taken the correct view. I think that this lady had only a liferent in this sum, and although under the provisions of both deeds she might be entitled to use the capital of it during her life in case of urgent necessity, I think she had no power to dispose of it by will. The difference in the expressions used regarding this sum of £2000 and the other sum of £2100 in both deeds makes this quite clear.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Reclaimers—Lorimer—Craigie. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Respondents—T. Shaw—W. Campbell. Agents — Carmichael & Miller, W.S.

Friday, February 20.

FIRST DIVISION.

[Exchequer Cause.

RUSSELL (SURVEYOR OF TAXES) *v.* NORTH OF SCOTLAND BANK.

Revenue — Income-Tax — Application for Certificate of Over-Payment—Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 133—*Appeal—Competency.*

Held that where the General Commissioners granted a certificate of overpayment under section 133 of the Income Tax Act 1842, holding that the application for such certificate had been made timeously under the Act, it was competent to appeal against their decision.

Revenue — Income-Tax — Application for Certificate of Over-Payment — Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 133.

By section 133 of the Income-Tax Act 1842 it is enacted, "That if within or at the end of the year current at the time of making any assessment under this Act," any person charged under Schedule D should find, and should prove to the Commissioners, that his profits during the year had fallen short of the computed sum upon which he had been assessed, it should be lawful for the Commissioners to cause the assessment to be amended, and if the sum assessed should have been paid, to grant a certificate of over-payment.

A bank discovered in October 1888 that it had been assessed on too large a sum for the year 1888-9, but failed to apply for a certificate of over-payment till July 1890. *Held* that the application for a certificate must be made within the year current, or within as short a time after the end of that year as was possible by the exercise of due diligence, and that the bank's application must be refused, not having been made with due diligence.

George Anderson, manager for and on behalf of the North of Scotland Bank, Limited, Aberdeen, appealed under section 133 of 5 and 6 Vict. cap. 35, as amended by section 6 of 28 Vict. cap. 30, against an assessment of £35,840, 7s., made upon the company on its own return under Schedule D of the Income-Tax Acts for the year 1888-9, and craved to have it restricted to £27,036, 8s. 7d., and inasmuch as the tax on the assessment had been paid, craved to have a certificate of over-assessment, and to be repaid the sum of £220, 1s. 11d., tax at 6d. per pound on £8803, 8s. 5d., for the year 1888-9.

The Commissioners having fully considered the case, were of opinion (1) that the words "within or at the end of the current year" did not imply a limitation but an extension of time; (2) that even assuming the view of the case of *The Cape Copper Company*, presented by the Assessor, the claim in the present instance had been intimated within a reasonable time. They accordingly sustained the appeal, and on the application of the appellant granted a certificate of over-payment.

The Surveyor being dissatisfied with this decision, the present case was stated at his request under the Taxes Management Act 1880, for the opinion of the Court of Exchequer upon the following questions:—"(1) Whether the Commissioners' decision is subject to appeal or review? and (2) if it be so, whether according to the facts stated, the Commissioners had powers to grant a certificate of over-payment for the year 1888-89?"

The facts as stated in the case were these:—(1) The company was assessed under Schedule D on its own return on the full amount of its untaxed profits on the average of the three years 1885, 1886, and 1887, as shown by its balance-sheets made up to 30th September in each of these years. (2) The proved amount of the untaxed profits for the year of assessment, estimated in conformity with section 6 of 28 Vict. cap. 30, on the average of the three years, including the year of assessment, fell short of the amount assessed by the sum of £8803, 18s. 5d., and it is the tax on this sum at the rate of 6d. per pound (£220, 1s. 11d.) which is the amount of which repayment is sought for 1888-89. (3) The company's balances for each of the years on which the foregoing average is founded were certified by the company's auditors as under:—1886, on 15th October 1886; 1887, on 17th October 1887; and 1888, on 12th October 1888. (4) The meetings of the shareholders at which these balances and directors' reports were approved, were held as under:—1886, on 5th November 1886; 1887, on 4th November 1887; and 1888, on 2nd November 1888. (5) At the time the company made the return for the year 1888-89 the profits of the year of assessment were not and could not be known, the company's financial year ending on 30th September in each year. (6) No intimation of any appeal was made until 10th July 1890. In support of the appeal,

Mr Alexander Edmond, law-agent for the bank, referred to the provisions of the section of the Act (5 and 6 Vict, cap. 35, section 133) under which the appeal was made, and contended that the words "within or at the end of the year current at the time of making any assessment under this Act, or at the end of any year when such assessment ought to have been made," did not impose any limitation of time.

Section 133 of the Income Tax Act 1842 provides—"And be it enacted, that if within or at the end of the year current at the time of making any assessment under this Act, or at the end of any year when such assessment ought to have been made, any person charged to the duties contained in Schedule D, whether he shall have computed his profits or gains arising as last aforesaid on the amount thereof in the preceding or current year, or on an average of years, shall find, and shall prove to the satisfaction of the Commissioners by whom the assessment was made, that his profits or gains during such year for which the computation was made fell short of the sum so computed in respect of the same source of profit on which the computation was made, it shall be lawful for the said Commissioners to cause the assessment made for such current year to be amended in respect of such source of profit as the case shall require, and in case the sum assessed shall have been paid, to certify under their hands to the Commissioners for Special Purposes at the head office of Stamps and Taxes in England the amount of the sum overpaid on such first assessment; and thereupon the said last-mentioned Commissioners shall issue an order for the repayment of such sum as shall have been so overpaid." . . .

Argued for the Surveyor of Taxes—1. *On the Competency*—Assuming that the question decided by the Commissioners was whether the bank's claim for a certificate had been made within a reasonable time or not, an appeal from their decision was competent, appeals on questions of that kind from decisions of General Commissioners having been allowed before—16 and 17 Vict. c. 34, sec. 52; *Charlton* v. *Commissioners of Inland Revenue*, May 22, 1890, 17 R. 787; *Lothian* v. *Macrae*, December 12, 1884, 12 R. 336. The real question also in this case was one of law, namely, whether under the Act the Commissioners were entitled to give a certificate or not. Under the Income Tax Act 1842, appeals were regulated by sec. 118, and an additional privilege was given by sec. 133, but under The Taxes Management Act 1880, sec. 57, the whole of the remedies given to assessed parties by application to the Commissioners were grouped under the title "appeals," and therefore the present case fell under section 59 of The Taxes Management Act, and was competent. 2. The words in sec. 133 of 5 and 6 Vict. c. 35, "within or at the end of the year current," meant in this case within or at the end of the year from 5th April 1888 to 5th April 1889. The exact time after the end of the year within which the taxpayer must apply to the Commissioners was left indefinite, because difficulties in the ascertainment of profits might arise; but when the profits had been ascertained, the tax-payer was bound to proceed forthwith to prove any deficiency to the Commissioners. The Act 23 Vict. c. 14, had no application. It imposed a limitation where there was none before. Here there was one already. The special feature of this case was that the shortcoming was discovered by the bank on 12th October 1888, *i.e.*, within the year of assessment, but no application was made to the Commissioners till twenty months thereafter, of more than a year after the end of the year of assessment. The present case was distinguished from that of *The Cape Copper Company*, *infra*, because here the Court knew when the deficiency was discovered; there, as Mr Justice Lindley stated, they had not. The way in which the English Court treated the case was that latitude was to be allowed in discovering the error but not in making the claim for repayment. The appeal here had not been intimated with reasonable despatch, and the Commissioners should not have granted a certificate. Further, the application to the Commissioners should have been, not for a certificate of over-payment, but for amendment of assessment.

Argued for the bank—1. There was no question of law raised for the consideration of the Court, as the Commissioners had merely decided that the application for a certificate had been made within a reasonable time, and the appeal was therefore incompetent. Further, under the Taxes Management Act, section 59, an appeal to this Court could only be taken "on the termination of any appeal" to the Commissioners. In the present case the bank had merely applied to the Commissioners for a certificate of over-payment, and such an application was not an "appeal" in the sense of section 59—*Strain* v. *Strain*, June 26, 1886, 13 R. 1029. 2. The words "within or at the end of the year," &c., did not impose any limitation of time, but merely that the tax-payer might have the assessment made upon him amended either before or after the year had expired. The only limitation, therefore, was that of three years imposed by 23 Vict. cap. 14. Where the Legislature intended to limit the period within which appeals should be competent, precise language was used, such as "within three months after the end of such year," or "within six months after the expiration of the year for which the duty is assessed." Assuming that there was doubt whether section 133 of 5 and 6 Vict. c. 35, contained a limitation, tax-payers were entitled to the benefit of the doubt. Further, even supposing the section did contain a limitation, it must be construed in a reasonable manner, *i.e.*, a reasonable time must be allowed to the tax-payer within which to lodge his claim, and the bank here had intimated its claim within a reasonable time—*in re Cape Copper Mining Company*, 1888, 21 Q.B.D. 313, 2 T.C. 332.

At advising—

LORD PRESIDENT—This is an appeal under section 133 of the Income-Tax Act (5 and 6 Vict. c. 35) by the North of Scotland Bank against an assessment made on them on their returns for the years 1888-9 and 1889-90. The surveyor, however, having consented to a certificate of over-assessment being granted applicable to the year 1889-90, the only question for the consideration of the Court is whether a similar certificate ought to be granted for the year 1888-9.

The proved amount of the untaxed profits for the year of assessment estimated in conformity with sec. 6 of 28 Vict. c. 30, on the average of the three years, including the year of assessment, fell short of the amount assessed by £8803, 18s. 5d.; and it is the tax on this excess, at the rate of sixpence per pound (£220, 1s. 11d.), of which the appellants claim relief for the year 1888-9.

The company's balance for the year of assessment was certified by their auditors on 12th October 1888. This balance, and the directors' report thereon, were approved by a meeting of the shareholders on 2nd November 1888.

It does not appear from any statement in the case before us at what date the overpayment was made, and probably this is immaterial. Indeed I am disposed to think it is quite immaterial. The important dates are (1) when the fact of overpayment was ascertained, and (2) when application was made to the General Commissioners for a certificate of overpayment. After the overpayment was made the only remedy open to the appellants was an application for a certificate of overpayment under sec. 133 of the statute 5 and 6 Vict. c. 35. The question is, whether they have made such application within the time prescribed by the section according to its true and just construction?

The blunder had been discovered by the company's auditor so early as the 12th October 1888, but no claim was made for a certificate of over-assessment till the 10th July 1890. The surveyor maintains that this demand comes too late according to the true construction of sec. 133, while the company's contention is in effect that there is in the section no limitation of time for making such demand.

The words of the section are—"If within or at the end of the year current at the time of making this assessment any person charged with the duties contained in Schedule D, whether he shall have computed his profits or gains arising as last aforesaid on the amount thereof as arising on the preceding or current year, or on an average of years, shall find and shall prove to the satisfaction of the Commissioners by whom the assessment was made that his profits and gains during such year for which the computation was made fall short of the sum so computed in respect of the same source of profit on which the computation was made, it shall be lawful for the said Commissioners to cause the assessment for such current year to be amended in respect of such source of profit as the case shall require, and in case the sum assessed shall have been paid, to certify under their hands to the Commissioners for special purposes the amount of the sum overpaid upon such assessment," and thereupon the Commissioners for special purposes shall issue an order for repayment of the sum overpaid.

The words specially requiring construction are the words introductory to the section—"within or at the end of the year current at the time" of making the assessment. Literally these words may be read as meaning that the claim must be made before the expiry of the year of assessment; and in some cases there may be no difficulty in complying with this strict and literal meaning of the words. But when there is another and ever largely increasing class of cases in which such compliance is absolutely impossible, as where a company is engaged in large mercantile concerns involving the keeping of accounts in various parts of the world, which cannot be brought together and balanced as a whole without the lapse of a considerable time after the lapse of the financial year on the 5th of April—to apply a strict and literal construction to the statutory words in such cases would be in the highest degree unreasonable and unjust. On the other hand, it would be quite as unreasonable to extend the time for making the claim to any time subsequent to the lapse of the year of assessment. This construction would really deprive the words "at the end of the year" of all intelligible meaning. It seems to me therefore that the only rational and the satisfactory solution of the difficulty is to hold that the claim must be made either within the year or within such a period after the close of the year as will enable the trader to ascertain, by using due diligence, whether and to what extent an overpayment of tax has been made.

The case of *The Queen* v. *Special Commissioners of Income-Tax* (in *The Cape Copper Mining Company*) came first before a Divisional Court and afterwards before a Court of Appeal of the High Court of Justice in England. The arguments of counsel and the judgments are to a considerable extent devoted to technical questions with which we have no concern. But there are very distinct and lucid expressions of opinion as to the construction of the opening words of section 133, which are worthy of the highest consideration, particularly as in the end they formed the real ground of the judgments.

In the Court of Appeal the Master of the Rolls said—"You must give a meaning to these words 'at the end of the year' elastic enough to make them fairly and reasonably applicable to the different cases to which they will have to be applied. I think it must not be so large as to say at any time after; I think it must not be so restrictive so as to say that the Court can lay down one single period within which every case must be found and proved. I think you must give an interpretation, as I say, which will make it applicable to each particular case, and the real construction of it to my mind is this—It must be in as short time as

in the particular case by exertion the party can fairly be said to have found out and to have proved; it is not simply to say that it is within a reasonable time as a general mode; it is in the shortest time that he can do it if he has made every exertion which he ought to have made. So that if a person really delays the examination of his affairs, although it may not be unreasonable for him to delay, if he really delays it beyond the time when if he had made all the exertion he ought to have made he would have found it out sooner, he is too late; he has not complied with this stipulation 'at the end of the year;' but if he has made every exertion which he ought to have made, then to say because a man has been several months, or in some cases more than a year, or, if you please, more than two years—for you cannot fix a time—if he has made every exertion that he ought to have made, and yet cannot have done it within a less time than he has done it, to my mind he has satisfied the meaning of the section."

Lord Justice Lindley said—"It appears to me the true view of that expression has been stated correctly by the Master of the Rolls. It is as soon after the end of the year as is reasonably possible having regard to the facts of each particular case. Not literally at the end; that is absurd—everyone sees that it is impossible. Nor does it mean at any time hereafter, nor even within a reasonable time afterwards, unless diligence be employed as a limitation."

These opinions commend themselves to my mind as presenting the only rational and satisfactory view of the intention of the Legislature in using the language under construction. And therefore, without further discussion, I content myself with expressing my entire concurrence in these opinions.

The application of the rule so established to the present case does not admit of any dispute. As already mentioned, the fact and the amount of the overpayment of tax was ascertained so far back as the 12th of October 1888, but no claim was made for a certificate of over-assessment till the 10th of July 1890. The company therefore, in full knowledge of the facts, delayed their application to the Commissioners for a period of twenty months. This is certainly not the "due diligence" nor "every exertion which he ought to have made" in the language of the learned Judges already quoted.

The judgment of the Court, I think, ought to be, to reverse the determination of the Commissioners, and remit to them to refuse the certificate of over-assessment for the year of assessment mentioned in the case.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court reversed the determination of the Commissioners, and remitted to them to refuse the certificate of over-assessment.

Counsel for the Inland Revenue—Asher, Q.C.—Young. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for the Bank—C. S. Dickson. Agent—Alex. Morison, S.S.C.

Saturday, February 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

FLYNN *v.* M'GAW.

Reparation—Master and Servant—Labourer Falling through Insecure Floor—Alleged Incompetency of Foreman—Relevancy.

A workman who sued his employer for damages for injury sustained in his service, averred that the foreman who was in charge, and to whose orders he was bound to conform, had ordered him to go upon the floor of the first flat of a building which was insecure from decay, and which had been rendered more insecure by the removal of certain joists from below, which fact the foreman was aware of but the pursuer was not, and that the accident happened in consequence of the foreman's negligence in failing to see that the floor was secure. The pursuer also averred that the foreman was incompetent to be left in charge of the operations, and that if a skilled foreman had been employed he would have taken means to guard against such an accident as happened.

Held (*diss.* Lord Young) that the pursuer had averred a relevant case for inquiry.

David Flynn, labourer, Glasgow, sued his employer William M'Gaw, mason, Maryhill, for damages for personal injury, both at common law and under the Employers Liability Act 1880.

He averred that during September 1890 he and two other men were under the superintendence of Samuel Merrigan, a foreman in the employment of the defender, pulling down an old house in Glasgow. He was bound to conform to Merrigan's orders. Upon 23rd September Merrigan ordered the pursuer to go up to the floor of the first flat of the building in order to remove the flooring and joists. Several of the joists had already been removed, and the floor was covered with the bricks, lime, and rubbish of the partition walls of the flat which had been taken down. While clearing away the rubbish preparatory to removing the floor a portion of the floor gave way, and the pursuer was precipitated to the bottom of the building, whereby he received severe injuries.

He further averred—"(Cond. 7) The said accident, and the injuries which resulted to the pursuer therefrom, were due to the fault of the defender, or the said Samuel Merrigan, for whom the defender is responsible. The floor in question was in an insecure state in consequence of its age and the state of decay into which it had fallen prior to the operations in question, and it had been rendered still more insecure and dangerous by the operations of the defender, under which are included the removal of the joists from beneath a portion of it, said