to fishings which once belonged in the several shares I have mentioned to the burgh, Urquhart, and Wiseman.

I find from the evidence that none of the *pro indiviso* proprietors ever asserted a right to fish or ever fished further up the river than the Red Craig. Of course the right of each proprietor is of the same quality, and is to be exercised in the same locality. It is very remarkable that with a right of this kind vested in three proprietors there is no evidence to show that anyone of these disputed the right of the Earl of Moray to the fishings which are claimed in this action. Apart from the evidence as to rod fishing, to which I shall afterwards advert, the burgh had no possession at all, either by themselves or by tenants or vassals. The only other persons who connect themselves with this *pro indiviso* right, are the proprietor of Moy, Mr Arbuthnot, and in succession Mr Hogarth. But it is very clear that none of them ever asserted a right to fish or ever fished higher up than the Red Craig. We have the most distinct evidence of this from fishermen employed by Moy and Mr Arbuthnot, and from Mr Hogarth himself. The title to the *pro indiviso* right has not been very distinctly deduced, but it is clear that Mr Hogarth has acquired nearly the whole of it with the exception of two-sixteenths which belong to Moy, and his evidence is very decided that these fishings as they were possessed were all below the Red Craig.

At one time I thought that the defenders might be able to shew that they had possessed, to some extent at least, through Mr Hogarth as their vassal, and that as superiors they might found on this possession in answer to the pursuer's case. But further consideration has satisfied me that they cannot. It is not sufficient for them to shew that Hogarth was in possession of the fishings. They must shew that he was in possession of them as their vassal. So far as Mr Hogarth's evidence goes it is clear against the defenders. For he says that he and his predecessors possessed the fishings above the Red Craig as tenants of the Earl of Moray. Nor is this in the least surprising when we consider that the other owners of the fishings in which the burgh had a share never possessed or claimed to possess beyond the Red Craig.

So far therefore it is plain enough that the fishings which were feued out in 1505, and again in part to the defender in 1539, have been identified by the possession which has followed on the grant as lower down the river than those in question. But it is as clear that the Earls of Moray have had for time immemorial possession of the fishings as far as the Red Craig. There has been produced a tack dated so early as 18th February 1655, by which the Earl of Moray lets for a period of years the salmon-fishings of Findhorn from the pool called Duwein to the pool called Stoneypool. The situation of the former has not been well ascertained, nor is it material. The Stoneypool is below the Red Craig. A series of accounts have been produced from 1642 downwards, and we see from them that the Earls had high and low net-fishings in the river, and the latter must have been below the Sluiepool, which was the highest net-fishing. St John's pool is mentioned in them as part of Lord Moray's fishings, and this pool is close to the Red Craig. Further, there is the concurrent evidence of all those who were engaged in the salmon-fishing of the Findhorn, that the Earls of Moray owned and possessed the salmon-fishings down to the Red Craig. There is not a syllable to the contrary. To my mind it is just as clear that they possessed above the Sluiepool. But this is not of as much importance, because the defenders have not produced any title under which they could claim fishings higher up the river than that pool.

I have only to notice in conclusion the allegation of the defenders that the "burgesses and members of the community of Forres" have in virtue of the Crown charter of 1496, and other titles of the burgh, been in use for time immemorial to angle for salmon within the limits of the fishings claimed by the pursuer. That there has been a great deal of rod-fishing cannot I think be disputed. But I do not think that it can in any way affect the decision of the case—first, because for that the burgh has no title to fishings above Sluiepool, and secondly because the rod-fishing was not exercised in virtue of any right belonging to the burgh. There may have been a vague notion that the burgh had some right of salmon-fishing of which the inhabitants of the town might avail themselves. But this is not enough. Such fishings as belonged to the burgh would form part of the common good, and fall under the administration of the town council. It does not appear that the council took any charge of these or granted any licences to fish. Indeed, they could not, for though the titles of the *pro indiviso* fishings of which the town had part are not very clearly traced, it appears from the treasurer's accounts that the share of the town had been feued out. If so they could have given no licences to fish by rod. I can come to no other conclusion than that the rod fishing was either a trespass on the pursuer's right, or by his tolerance, and in either case it will not avail the defenders.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD JUSTICE-CLERK—That is the opinion of the Court.

Counsel for Pursuer (Respondent) — D. F. Balfour, Q.C.—Mackay. Agents — Melville & Lindesay, W.S.

Counsel for Defenders (Reclaimers)—Comrie Thomson — Dickson. Agent — Robert Stuart, S.S.C.

Friday, January 8.

FIRST DIVISION.

[Court of Exchequer.

MILLER (SURVEYOR OF TAXES) *v.* THE GLASGOW CORPORATION WATER COMMISSIONERS.

Revenue—Assessment—Income-Tax.

The Glasgow Water Commissioners were appointed under a local Act of Parliament, by which they were authorised, *inter alia*, to acquire the works of certain private water

companies and to bring in an additional supply of water into the city. They were empowered to levy a compulsory rate within the municipal bounds, and also a rate on persons who chose to take the water outside the boundary, and to supply manufacturers and others by special arrangement. Any balance of the rates levied within the district of compulsory supply after certain statutory deductions was to be used to reduce the next year's assessment. *Held* that while this balance was not assessable for income-tax, the surplus revenue derived from rates paid by those who chose to take the water in the district beyond the compulsory boundary, and by the sale of water for manufacturing purposes, was assessable for income-tax.

This was a case for James Sherman Miller, Surveyor of Taxes, on the appeal taken by the Glasgow Corporation Water Commissioners to the Commissioners of Income-Tax for the district of Glasgow against an assessment of income-tax. The Water Commissioners had appealed against an additional assessment under Schedule D [of 5 and 6 Vict. c. 35] for the year ending 5th April 1885 on the sum of £21,729, duty £543, 4s. 6d., and a surcharge under Schedule D for the year ending 5th April 1884 on the sum of £15,799, duty £339, 2s. 11d., and the Commissioners had sustained their appeal.

The present case was a sequel to a case between the same parties, decided on 26th May 1875, reported 12 S.L.R. 466, and 2 R. 708 As narrated in the previous report, the Water Commissioners were by this Act required to furnish a supply of water within the municipal boundary of Glasgow. This was the district of compulsory supply. Within that district they levied a "domestic water-rate" on the rents of all dwelling-houses, and a "public water-rate" on the annual value of all dwelling-houses, shops, and other buildings. They also supplied water to a district outside the compulsory supply boundary, but the rates there were only paid by those using the water. They also sold water within and without the boundary for manufacturing purposes by special rate or measure. Their surplus rates, after paying into sinking fund, annuities, interest, &c., were applied to reduce the next year's rates. The Court in the previous case decided that such surplus derived from rates within the compulsory supply district was not profit within the meaning of the Income-Tax Act, and therefore not assessable for income-tax, any question as to revenue raised beyond the compulsory limit remaining undetermined. The question before the Court in this case related to the surplus revenue derived from the supply of water outside the district of compulsory supply, and from the supply of water within or without it for trading purposes by special rate or measure, excluding the estimated proportion of surplus revenue arising from the "domestic water-rate" and "public water-rate" within the compulsory district, which the previous decision had settled not to be assessable.

Before the Income-Tax Commissioners the Water Commissioners contended that under the provisions of their Act of Parliament referred to no profit could arise from the undertaking, and in support of their contention they referred to the previous case stated on their appeal against a similar charge for the year 1872–73. They further submitted that the amounts on which they had been charged in the first assessment for the year in question embraced the total amount of annuities and yearly interest on borrowed money payable by them out of the revenues of the undertaking from which they retained income-tax, and that they were not liable to any further assessment; that the additional charges appealed against virtually applied to the sinking fund, which was a statutory obligation, and was expressly classed in the 89th section of the Act, with the other items of general expenditure for which money is authorised to be raised in the manner provided by the Act, and that in the statement showing how the additional assessments had been arrived at the estimated nett revenue from outside supplies, and from trade and other charges, was treated as profit, but in reality the amount was simply the proportion of the sinking fund corresponding to the rates levied, and the computation did not prove that any profit had been derived from the supply of water to the outlying districts. The total amount carried to the sinking fund in 1882–3 was £26,246, and in 1883–4, £26,735.

The Surveyor of Taxes contended as follows—(1) That under the provisions of the Income-Tax Acts the Water Commissioners were liable to be assessed in respect of the full annual value or profits of the waterworks carried on by them, and not in respect of the amount of annuities and interest payable out of the revenue derived from the property, and that for the purpose of ascertaining the amount of yearly value or profits for such assessment the total amount of the receipts should be taken, from which there should be deducted all expenses necessarily incurred in carrying on the concern, and maintaining and repairing the property, but not the annuities or interest payable upon the debt, except such proportion thereof as was payable out of the compulsory rates levied from occupiers of dwelling-houses and owners of property within the limits of compulsory supply, the proportion of interest so payable being held to be chargeable under the provision contained in section 102 of 5 and 6 Vict. c. 35. (2) That the duty under these additional assessments was properly charged on the Water Commissioners as the corporation carrying on the concern. (3) That in the 89th section of the Water Commissioners' Act of 1855, directing the application of the revenue from the waterworks, the provision contained in the last clause for the payment of 'all other charges and expenses chargeable against revenue,' must be read as including the Government assessments. (4) That the duties of income-tax were by statute assessed and levied throughout the whole of the United Kingdom; that there was no exemption in favour of waterworks, or other property belonging to corporations or communities; that the fact that commissioners appointed under a local Act of Parliament were empowered to take over and carry on within a certain area waterworks previously the property of joint-stock companies and to extend the same did not affect the liability to assessment to income-tax, and could not operate to deprive the Crown of the duty on such property granted by Parliament, except in so far as related to the revenue authorised to be raised by compulsory rates within the limits of compulsory supply. (5) In support of his contentions

the Surveyor referred to the decision of the House of Lords on the appeal of the *Mersey Docks and Harbour Board* v. *Lucas*, decided June 28, 1883, L.R., 8 App. Cas. 891.

The Commissioners, as above stated, sustained the appeal and disallowed the assessment, and the Surveyor of Taxes took this Case.

Argued for the Surveyor of Taxes—What was sought to be taxed was returns obtained from those who voluntarily took the water. This source of revenue fell under the reservation of the Court in the previous case. The Water Trust was created for the benefit of citizens within the the municipal boundaries, and revenue coming from persons outside went into the pockets of persons within the municipal boundaries. This was just such a profit as the Income-Tax Act was intended to apply to.

Authority—*Black* v. *Attorney-General*, June 17, 1871, L.R., 6 Ex. 308.

Replied for the Water Commissioners—The point reserved by the Court in the previous case was not reached in this case. If there was raised a sum over and above the money necessary to reduce the domestic water-rate, then that might be such a profit as would fall under Schedule D of the Income-Tax Act. No doubt the Commissioners sold water, but they did not sell it as a private company would; they were obliged to part with it to all who desired it, and at a fixed rate. The Commissioners could not make anything by the sale of the water, as any surplus after providing for working expenses was devoted to a reduction of the rates. The money which it was sought to assess was one of the working expenses of the corporation, and so not assessable.

Authorities — *Paddington Burial Board* v. *Commissioners of Inland Revenue*, March 14, 1884, L.R., 13 Q.B. Div. 9; *Mersey Docks Board* v. *Lucas*, June 28, 1883, L.R., 8 App. Cas. (H. of L.) 891.

At advising—

Lord President—It must be conceded that the question raised by the present case is in material facts different from that decided by this Division of the Court on a case between the same parties in 1875.

The local Act 18 and 19 Vict. cap. 118, enables and requires the appellants to supply water to two different districts, one being within the municipal boundaries of Glasgow and the other beyond. In the former district the Commissioners are empowered to levy two rates, one called the domestic water-rate, leviable from the occupiers of all dwelling-houses according to rental, and the other called a public water-rate, leviable on the full value of all premises whatever, including shops and works as well as dwelling-houses. These two rates are compulsory, and fall to be paid whether the occupiers of dwelling-houses or the owners of property use the water or not. But beyond this district of compulsory supply and assessment the powers and duties of the Commissioners are different. The inhabitants of the suburbs of Glasgow beyond the limits of compulsory supply are not bound to pay any rates unless they choose to have a supply of water, but if they choose to have it, the Commissioners are then entitled to levy a separate rate on them. The Commissioners also under authority of their Act supply water by measure or in terms of special agreement to persons requiring water for manufacturing or other trading purposes, either within or without the limits of compulsory supply. The rates must be so regulated as to afford a sum annually sufficient along with the amount received for water supplied to traders to cover the whole expenses of the year, including annuities, interest of mortgages, debt, and one per cent. on the amount of the money borrowed to be set apart to form a sinking fund for redemption of the annuities and mortgages.

Whatever surplus arises after providing for those purposes is to be carried into the next year's account, and applied to the reduction of the compulsory rates for the next year. In the previous appeal it was stated as matter of fact that the amount paid into the sinking fund for the year then in question, and the surplus carried forward to next year's account to be applied in reduction of the compulsory rates amounted together to £17,032, 15s., but without distinguishing in any way from what sources of revenue this surplus arose. Income-tax was charged on this sum as being of the nature of profits or gains under Schedule D. But the Court were of opinion that if the surplus was derived from the amount of rates levied within the limits of compulsory supply it could not be considered as profits or gains of an undertaking. We were all of opinion that within the limits of compulsory supply the concern or undertaking as defined by the local Act was of this nature, that the citizens of Glasgow undertook to assess themselves for accomplishing the important public purpose of supplying the city (being the limits of compulsory supply) with a good supply of pure water; that in doing so they had and could have no view of making profit, for that would have been equivalent to paying out of one pocket and into another pocket of the same individual or class; that they paid these assessments for no other purpose than that of obtaining the particular contemplated benefit, and when that benefit is fully attained and secured for the future, the assessment and the authority to levy it comes to an end. I have reconsidered that judgment, and have not seen any reason to doubt its soundness.

While entertaining these views, we could not sustain the charge under Schedule D on the sum of £17,032, 15s., but we distinctly intimated that if the Inland Revenue authorities had discriminated between the revenue derived from rates within the limits of compulsory supply and the other revenues of the Commissioners a different question would have arisen, viz., whether the surplus, if any, arising from carrying on a traffic in water might not be chargeable with income-tax as profits and gains.

There is no proposal on the part of the Inland Revenue to challenge the previous judgment of the Court, but income-tax has now been charged under Schedule D on a sum of £15,081, which admittedly represents the surplus revenues derived from the supply of water outside the limits of compulsory supply, and from the supply of water within those limits for purposes of trade, manufacture, &c., excluding the estimated proportion of surplus revenue arising from the domestic rate and public rate levied within the limits

of compulsory supply. There is thus drawn a clear distinction between revenue derived from the compulsory rates levied within the municipal boundaries, and that derived from the sale of water for trading purposes and from non-compulsory rates levied from persons and properties beyond these boundaries. To the former kind of revenue our former judgment is of course directly applicable, but to the latter in my opinion it is not.

In so far as the Commissioners sell water either by measure or for a consideration fixed by special agreement or in return for a non-compulsory rate as the price of the water, they are in every sense of the term trading or trafficking in water, and their surplus revenue thus derived is profit or gain resulting from this trade within the meaning of Schedule D. The circumstance that these profits enure to the benefit of the citizens of Glasgow within the municipal boundaries does not affect the question, because that only shows that the citizens of Glasgow are through their representatives the Water Commissioners carrying on outside the limits of compulsory supply the trade of water merchants and deriving profits therefrom.

It is, I think, impossible to distinguish this case from *The Attorney-General* v. *Scott* (28 Law Times, 302), and *The Attorney-General* v. *Black*, decided in the English Court of Exchequer, which though not binding upon us as authorities seem to me to rest on sound legal principles, and on a just construction of Schedule D of the Income Tax Acts. And the principle and rule of construction are confirmed by the more recent case of *The Mersey Docks and Harbour Board* v. *Lucas*, which as a judgment of the House of Lords on the construction and effect of a British statute, though pronounced in an English appeal, is of binding authority here. I am therefore for reversing the order of the Commissioners and sustaining the assessment, and that is the opinion of the Court.

The Court reversed the judgment of the Commissioners and sustained the assessment.

Counsel for the Inland Revenue—Sol.-Gen. Robertson — Lorimer. Agents — David Crole, Solicitor for Inland Revenue.

Counsel for Glasgow Water Commissioners—D.-F. Balfour, Q.C.—Ure. Agents—Campbell & Smith, S.S.C.

Wednesday, January 13.

SECOND DIVISION.

KYD AND OTHERS, PETITIONERS.

Election Law—Parliamentary Election—Returning Officer's Expenses—Corrupt Practices Act 1883 (46 *and* 47 *Vict. cap.* 51).

Petition by election agent for authority to pay accounts of returning officer at an election, which were admittedly due, but had not been sent in within fourteen days after the poll was declared, *granted de plano.*

The Act 46 and 47 Vict. cap. 51, sec. 29, sub-sec. 2, provides—"Every claim against a candidate at an election, or his election agent, in respect of any expenses incurred on account of or in respect of the conduct or management of such election, which is not sent in to the election agent within the time limited by this Act, shall be barred, and shall not be paid, and, subject to such exception as may be allowed in pursuance of this Act, an election agent who pays a claim in contravention of this enactment shall be guilty of an illegal practice." And sub-section 3 provides—"Except as by this Act permitted, the time limited by this Act for sending in claims shall be fourteen days after the day on which the candidates returned are declared elected."

Sec. 29, sub-sec. 9, provides—"On cause shown to the satisfaction of the High Court [in Scotland the Court of Session is one of its divisions], such Court, on application by the claimant, or by the candidate or his election agent, may by order give leave for the payment by a candidate or his election agent of a disputed claim, or of a claim for any such expenses as aforesaid, although sent in after the time in this section mentioned for sending in claims, or although the same was sent in to the candidate and not to the election agent."

This petition was presented by John Proctor Kyd, solicitor, Dundee, and others, being the election agents for the several candidates at the parliamentary elections for the burgh of Dundee, Montrose district of burghs, and the county of Forfar, which took place respectively on the 26th and 28th November and 2d December 1885. All the candidates lodged sums of money with the returning officer in security of the election expenses in terms of the Act 41 and 42 Vict. cap. 41, sec. 3. The returning officers' expenses were made up by the Sheriff-Clerk, but were not sent in until after fourteen days from the respective dates of the declaration of the poll. It was considered that they would be timeously sent in if lodged with the agents within twenty-one days of the said respective dates.

In these circumstances the election agents presented this petition to the Second Division of the Court of Session. The petitioners stated that they were satisfied with the accuracy of the accounts, a statement of which was given in the petition, and that they were justly due and ought to be paid, but stated that as the conditions of the Act had not been fulfilled, they did not consider it safe to pay the accounts without the sanction of the Court. They therefore prayed the Court to dispense with the reading in the minute-book and publication on the walls, and pronounce an order giving leave for the payment by petitioners as election agents of the sums found due by each to the returning officer.

The Court issued the following order—"Grant leave for payment by the petitioners in terms of the prayer of the petition of the several sums therein specified; dispense with the reading of the petition in the minute-book and with the intimation thereof on the walls, and decern."

Counsel for Petitioners—Dickson. Agents—Millar, Robson, & Innes, S.S.C.
