment was public or of a public nature. Since the year 1899 he has held one and the same office or employment throughout. He has risen in that employment and is now a fourth class clerk. But his office or employment has throughout been the same, and if his office or employment was public in the year ending the 5th April, 1918, it must have borne that character when, in February, 1899, he was a " lad clerk " and in 1901 became a " clerk " in the service of the Great Western Railway. His pay or salary, if it is to be called a salary, has been raised from time to time and during the year in question was £130 per annum plus a war bonus of £45. To say that such a servant holds a public office or an employment of profit of a public nature seems to me absurd. Having regard to Section 6 of the Income Tax Act, 1860, it is plain that a railway company may employ persons in such manner as that they hold offices or employments of profit falling within Schedule E and therefore (as I hold) public or of a public nature. I do not attempt to say what they are. But I do say that this clerk is not among them. In some future case it may be necessary to inquire whether that which is contemplated is not an office permanent in its nature to which upon the occasion of a vacancy a successor must be or naturally would be appointed, whether some status of dignity or responsibility is not to be looked for, whether in some definite manner public duty or public position is not contemplated. This may well be the case. It carries me no further than saying that each case must be determined on its facts, and in every case the question will be whether upon the facts the office or employment is public within the meaning of the Act.

We were pressed with authorities. In *A.G.* v. *Lancashire and Yorkshire Railway* (2 H. & C. 792, 33 L.J., Exc. 163) it was held that engine drivers, porters and the like did not come within Schedule E. I think this was right, and, if they are outside Schedule E, I do not see any ground upon which a fourth class clerk in a district superintendent's office at Swindon is within it. A man's employment does not become any more " public " because it is sedentary or

clerical and not physical or manual. As between an engine driver and a fourth class clerk, the former certainly owes more duties to the public, whose lives he in fact has in his hands, than does the clerk who sits in an office and casts up accounts or conducts correspondence or checks returns. If the test were whether the man owes duties to the public, the clerk can only in a very remote sense—a sense in which everyone owes duties to the public—be said to do so. It would, however, be more accurate perhaps to apply the test whether he is employed by the public than the test whether he owes duties to the public. But this again finds no firm ground; for a railway company is not the public, and yet under the Act of 1860 a servant of a railway company may hold a public office. Some other test must be found. In *Berry* v. *Farrow* ([1914] 1 K.B. 632), where the man was managing director of an insignificant limited company to which he had assigned a patent but which in fact had done no business, Mr. Justice Bankes expressed the opinion that he was rightly assessed under Schedule E. No reasons were given: *A.G.* v. *Lancashire and Yorkshire Railway* was not cited, and whether the point had been taken or argued does not appear and it would seem not to have arisen for decision. If it did arise, and if it was decided, I think the decision was wrong. *Tennant* v. *Smith* (1) ([1892] A.C. 130) demands more attention. It was a case in this House. The man was a bank manager. He was bound, as part of his duty, to occupy the bank house as custodian of the premises. He occupied it rent-free. The question was whether in estimating his income for Income Tax the yearly value of the house was to be taken into account. The decision was that it was not. In opening the case Sir Horace Davey said that for the purpose of his case it was of no importance whether the assessment was under Schedule D or Schedule E. The Respondent argued that it fell under Schedule D. There were sitting six noble and learned Lords. Two of them, Lord Halsbury and Lord Watson, expressed the opinion that the assessment fell under Schedule E. From Lord Macnaghten's judgment at page 163(2) I gather that he certainly expressed no opinion that it was Schedule E, but on the contrary thought that it was not relevant for the decision whether it was D or E. Lord Morris and Lord Field say nothing about the point. Lord Hannen (on page 165 at foot(3)) seems to have thought, as did Lord Macnaghten, that it was irrelevant to the decision whether it was D or E. My Lords, under these circumstances *Tennant* v. *Smith* is no decision of your Lordships' House binding upon your Lordships upon the question now for decision.

My Lords, under these circumstances I hold myself free to follow my own judgment as to the true construction of the Act. I go no further than to say that I have to inquire whether upon its true construction Mr. Hall held a public office or employment of profit of a public nature, and while I do not attempt to define what office or employment would satisfy those requirements, I hold that Mr. Hall's office or employment does not. For these reasons I think that this Appeal must be allowed.

Lord Carson.—My Lords, I concur in the conclusion that this Appeal should be allowed. I only desire to add that I associate myself with the observations of my noble and learned friend, Lord Atkinson, as regards the form in which their findings and conclusions have been stated by the Commissioners. It is very desirable in the interests of the subject that questions of law and fact and the decisions upon them should be kept separate and clearly distinguished in the Case Stated.

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(1) 3 T.C. 158. (2) 3 T.C. at p. 170. (3) 3 T.C. at p. 172.

Lord Buckmaster (to Counsel).—Is there any form in which you want the Order drawn? Do you want the assessment quashed? (*After a pause.*) Does not Counsel for the Appellants know what Order he wants?

Mr. Besly.—Is it possible to have the form of the Order remitted?

Lord Buckmaster.—What do you mean? You cannot remit the form of the Order. You see, the question is whether the assessment is to be quashed. Mr. Hills, is not the right thing to quash the assessment? Of course the formal thing is that the Appeal should be allowed with costs here and below, but you are dealing with the assessment made and challenged before the Commissioners for Special Purposes of Income Tax. Surely the right thing is to quash the assessment that was wrong.

Mr. Hills.—I do not believe myself, my Lord, that that is the form.

Lord Buckmaster.—Then in what form ought it to be made? You see you challenge the assessment.

Mr. Hills.—I believe the only Order that is necessary is that the Appeal should be allowed with costs. The Appeal is against the assessment, and the result is that the assessment is discharged. I am speaking rather without consideration; I have not considered it from that point of view.

Lord Buckmaster.—Very well; Counsel for the Appellant asks for nothing further.

Mr. Besly.—My Lord, may we have the assessment quashed as well?

Lord Buckmaster.—You do not tell me it is the ordinary practice that it should be done. I am not sure that it is necessary.

Mr. Hills.—My Lords, they have appealed against the assessment, and I think that is all that is necessary.

Questions put:—

That the Judgment appealed from be reversed.

The Contents have it.

That the Respondent do pay to the Appellants their costs here and below.

The Contents have it.