Friday, June 16.

SECOND DIVISION.

[Exchequer Case.

LEITH, HULL, AND HAMBURG STEAM PACKET COMPANY *v.* GENERAL COMMISSIONERS OF INCOME-TAX.

Income-Tax—Depreciation—Deduction for Wear and Tear—Customs and Inland Revenue Act 1878 (41 *Vict. cap.* 15), *sec.* 12.

By the 12th section of the Customs and Inland Revenue Act 1878 it is enacted that the Commissioners shall in assessing the profits or gains of any trade, etc., chargeable under schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, "allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on."

Held that in estimating the deduction to be so allowed the Commissioners are not entitled to make any deduction upon the sum representing the wear and tear during the year in question on account of any interest which may be earned on the sums allowed.

Process—Stated Case—Appendix Held not part of Case—Taxes Management Act 1880 (43 *and* 44 *Vict. cap.* 19), *sec.* 59.

In an appeal against the decision of the General Commissioners of Income-Tax by case stated under the Taxes Management Act 1880, section 59, the Court (*dub.* Lord Young) *ordered* the Commissioners to amend the case by inserting in it certain facts contained in the appendix annexed to the case.

On an appeal by the Leith, Hull, and Hamburg Steam Packet Company, shipowners, Leith, against the decision of the General Commissioners of Income-Tax, the following case was stated by the latter for the opinion and judgment of the Court of Exchequer under the Taxes Management Act 1880 (43 and 44 Vict. cap. 19), sec. 59:—"At an adjourned meeting of the Commissioners for General Purposes under the Property and Income-Tax Acts, for the county of Edinburgh, held at Edinburgh on the 15th day of February 1898, for the purpose of hearing and disposing of appeals, The Leith, Hull, and Hamburg Steam Packet Company appealed against the assessment imposed on them for the year ended 5th April 1897 under Schedule D of the Property and Income-Tax Acts, and craved a reduction of the assessment to the extent of £7765, on 'the ground of overcharge, consequent upon insufficient allowance for wear and tear.'

"The appellants having requested that the profits of their business should not be made public, the Surveyor of Taxes, Mr Philip Musgrave, on behalf of the Crown, agreed that the annual profits should not appear in the case.

"The following are the facts found or admitted:—(1) The appellants are the owners of a fleet of thirty-seven iron and steel steamers, which they employ in trading between Leith and Newcastle, Sunderland, Hull, Hamburg, and the Baltic ports. The ages of the steamers vary from one to thirty-seven years. (2) The Crown and the appellants agreed upon a sum to be taken as representing the profit earned by the appellants from their business as shipowners, estimated in terms of the first rule of the first case of Schedule D of section 100 of the Income-Tax Act 1842, on an average of the three years ended the 31st day of December 1895, and that they are assessable to income-tax for the year ended 5th April 1897 on said sum, less the just and reasonable deduction to represent the diminished value of their vessels by reason of wear and tear during the year, as authorised by section 12 of the Customs and Inland Revenue Act 1878. (3) In addition to the allowance for diminished value by reason of wear and tear, the appellants, in bringing out their gross profits, are entitled to deduct and do deduct the cost of all repairs and of all replacements of parts of their vessels requiring replacement, except new engines and boilers, the cost of which (following a general practice among shipowners) is charged to capital, and thus becomes subject to allowance for wear and tear. (4) To facilitate the adjustment of the allowance for wear and tear, the Crown and the appellants agreed that one-half in value of the fleet were passenger steamers, and one-half cargo steamers; and it was also agreed that passenger steamers diminish more rapidly in value from wear and tear than cargo steamers, and that in arriving at the allowance for wear and tear, 1 per cent. might be taken as representing the difference to be allowed between the one and the other. (5) Shipping may diminish in value from various causes, but it is admitted that physical deterioration on account of wear and tear is the only cause of diminished value that comes within the provisions of the Customs and Inland Revenue Act 1878. (6) For the year ended 5th April 1897 the appellants claimed for depreciation by reason of wear and tear £30,534, but the assessing authorities reduced the allowance to £22,769, which is equal to 5½ per cent. on £413,984, the written-down value of the appellants' steamers at 31st December 1895. The deduction allowed by the assessing authorities is at the rate of 6 per cent. on the written-down value of passenger steamers, and 5 per cent. on the written-down value of cargo steamers; and as it is agreed that one-half in value of the appellants' fleet consists of passenger steamers and one-half of cargo steamers, 5½ per cent. (the mean between 5 and 6 per cent.) on the diminishing value of the steamers has been allowed as a deduction on the written-down value of the whole fleet.

"We, the Commissioners, after hearing

parties, refused the appeal, and confirmed the assessment. Whereupon the appellants expressed dissatisfaction with our decision as being erroneous in point of law, and required that a case should be stated for the opinion of the Court of Exchequer, and it is hereby stated and signed accordingly.

"The opinion of Sheriff Rutherfurd, who delivered the decision of the Court, and a statement showing the effect of depreciation on the diminishing value of a steamer costing originally £20,000 at various rates per cent., and on which the decision proceeded, are subjoined as an appendix to this case.

"The question of law for the opinion of the Court is—Whether the deduction of 5½ per cent. for wear and tear allowed by the Commissioners is or is not just and reasonable, and a fair and valid exercise by the Commissioners of the discretionary power conferred upon them by the 12th section of the Act 41 Vict. cap. 15?—AND. RUTHERFURD; GEO. AULDJO JAMIESON; ALEX. W. INGLIS.

"*Edinburgh*, 10*th November* 1898."

The opinion of Sheriff Rutherfurd appended to the stated case was in the following terms:—"The income tax is a tax upon gross profits subject to certain deductions specially authorised by statute, and prior to the year 1878, in assessing the duty payable under Schedule D of the Act 5 and 6 Vict. cap. 35, no deduction was allowed on account of the annual depreciation in value by wear and tear of machinery or plant used in producing the profits.

"This appeared to the Legislature to be a hardship to the taxpayer, and accordingly it was provided by the Customs and Inland Revenue Act of 1878 (41 Vict. cap. 15), section 12, that 'notwithstanding any provision to the contrary contained in any Act relating to income-tax, the Commissioners for General or Special Purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on.'

"It seems to me that the purpose of this enactment plainly was to allow the taxpayer such a deduction from the amount of profits annually realised as will fairly and reasonably represent the diminished value by wear and tear during the year of the plant used to produce these profits, so that when his plant is worn out he may be in a position to replace it by new plant or machinery of a like description. I observe that the statute does not require the Commissioners to ascertain the *actual* depreciation in value of machinery or plant during the year, but to allow such deduction therefor 'as they may think just and reasonable.' It would obviously involve in most cases a very expensive and laborious inquiry if the taxpayer, in order to get the benefit of the allowance for wear and tear, had to show the annual diminution in value from this source of each item of his plant. In the course of the discussion I suggested by way of illustration the case of a railway company owning hundreds of steam engines and thousands of carriages, waggons, &c., and I think that the same thing holds good in the case of large manufacturers and owners of shipping. If in the present instance it were necessary to ascertain the actual depreciation in value of each of the appellants' ships by reason of wear and tear exclusively, we have not been furnished with details sufficient for that purpose. But in my opinion that is not necessary, and I think that the appellants will have no reason to complain if we can otherwise fix such a rate of deduction from their profits (and of course if there are no profits there will be no assessable income), which will enable them to replace their vessels, when these are worn out by wear and tear, with others of the same original value.

"Now, in order to determine such a rate of deduction from profits realised by the shipowner, it is hardly necessary to say that we must in the first place ascertain, as nearly as possible, the period within which a steamship (for it is only with steamships that we are here concerned) would become unproductive of profit by reason of ordinary wear and tear, without taking into account loss by shipwreck, or depreciation in value through the introduction of vessels of an improved type, or other similar causes.

"In an appeal last year at the instance of the Leith, Hull, and Hamburg Steam Packet Company, the Commissioners came to the conclusion that the average duration of the life of steamships, including vessels built either of iron or steel, and designed either for cargo or for passenger traffic, might fairly be computed at about twenty-two years, having regard merely to their annual diminution in value by reason of wear and tear. In the present instance Mr Warrack during the discussion frankly stated, in answer to a question which I put to him, that he did not, on behalf of himself and the other shipowners who concurred in his views, object to the period of twenty-two years being held to be the average life of steamships as affected solely by wear and tear. On the part of Messrs James Currie & Company, who represent the Leith, Hull, and Hamburg Steam Packet Company, and who maintain that their case is exceptional, it was stated that they are the owners of thirty-seven sea-going steamers, of which thirty-five were built to their own order, viz., three iron and sixteen steel cargo ships, nine iron and seven steel passenger ships; and that from correspondence with some of the best known brokers for the sale of steamers, they deduce the following estimates of the probable average life of steamers of these classes as terminated by wearing out:—Iron cargo, twenty-six years, iron passenger, twenty-four years; steel cargo, twenty-two years, and steel passenger, nineteen years,—which gives an average of slightly over twenty-two years

for the thirty-five vessels built to their own order.

"In these circumstances I am of opinion that, for the purposes of the present inquiry, twenty-two years may fairly be taken to represent the average duration of the life of a steamship. On this assumption Messrs Warrack & Company and the majority of the appellants contend that the annual diminution in the value of their ships from wear and tear may be moderately estimated by a deduction from their profits of 7 per cent. in the case of cargo ships, and 8 per cent. in the case of passenger ships (which wear out rather more quickly), or 7½ per cent. over all; while Messrs Currie & Company claim as a reasonable allowance 9 per cent. for cargo steamers, and 10 per cent. for passenger boats, or 9½ per cent. over head. On the other hand, the officers of Inland Revenue maintain that 5 per cent. for cargo and 6 per cent. for passenger ships, or 5½ per cent. over all, is a fair and sufficient deduction. In order to test this, the case has been put of a cargo ship costing originally £20,000, and in ascertaining what deduction from his profits an owner who is his own insurer would require to set aside in each year of her assumed life of twenty-two years, in order at the expiry of that period to indemnify himself for her annual depreciation in value by wear and tear alone, exclusive of loss by shipwreck and by other causes which cannot be taken into account, it is apparent that if he allowed 5 per cent., or £1000, on her original value in the first year, and at the same rate, or £950, on her diminished value for the second year, and so on, he would at the end of the twenty-two years have laid by sums amounting to £13,529, 6s. 7d.

"It is not to be supposed, however, that a prudent man who is his own insurer would allow these sums to remain unproductive, and I do not think it is unreasonable to assume that they might be invested in his business, or otherwise, so as to yield 3 per cent. interest. At that rate the interest at the expiry of the twenty-second year would amount to £6975, which, added to the sums before mentioned amounting to £13,529, 6s. 7d., would leave the shipowner with £20,504, 6s. 7d. to recoup himself for loss by wear and tear of a vessel the original cost of which was £20,000.

"But the appellants object to this mode of calculating the allowance to which they are entitled on the ground that, 'of the £20,000 first cost, said to be repaid, all that the shipowners really get is £13,532, the remaining £6468 being wrongfully withheld by the Revenue authorities in name of compound interest claimed as due to them.'

"It seems to me that this objection has arisen out of some misapprehension and confusion of ideas, for the Inland Revenue officers do not seek to withhold any portion of the deduction of 5 per cent. which they concede may be reasonably allowed for annual diminution of value by reason of wear and tear, and the case put is merely one illustration, with the view of showing that 5 per cent. on the diminishing value during each of the twenty-two years is a fair allowance; but the same result may be reached in a different manner, as, for instance, by taking the cost of a policy of insurance against the depreciation of a ship's original value by wear and tear during the period mentioned, and other tests have been suggested, to which I do not think it necessary to refer.

"No doubt Messrs Warrack & Company and the majority of the appellants stated that, as the result of their experience, extending over a long period, they consider 7½ per cent. to be a very moderate deduction for wear and tear, while Messrs Currie & Company say that they have come to the conclusion that in their case it should, at the very least, be 9½ per cent.

"Now, I must say that I am somewhat at a loss to see how there can be such a difference in circumstances, whether as regards the kind of ships or the traffic in which they are employed, as to warrant in the case of Messrs Currie & Company an allowance of 2 per cent. more than the deduction claimed by the other appellants. But however that may be, and while I am satisfied that the appellants, gentlemen whose opinions in matters relating to shipping are entitled to much weight, have given us what they believe *in bona fide* to be the actual results of their experience, I can only repeat that we have not before us the means of checking these results, and I cannot help thinking that further inquiry would show that the percentage which the appellants claim to have allowed them must include something more than depreciation merely by wear and tear.

"Accordingly, I should be prepared to hold that 5½ per cent. overhead is a just and reasonable deduction, irrespective of the decision of last year in the case of the *Leith, Hull, and Hamburg Steam Packet Company*, in which the Commissioners arrived at the same conclusion, and their decision was affirmed by the Court of Exchequer on appeal. But while the judgment in that case related to the assessment for a different year, and may not be *res judicata*, even as in a question with Messrs Currie & Company, it is certainly a precedent which I should consider myself bound to follow, unless some much stronger reasons for not doing so were submitted to us than any which we have yet heard.

"On the whole matter, therefore, I am for dismissing these appeals."

Argued for appellant—The real question before the Court was whether in calculating the amount to be allowed for depreciation the Inland Revenue were entitled to take into account that the sum annually allowed for depreciation might be invested by the appellants and interest derived from it. That this was the true question plainly appeared from the appendix to the stated case, and if the appendix were held not to be part of the case the Commissioners should be asked to amend the case so as to show in the case itself what was the real point in dispute. Depreciation was the sum which would represent the original cost of the vessel at the close of the period which constituted its life, and they were

entitled to accumulate the sum allowed year by year in name of depreciation without investing it. The Commissioners had no right to take into account interest for the sum set apart for depreciation. There was no warrant for doing so in the statute; all that could be taken account of was the "diminished value by reason of wear and tear." There was no discretionary power conferred on the Commissioners, the statute laid down a rule for estimating the deduction for wear and tear. If the Commissioners failed to apply this rule they committed an error in law, and they had done so in the present case.

Argued for the respondents—The case must be taken as it stood. It disclosed no question of law but a question of fact, viz., What deduction did the Commissioners think just and reasonable as representing the diminished value by reason of wear and tear? That was a question of amount, and therefore matter of fact and for the Commissioners to decide, and the Court should not send back the case to be amended but should refuse the appeal—*Leith, Hull, and Hamburg Steam Packet Company* v. *Bain*, June 16, 1897, 3 Tax Cases 560; *P. & O. Steam Navigation Company* v. *Lee*, 1898, 79 L.T. 118. In any event on all questions of this kind a very wide discretion was vested in the Commissioners by the statute, and where the Commissioners had applied their minds to the point and decided it to their satisfaction the Court should not interfere with their decision—*Caledonian Railway Company* v. *Special Commissioners of Income Tax*, November 18, 1880, 8 R. 89; *Burnley Steamship Company Limited* v. *Surveyor of Taxes*, July 10, 1894, 21 R. 965.

At advising (January 27, 1899)—

Lord Justice-Clerk—I think that this case which is stated for our decision ought in some particulars to be amended by our having a distinct statement of fact upon the following points, viz.—(1) in arriving at the assessment appealed against, what period of years the Commissioners assumed to be the average length of a steamer's life during which it could be productive of profit? (2) Whether an allowance of 5½ per cent. on the value of a steamer year by year would of itself be sufficient to produce a sum at the end of the steamer's average life equal to the steamer's cost? and (3) Whether in fixing the sum allowed for depreciation the Commissioners took into account the probable return obtainable by the due investment of the sum which was so allowed?

Lord Young—I have always been very averse to express any dissatisfaction with a proposal on the part of the Court either to amend a case or sometimes to take evidence before answer, but I think it my duty here to say in a few words that I think the case here is quite satisfactory as a case for discussion, and for our decision without any amendment. Indeed, I had formed and written my opinion on the merits of the case before I knew there was any intention to propose any amendment upon it. The only thing I think it necessary to say is this, that I regard the appendix, which is referred to as the opinion of Mr Sheriff Rutherfurd, as part of the case, and I have proceeded upon it as part of the case. The end of the case proper, so to speak—distinguishing between it and the appendix—is this—"The opinion of Sheriff Rutherfurd, who delivered the decision of the Court"—that is, of the three Commissioners of whom he was one—"and a statement showing the effect of depreciation on the diminishing value of a steamer costing originally £20,000 at various rates per cent., and on which the decision proceeded, are subjoined as an appendix to this case." The Solicitor-General said something in answer to a question which cast a doubt upon whether the Crown authorities or the taxing authorities thought so, but I think we must take the case stated to us by the Commissioners as importing a statement by them that in forming the opinion that 5½ per cent. was a proper percentage of deduction they were influenced by the operation of the deduction at that rate, taking account of interest. This may not be such a fact as the Taxes Act, section 59, requires to be set forth in a case stated under it, but the Commissioners, I think, certainly intended thereby to inform us of their view to that effect. Now, my hesitation in concurring with your Lordship's view as to an order for an amendment is founded chiefly upon this, that the case is sufficient without it, and that the opinion of Sheriff Rutherfurd appended may be taken as part of the case, because there is a pretty distinct opinion expressed both by the First Division in a case before them, and also expressed and acted upon by the Divisional Court of the Queen's Bench, that this is not a matter of fact and is not a question of law, but information given to us of the Commissioners' deliberation, their view which they had arrived at as to what was best and reasonable upon arguments which they thought it just and reasonable to give effect to, and I have my doubts, especially as no order for any further explanation as to these was made in the cases to which I have referred, whether we can properly ask the Commissioners to give us information as to the views upon which they proceeded beyond that which they have done. I think we may take account of what they have done, and the explanations they have given in considering the case, but I doubt whether we ought here to do what was not done in the other cases—order an amendment with respect to these views which they proceeded upon in their consideration and deliberation in the matter when they had the case at avizandum.

Lord Trayner—I agree with your Lordship in the chair that we ought to ask the Commissioners to amend the case in the three particulars stated. I should have contented myself with simply saying so, but I feel called upon to make a single observation in reference to what has fallen

from Lord Young. There is no doubt whatever about the competency of the order, for it is not only strictly within the inherent power of the Court, but is directly provided for under the statute on which this case is presented to us, that the Court may if they think proper order the case to be amended. That the First Division and the English Court—I prefer myself to speak mostly of the First Division, because I know nothing of the proceedings in England—that the First Division did not think it necessary to order amendment of the case before them only showed they were able to dispose of the case presented to them on the statement that was made. On the statement that is made here I cannot dispose of the question on which our judgment is asked. It is right to say that if I was in a position, as Lord Young thinks he is, to take the appendix to the case as part of the case, there might be no great necessity for the order which is proposed, but the Solicitor-General distinctly said, in answer to a question I put to him, that he did not consent that we should hold the appendix as part of the case. As a doubt may arise as to whether the appendix is part of the case, I think it right, by the order your Lordship proposes to pronounce, to have formally before us the facts which are contained in the appendix, and which I regard as material for the decision of the case.

Lord Moncreiff—I agree that the Commissioners should be asked to amend their case.

The Court pronounced the following interlocutor:—"Appoint the Commissioners to amend their case by stating, 1st, What period of years they assumed in arriving at the conclusion appealed against to be the average length of a steamer's life, during which it would be productive of profit; 2nd, Whether an allowance of 5½ per cent. as the value of the steamer (year by year), would of itself be sufficient to produce a sum at the end of the steamer's average life equal to the steamer's cost; and 3rd, Whether in fixing the sum allowed for depreciation they took into account the probable return obtainable by the due investment of the sum so allowed."

The Commissioners lodged the following amendment:—"In compliance with the foregoing interlocutor we respectfully beg to amend the case by stating in answer to the questions put to us—1. That we assumed twenty-two years as the average duration of the profit-producing life of the appellant's steamships, having regard to their annual depreciation in value solely by wear and tear. We understand that a former decision of Commissioners of Income-Tax, which was affirmed by the Court of Exchequer, proceeded upon the same assumption. 2. An annual allowance of 5½ per cent. on the footing of the ship's value being reduced by that amount year by year will of itself amount at the end of twenty-two years to £71, 3s. 10d. for each £100 of the vessel's original value. If the money thus allowed were used in trade to produce 5 per cent., the amount would be increased from £71, 3s. 10d. to £138, 2s. 8d. If it were invested in Consols, say at 2½ per cent, it would amount to £98, 11s. 2d. This leaves out of view the breaking-up value of the ship. 3. In fixing the deduction to be allowed for diminished value through wear and tear, we took into account that the sum annually allowed might be so invested as to produce a return of 3 per cent. per annum.—And. Rutherfurd; Geo. Auldjo Jamieson; Alex. W. Inglis.

"*Edinburgh*, 14*th March* 1899."

At advising (June 16, 1899)—

Lord Trayner—The case here submitted to us by the Income Tax Commissioners is not well stated, although, as amended (under the order of Court), we have, I think, a sufficient statement of facts to enable us to reach the question of law upon which the appellants desire to have the opinion of the Court. In preparing this case the Commissioners would have done well had they given more consideration and effect to the observations of the Lord President made in a recent case between the same parties. It is the duty of the Commissioners to afford all reasonable facilities for the review of their determination (when that is desired) and not by an imperfectly stated case to render, practically, nugatory the appeal to us which the statute has conferred on persons dissatisfied with the judgment of the Commissioners.

It is said that the Commissioners are not bound to state the grounds on which they arrive at their determination, and perhaps they could not be compelled to do so. But I should think it only consistent with their public duty—a duty as much to the taxpayer as to the Crown—that they should, if asked to do so, disclose fully and fairly the grounds on which they had proceeded, as it is, or may be, only on such disclosure that the legality of their determination can be ascertained. In this case the Commissioners have put us in possession of the grounds of their determination, and we are therefore in a position to judge whether that determination is within their statutory power or not—in other words, whether it is a valid exercise of their statutory power.

By the 12th section of the Inland Revenue Act of 1878 it is provided that the Commissioners shall "in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade, chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on." I agree with the Commissioners in thinking that "the purpose of this enactment plainly was to allow the taxpayer such a deduction from the amount of profits annually realised as will fairly and reasonably represent the diminished value by wear and tear during the year of the plant

used to produce these profits, so that when his plant is worn out he may be in a position to replace it by new plant or machinery of a like description." Accordingly, taking the average life of a steamer at twenty-two years, as the Commissioners do, they are, on their own reading of the statute, to allow the owners of the steamer such a deduction yearly from the assessment imposed on them as will at the end of that time represent the amount of the steamer's original cost. But this the Commissioners have not done. To show this I take their own illustration. Assume the cost of the vessel to be £20,000. The Commissioners say that 5 per cent. on that for the first year, and the same allowance on her diminishing value in each succeeding year, would result in the shipowner having received in the twenty-two years a sum of £13,529. Let it be so. But at the end of the twenty-two years the shipowner should have received or been allowed in deductions a sum equivalent to the steamer's original cost, viz., £20,000. Therefore he has received, on the Commissioners' own statement, a sum of about £6500 less than he was by statute entitled to. This is, of course, apparent to the Commissioners, and they proceed to show how the deficiency is to be made up. They say the shipowner is a prudent man, and will not let his annual allowance (amounting in twenty-two years to £13,529) remain unproductive. He will invest the money at 3 per cent., which will at the end of twenty-two years produce £6975. The deficit is thus made up. But that is not what the statute entitles the shipowner to. It does not limit his right to such a sum as if invested at 3 per cent. will indemnify him for the depreciation in value of his ship by tear or wear; it entitles him to the full amount of the depreciation, without condition as to how he shall dispose of or use the allowance made to him on that account. And this, certainly, the Commissioners have not given the appellants in the present case. To illustrate this further, suppose that the statute instead of providing that the shipowner should be allowed a deduction from his assessment, had directed that from the assessment (paid in full) a sum equal to the ascertained depreciation of the vessel for the year should be returned or repaid, would the Commissioners have been entitled to say—the depreciation for the year amounts to £1100, but we shall only pay you £1070, as by the investment of that sum at 3 per cent. you can make up the full sum. That would simply be the Commissioners keeping in their pockets £30 due to the shipowner. But whether the return to the shipowner is to be by way of deduction or repayment, the end is the same. He is to be indemnified for the depreciation of his vessel by the amount of the deduction or the repayment.

Besides, the determination of the Commissioners proceeds on the view that an investment for small sums (annually growing smaller) yielding 3 per cent. can be at once obtained by the shipowner. Suppose that no such investment can be obtained, or that the investment promising 3 per cent. being obtained, the interest is not paid, how is the depreciation allowance at the end of the twenty-two years to be made to square with the original cost of the vessel. How, if such an investment being obtained both capital and interest were lost by the failure of the investment? These are risks not put on the shipowner by the statute. If the allowance which the statute directs to be made is made, the shipowner finds himself possessed, when his vessel can no longer earn profits, of a sum equivalent to the original cost of his vessel, which indemnifies him for the loss by deterioration of his property through tear and wear. But the Commissioners do not even give the appellant the sum which they profess to give him. Having invested his £13,529 at 3 per cent., and earned thereby in twenty-two years the sum of £6500 he is not allowed to keep it. The counsel for the Commissioners avowed that on that £6500 the appellant would be charged income-tax. At the present rate of income-tax that would form a deduction of over 3 per cent. from the £6500, or about £200. If the income-tax happened to be increased during the twenty-two years, the deduction would of course be greater.

In my opinion the Commissioners are bound to fix a just and reasonable sum by way of deduction for tear and wear; and to take the average life of a steamer, and over that period to spread the original cost, appears a very just and reasonable way of ascertaining what that allowance or deduction should be. But that deduction when fixed should be allowed to the appellants in full apart from all considerations of the use they can or may make of it. It appears to me to be altogether inadmissible for the Commissioners to allow less than the proper deduction, because a use may be made of the sum actually allowed, which may (as it may not) result in producing the sum which should originally have been allowed.

I do not think a reference to the practice of merchants or companies of writing off from their yearly profits a certain sum for depreciation of plant gives any support to the view adopted by the Commissioners in the present case. The merchant and the Commissioners are not on the same footing. The merchant can do what he likes with his profits. He may write off more or less for depreciation, just as he may be more or less prudent. And he may do what he likes with the sum he has written off for depreciation. If he likes to take the risk of investment, he may better his position, or he may make it worse. But on the other hand, if he pleases, he may simply deposit his written-off profits, so that he may when his plant is worn out have a fund sufficient for its renewal on hand. This the Commissioners (who are not dealing with their own money, and in that respect differ from the merchant) do not allow the appellant to do. The Commissioners do not give the full amount due to the appellants but only a part, and with that part desire the appellants to speculate at their own risk in order to make up a sum, which should be theirs

and at their absolute disposal without any risk whatever. If the appellants make a profitable investment the Commissioners claim all the more income-tax; if they make an unprofitable investment, they must bear all the loss. In either case the taxpayer suffers and the tax-gatherer gains.

Neither party suggested any modification of the determination of the Commissioners, and I am of opinion that that determination should be reversed.

LORD JUSTICE-CLERK—I concur in the opinion which has been read by Lord Trayner.

LORD YOUNG—I had prepared the following opinion before the Court sent back the stated case to the Commissioners to be amended. As I was of opinion that the appendix must be taken as part of the case I saw no necessity for any amendment, and I shall therefore read the opinion which I prepared before the amendment was ordered.

The case before us is stated under the Taxes Management Act 1880, section 59, by the Commissioners of Income-Tax on the requisition of the Leith, Hull, and Hamburg Steam Packet Company. The Company had appealed to the Commissioners against the income-tax assessment imposed on them for the year ending 5th April 1897, and being dissatisfied with their determination "as being erroneous in point of law," required from them and transmitted to us the case on which we have now to give our judgment. The Act provides that the Court "shall hear and determine the question or questions of law arising on a case" so transmitted. The Crown maintain that there is no question of law arising on this case, and therefore that we cannot interfere with the determination of the Commissioners.

The Steam Packet Company, on the other hand, maintain that there is a question of law arising in the case, and that the determination of the Commissioners, as explained in Mr Rutherfurd's opinion, proceeded on an erroneous view of it.

The preliminary question necessarily is, whether or not there is a question of law "arising on the case," and in dealing with this preliminary question I think we must regard the appendix as part of the case.

The Steam Packet Company's dispute with the taxing officials regarded only the amount of the deduction made by them "as representing the diminished value by reason of wear and tear during the year" ending 5th April 1897 of the steamers used for the purposes of their business. The steamers (thirty-seven in number) were at the beginning of the year worth £413,984. The taxing officials allowed as depreciation by tear and wear during the year the sum of £22,769, being 5½ per cent. on the value at the beginning of the year. The company claimed £30,534 as a just and reasonable deduction, being at the rate of 9½ per cent. as the diminution by tear and wear during the year. The question which of these sums reached respectively by these different percentages, or whether either of them is just and reasonable as representing the diminished value by reason of wear and tear during the year ending 5th April 1897 of this company's thirty-seven steamers, does not at first sight look like a question of law. The company, however, contend that although the question has not *prima facie* the aspect of a legal question, yet the Commissioners in determining it may have proceeded on a view of the subject which the law does not sanction or permit to be acted on, and that Sheriff Rutherfurd's opinion on which the decision proceeded shows that they did so.

The only expression of the erroneous view (in point of law) thus suggested is to be found in an imaginary-put case which seems to have been suggested, or to have suggested itself in the course of the argument on subsequent deliberation as illustrative of the question under consideration. This put case was that of one steamer of the value of £20,000, which after twenty-two years' constant work was worn out and worthless by reason of tear and wear. In that case Sheriff Rutherfurd and the other Commissioners thought that a deduction of 5½ per cent. each year on the diminishing value would be just and reasonable as representing the diminished value by reason of wear and tear during the year, although the aggregate of such deduction during the twenty-two years amounted to only £13,529, 6s. 7d., their opinion being that as the annual deduction left the taxpayer exactly so much richer at the end of each of the twenty-two years, interest ought to be taken account of in determining what amount (or percentage) of deduction in each year was "just and reasonable" to enable the shipowner at the end of twenty-two years to replace the old ship with a new one.

The case of the Steamboat Company now complaining is that thus to take account of interest is contrary to law, and that the case as stated shows that this was done in the rejection by the Commissioners of their appeal.

I think we must take the case stated to us by the Commissioners as importing a statement by them that in forming the opinion that 5½ was a fair and reasonable percentage, they were influenced by the operation of deduction at that rate on this illustratively-put case, taking account of interest as explained. This may not be such a "fact" as the Taxes Act (section 50) requires to be set forth in a case stated under it, but the Commissioners, I think, certainly intended to inform us of their view.

With respect to the undoubtedly proper facts on which the determination proceeded, we must take them to be exactly as stated. There is, indeed, no dispute regarding them, and neither party expressed a desire for the statement of any other matter of fact, or indeed suggested any other.

The Commissioners had to determine what deduction they thought just and reasonable as representing the diminished value by reason of wear and tear during the

year in question of the company's steamers; or rather (as the question came before them on appeal), whether the deduction allowed by the taxing officers was just and reasonable, and if not, then to make it so according to their opinion. Sheriff Rutherfurd explains that they had no materials or evidence which could enable them to form an opinion on the question otherwise than by ascertaining what was a reasonable overhead percentage of deduction in the view or on the footing (assented to by the parties) that the average lifetime of a steamer was twenty-two years, at the end of which its value was diminished to zero by reason of tear and wear. This is what they did with the assent, as I understand, of both parties except as to the rate of percentage. The dispute between the parties regards only this rate and the result of applying it. The taxpayer contends that a percentage ought to be taken that will give a sum for deduction annually, which being wrapped up in a napkin and stored away in a safe, the wrapt-up accumulations in the safe at the close of the ship's life by reason of tear and wear (to take the illustratively-put case) will amount to its original cost or the price of a new equivalent. The proposition is intelligible (although I know of no authority for it) that neither the taxing officials to begin with, nor the Commissioners on appeal from them, can legally do their duty in this matter without ascertaining the actual depreciation in value by reason of tear and wear during the year of each of the ships used by the taxpayer in the course of the year. But this has not been maintained, and is (I understand admittedly) practically impossible in such a case as we are now considering. Take the supposed case, about which there is not likely to be much dispute, of a shipowner having only one steamer. I should think the case very rare in which that one steamer ran from the beginning of the taxing year to the end of it, and the case very frequent in which it was sold after a quarter of a year or half a year, or any period, and replaced by another. And then, in the case of the one steamer, what the Commissioners would have to do would be to ascertain the wear and tear during the quarter of a year or half a year that steamer ran, and the diminution in value by tear and wear in three quarters of a year or half a year of another, and so on, with any number of replacements, whether by new steamers or second-hand steamers; and dealing with a shipowner who has a fleet of 37 steamers, I fancy the case never occurred of 37 new steamers being started each year and being carried on without change till the end of the taxing year. They may be changed, each steamer any number of times during the year, and replaced by new or second-hand steamers more or less liable to suffer by tear and wear, and the idea of ascertaining the exact diminution of value by tear and wear of the steamers employed and earning the income of the shipowner during the year is manifestly upon the face of it admittedly an impossibility, and therefore the duty of those to whom the statute has committed the duty of ascertaining what is fair and reasonable in any particular case is, apart from any such inquiry, altogether as I have now been representing as admittedly impossible.

I assent to the contention of the complaining taxpayers here that the Commissioners are not entitled to make any reduction upon the sum representing the wear and tear during the year in question because of any interest which may be earned thereon by the taxpayer, or indeed because of anything that has (so far as I am aware) been suggested. But it is another and quite different proposition that in making up their minds as to what sum of deduction is just and reasonable as representing depreciation by tear and wear during the year, the Commissioners may not lawfully take account of interest as was done here. We could not possibly, I think, say either that they did not or that they could not intelligently think it just and reasonable, and therefore according to their duty, to do so. The view in which they thought it just and reasonable is thoroughly intelligible, and if in taking and acting on it they violated no rule of law, we have certainly no jurisdiction to interfere.

To determine with exact accuracy the depreciation of a large fleet of steamers during a year from tear and wear seems to be impossible. So far as the effects of use can be and have been removed by repairs and replacements (as by new masts, sails, and rigging) the cost of these is separately deducted. Further, the rapidity or rate of diminution in value from age must, I should think as matter of fact, vary considerably according to the quality or character of individual ships and other circumstances.

It is not, therefore, surprising that the Legislature should have avoided laying down any rule or rules for the guidance of those to whom the duty of determining the amount of equitable deduction on this account from assessable profits was committed. The language is, that they shall "allow such deduction as they may think just and reasonable as representing the diminished value," &c.

Lord Moncreiff—This case is not well stated. The question submitted for our consideration, although styled a question of law, does not, taken by itself, clearly and unambiguously disclose a question of law; but after fully considering the explanations which have been given by the Commissioners as to the process or formula by which they arrived at the percentage allowed as a deduction, I have come, though not without some hesitation, to be of opinion that the case raises a question of principle on the construction of the statute upon which the parties are entitled to our judgment.

The question whether the Commissioners have validly exercised their powers is attended with difficulty. It must be conceded that in dealing with a fleet of vessels the Commissioners in fixing the amount of deduction on account of wear and tear must, within reasonable limits, be allowed a free hand in making and acting upon

such investigations and calculations as they may think necessary for the purpose; and if, after fully applying their minds to the matter and acting upon competent evidence and considerations, they fix the amount of the deduction as being in their opinion just and reasonable, this Court cannot interfere with their discretion in the matter, whatever view may be taken of the sufficiency or insufficiency of the award. But the deduction which in the end they are bound by statute to allow is a deduction which represents the diminished value by reason of tear and wear *during the year*. The deduction being given as an ease to the assessment, the taxpayer is entitled to immediate relief according to the full extent to which his vessel has diminished in value in the year during which the profits on which income-tax is charged were earned.

Now, it clearly appears from explanations given by the Commissioners that 5½ per cent. on the diminishing value of the steamers does not, taken by itself, represent their diminished value by reason of wear and tear during the year. The diminished value is only reached by adding the interest which it is assumed would be obtained upon the percentages allowed year by year if they were invested so as to produce a return of 3 per cent. per annum.

Taking the life of a steamer at 22 years, we are informed that allowances at the rate of 5 per cent. on diminishing values would at the end of 22 years amount only to £13,529, 6s. 7d. In order to make up the £20,000 necessary to replace the vessel the percentages allowed would require to be invested at once at 3 per cent. per annum, and if this were done, at the end of 20 years, with compound interest, the aggregate interest would amount, it is estimated, to £6975, 0s. 1d.; and these two sums together would replace the original cost of the vessel.

While I follow and appreciate the actuarial calculation on which the Commissioners proceed, I do not think that their decision is warranted by the terms of the statute. The mode of calculation adopted deals, not with the present but with the future, and makes no allowance for contingencies or risks. The deduction is limited to 5½ per cent., on the assumption that the taxpayer is bound to invest, and will at once succeed in investing, the allowances so made during the life of the vessel so as to yield a profit of 3 per cent. per annum, and on the further assumption that the earning power of the vessel will continue unimpaired for twenty-two years. Further, it is assumed that the whole of the interest received on deductions so invested during the life of the vessel will be available at the end of the twenty-two years. But if the allowances are invested to profit, income-tax, perhaps at increased rates, will be charged year by year upon the interest so earned; and thus a substantial sum will fall to be deducted from the £20,000 which hypothetically should be available for renewal of the vessels.

On the whole matter I think that the statute does not contemplate any inquiry into the prospective use which may be made by the taxpayer of the deductions allowed.

The decision of the First Division of the Court in the case of the *Leith, Hull, and Hamburg Steam Packet Co.* v. *Bain*, decided June 1897, reported in Tax Cases, p. 960, No. 198, seems from the opinion of the Lord President to have proceeded on the ground that the question which I have just been considering was presented to the Court "not as a statement of formula by which the decision was reached," but as an illustration or argument in support of the Commissioners' decision. In this case we are informed that the decision was reached by aid of and depends on the soundness of the formula in question.

In the only other case to which we were referred—*Peninsular and Oriental Steam Navigation Company* v. *Lee*, 1898, 79 L.T.R. 118, the question seems to have been referred to in argument, but not to have been decided by the Commissioners or the Court. I observe that in that case Justice Kennedy says—"If there had been any misconstruction of the section, or if it could be shown that they included in coming to their result some element which they ought not to have included, or excluded what under the section they ought not to have excluded, then there might be an appeal."

Now, in this case I think the Commissioners have included or taken into consideration an element which they should have excluded, viz., the interest which it is assumed will be earned on the yearly allowances during the life of the vessel. This mode of fixing the deduction to be allowed (which appears to have been only recently adopted) is, in my opinion, not in accordance with the true meaning of the statute, and therefore I think that we should answer the question put to us by finding that the Commissioners have not validly exercised their powers under the statute.

I wish to add that my opinion does not proceed upon the amount of the deduction, but upon the process by which it was fixed, which shows that if the Commissioners had known that interest was not to be taken *in computo*, they would not have considered 5½ per cent. a just and reasonable deduction. I have only further to add that I am not at all surprised at the Commissioners adopting, on the analogy of a reserve fund, the view which they have stated. It seems at first sight a reasonable and plausible solution of the question, but on giving the matter full consideration, I think that it is not in accordance with the 12th section of the Act.

The Court pronounced the following interlocutor:—

"Reverse the determination of the Commissioners, and remit to them with the following instruction, viz.—that in estimating the deduction to be allowed to the appellants under the 12th section of the Act (41 Vict. c. 15) the Commissioners are not entitled to make any deduction upon the sum representing

the wear and tear during the year in question on account of any interest which may be earned by the appellants on the sums allowed."

Counsel for the Appellants — Balfour, Q.C. — Salvesen. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondents—Sol.-Gen. Dickson, Q.C.—Young. Agent—Solicitor of Inland Revenue.

Saturday, June 17.

FIRST DIVISION.

[Sheriff Court of Dundee.

WHITTON *v.* BELL & SIME, LIMITED.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 31), *sec.* 75, *sub-sec.* 1—*Employment "about a Factory."*

Section 7 (1) of the Workmen's Compensation Act 1897 provides that the Act "shall apply only to employment . . . on or in or about a factory, mine, quarry, or engineering work."

A cart belonging to the owners of a timber-finishing factory was being driven along the high road by a carter in their employment, who was taking a load of timber from the factory to a house in course of erection. At a spot two miles distant from the factory the carter met with an accident which caused his death.

Held that the employment was not "about" a factory in the sense of sec. 7, sub-sec. (1) of the Workmen's Compensation Act 1897, and that accordingly the employers were not liable in compensation.

This was a stated case under the Workmen's Compensation Act 1897, in a statutory arbitration in which the respondent Mrs Whitton, 16 Lyon Street, Dundee, widow of the deceased Adam Whitton, carter, sued Messrs Bell & Sime, Limited, timber merchants, Dundee, for compensation for the death of her husband.

The following case was stated by the Sheriff-Substitute (CAMPBELL SMITH):—"(1) That the appellants' business, which is a business for sawing, polishing, and distributing timber for building and other domestic purposes falls under the provisions of the Workmen's Compensation Act. (2) That Adam Whitton, the husband of the respondent (Mrs Arnot Bonthron or Whitton) and the father of the other pursuers, was one of the staff of carters employed by them to distribute to their customers the finished material of their works by means of a horse and cart belonging to them, and loaded by other men in their timber-finishing factory, as also to assist in unloading said timber when it arrived at its destination, and generally to do what he might be ordered to do with the aid of a horse and cart in the way of bringing rough timber into the works, and shifting it about therein for the convenience of the men, who cut it up and finished it for various architectural and domestic purposes. (3) That on the morning of 4th November 1898, before it was daylight, the deceased was directed by the appellants' 'delivery-clerk' to yoke the horse which he had brought from the appellants' stable to one of their carts for carrying long wood, standing loaded and ready to be yoked, and to deliver it at 'Nairn's job, Rockfield Street, *via* Blackness Avenue,' which job was a villa in the course of erection on ground feued from Hunter of Blackness. (4) That the delivery-clerk, in consequence of information from the contractor's joiners, who were to place the wood in the building, told the deceased to go by Blackness Avenue and take 'the old farm road,' which was the only practicable road at that time, as Rockfield Street was only in the course of construction. (5) That he, as directed, passed along this old farm road, which is estimated to be about two miles from the appellants' sawmill and other works, and runs by the side of a field 3 or 4 feet below the level of the road, and separated from it by a dry-stone retaining-wall of a frail character, never rising more than a few inches above the level of the road. (6) That when so passing along this old road, and the deceased on the cart guiding the horse with the reins, the left wheel of the cart came to a spot, guessed as being about 15 inches away from the retaining-wall, when the road and wall suddenly gave way, and the cart, load, and horse toppled over into the field, with the result that the driver was crushed to death beneath the load. And the Sheriff-Substitute also found '(7) It is not proved that the death of the deceased was caused by his serious and wilful default.'

"On the facts found as above the questions of law for the opinion of the Court are—(1) Were the appellants rightly held liable to make compensation under the Workmen's Compensation Act 1897? (2) Did the said accident arise out of and in the course of an employment 'on or in or about' a factory in the sense of the Workmen's Compensation Act 1897? (3) Was the deceased's employment one to which the Workmen's Compensation Act applies?"

The appellants referred to the cases of *Lowth* v. *Ibbotson*, March 11, 1899, 15 T.L.R. 264; and *Powell* v. *Brown and Another*, L.R. [1899], 1 Q.B. 157.

LORD PRESIDENT—The material finding in this case is that the accident in question occurred when this carter was at a place two miles from the works, driving a horse and cart with material belonging to the appellant. Accordingly, for the distance of two miles the carter was simply upon the high road, having departed from the factory, and passing along the road just like any other wayfarer, and exposed to the same risks.

The Sheriff has stated no circumstances