tion of things that now exists between the parties, I am of opinion that the judgment of the Court of Appeal is unsound. The learned Lords Justices appear to me to assume a state of things which I do not find to be established here. I think that the judgment of Buckley, J., is perfectly right, and under the circumstances I move your Lordships that the judgment appealed from be reversed.

LORD ROBERTSON—I agree with the Lord Chancellor that the case was rightly decided by Buckley, J. I think that there is great force in his initial observation that it would be an extraordinary proposition that because an open space has been made available to the public for enjoyment in an open condition free from building, the result should be to give immediately, or by the unavoidable operation of the Prescription Act, to the circumjacent owners, as a matter of right, an easement of light which theretofore they had not enjoyed. When the sections are examined I find it impossible to trace the bringing about of that extraordinary result. In the first place, I think that the vicar has never been ousted of his proprietorial rights, and when I turn to the administration of the body which is charged with preserving the place as an open space, it seems to me that, so far from being extraneous to the scope of that administration, what it is proposed to do is completely within it. I think that the erection of a screen is, or may be, entirely consistent with the purpose of maintaining this place as an open space for public enjoyment, and in furtherance of that purpose. No one can say that a recreation ground surrounded by flats seven storeys high and looked into by all the windows of those buildings is necessarily as good a recreation ground as one more open to the sun and less overlooked. Accordingly, just as Cozens-Hardy, L.J., says that these administrators could erect a toolhouse, that being in furtherance of the primary purpose of the administration, so I think that this erection is within that purpose. Of course I do not imply that it is the duty of all administrators of open spaces to surround their open spaces with screens; all that I say is that it is within the rights which have never been taken away from the proprietors and administrators of these grounds, and it may be a step to be taken in furtherance of the purposes with which they are charged. I need hardly say that what I have said bears relation directly to the argument of Cozens-Hardy, L.J., which indeed was adopted at your Lordships' Bar. On the other question, as to whether any screen is necessarily a building, which, as has been pointed out, is the condition of the argument, I can only say that proposition seems to me to be entirely inconsistent with the most obvious physical facts. On these grounds I think that the judgment of the Court of Appeal was wrong, and the judgment of Buckley, J., right.

LORD LINDLEY—I am entirely of the same opinion. The injunction granted by the Court of Appeal, to my mind, goes a great deal too far. There is not the slightest evidence to warrant the notion that the defendants or any of them intended to erect a building on this land, and accordingly the Court of Appeal have put in words which would cover building or screen. Screens are of all sorts and kinds, and I can imagine screens which obviously are not buildings, and would obviously be justified by the statutory powers conferred upon these public bodies. This open space may be preserved, and primarily ought to be preserved, as a place of recreation, and more or less as a garden. Now, just fancy an injunction to restrain these defendants from planting good sized trees in front of these windows which would interfere with already acquired rights of light. How could it be possible to maintain an injunction to restrain them from such planting? That shows that the Court of Appeal has gone too far. I entirely adopt the view taken by Buckley, J. I think that he has put the true construction on the Acts, and I agree that the appeal ought to be allowed with costs here and below.

Order appealed from reversed.

Counsel for the Appellants—Haldane, K.C. — Terrell, K.C. — Nash — Montague Barlow. Agent—John H. Horton, Solicitor.

Counsel for the Respondents—Astbury, K.C. — M. Romer. Agents — Cheston & Sons, Solicitors.

HOUSE OF LORDS.

Tuesday, November 21.

(Before the Lord Chancellor (Halsbury), Lords Robertson and Lindley.)

ASHTON GAS COMPANY *v* ATTORNEY GENERAL AND OTHERS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Revenue—Income Tax—Gas Company—Maximum Rate of Dividend Provided by Statute—Payment of Dividend Free of Income Tax.

The Special Act of a gas company provided that the profits of the company to be divided among the ordinary shareholders in any year should not exceed a specified rate.

Held that in calculating the rate of dividend income tax ought to be included.

This was an appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS, ROMER, and COZENS-HARDY, L.JJ.), who had affirmed a judgment of BUCKLEY, J.

The Act of Parliament under which the Ashton Gas Company was incorporated provided as follows:—"Except as in this Act provided, the profits of the company to be divided among the shareholders

in any year shall not exceed the rate of ten pounds per centum per annum (which rate is in this Act referred to as 'the standard rate of dividend') on the ordinary share capital or stock of the company authorised by Parliament and paid up."

For many years the company had paid to its shareholders the maximum dividends free of income tax.

The Corporation of Ashton and the Attorney-General in the present action sought a declaration that according to the true construction of the Act of Parliament the profits divisible in any year among the shareholders of the company ought to be calculated as inclusive and not exclusive of the amount payable for that year in respect of income tax on the profits to be divided and for an injunction to restrain the company from distributing profits otherwise than on the footing of such declaration.

BUCKLEY, J., and the Court of Appeal granted the declaration and the injunction craved.

The Gas Company appealed.

At the debate the appellants referred to the Income Tax Act 1842 (5 and 6 Vict. c. 35), secs. 40, 54, and 60.

It is enacted by sec. 60—"The duties hereby granted and contained in the said schedule marked A shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of the Act and to refer to the said duties as if the same had been inserted under a special enactment. Schedule A.—No. III. The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year of the profits received therefrom within the respective times therein limited. Third—Of ironworks, gasworks . . . on the profits of the year preceding."

Their Lordships gave judgment as follows—

LORD CHANCELLOR (HALSBURY)—But for the somewhat complex character of the dividend arrangements of this company, I should say that this was a clear case. There are two things which give rise to confusion. In the first place this action only raises indirectly the question of what is to be deducted in respect of income tax. The Legislature has laid down that the shareholders of this company shall not get more than a ten per cent. dividend on their shares. That seems to me to be a very clear proposition, and when we analyse the facts in this case I should have thought that the whole thing would have been settled in five minutes. In the second place, there is a somewhat difficult and complex machinery which makes the officers of the company officers of the financial department of the Government for the purpose of collecting the tax. Now, first of all, let us suppose that each shareholder is to get ten per cent. upon his shares. That is a very plain matter, and what the ten per cent. is can easily be ascertained. But then the particular Act of Parliament which is before us provides that ten per cent. being the utmost that the shareholders shall receive, they are in their turn the persons who are to collect the income tax for the Government. Let us suppose that we get rid of the machinery altogether and that the company are relieved from the necessity of collecting the tax for the Government. Let us suppose that instead of that machinery the shareholder is left face to face with the Government collectors, and that instead of acting as the Government receivers the company simply pays the ten per cent. to the shareholders, and allows the shareholder to make his bargain or rather to give accounts to the proper Government officer. The company having paid ten per cent., and it having been ascertained what the proper quota of the shareholder would be in respect of the income tax, suppose the company to give to the shareholder, besides the ten per cent. which they have already given to him, the quota for the income tax also, will they or will they not have given to the shareholder more than ten per cent. for his dividend? It is obvious that they will have given him the amount, we will call it x, which is due in respect of dividend, plus y, which is the amount of income tax due from him. So presented the case appears to me to be perfectly clear. The fallacy has been in arguing as if you can deduct from the income tax which you have got to pay something which alters that which is the real nature of the profit. Now, the profit upon which the income tax is charged is what is left after you have paid all the expenses necessary to earn that profit; indeed profit is a very plain English word, that is what is charged with income tax. But if you confused the expenditure which is necessary to earn that profit with the income tax, which is a part of the profit itself, one can understand how you get into the confusion which has induced the learned counsel to point out at such very considerable length that this is not a charge upon the profits at all. The answer to that is this—the income tax is a charge upon the profits, the thing which is taxed is the profit which is made, and you must ascertain what is the profit that is made before you deduct the tax. You have no right to deduct the income tax before you ascertain what the profit is. I cannot understand how you can make the income tax part of the expenditure, which expenditure earns itself. That appears to me to put in a clear form what this is. I share very much the difficulty of Buckley, J., in understanding how so plain a matter has been discussed in all the courts at such extravagant length, because it appears to me that when once you put the two propositions, "What is it that you are taxing?" "Profits." And then, "How can you ascertain profits without deducting the income tax itself, which you clearly can and must do?" I think that these two propositions render the matter absolutely clear from any doubts at all. In the case of *Last* v. *London Assurance Corporation*, 53 L.T. Rep. 634, 10 App. Cas. 438, which was

decided a good many years ago, in 1885, one can understand the argument which was there suggested, which was that when you are dealing with the bonuses of an insurance company you pay a bonus to induce people to become shareholders in your undertaking, therefore it is part of the necessary expenditure to induce people to come in. But the Court of Appeal, and this House afterwards, refused to acquiesce in that argument. They said "That is not true; you must ascertain first the income; you must ascertain what the income tax is levied upon—that is to say, the profit of the undertaking is to be ascertained first; and when you have found out what the profit of the undertaking is you have then to tax it as profit." Really the whole question comes back to the definition of the word "profits." When once you have defined what the word "profits" means it is perfectly clear what the result of this case must be. I am of opinion, for the reasons which I have given, that the judgment of the Court of Appeal is absolutely right, and I move your Lordships that the appeal be dismissed with costs.

LORD ROBERTSON—The whole argument of the appellants is rested upon the words of Schedule A read out of all relation to the subject-matter of the enactments. What has got to be remembered, and not to be ignored, is that Schedule A merely provides a formula for ascertaining the income arising from the ownership of lands. It is an artificial and rather elaborate method of estimating income, but what it yields is, on the theory of the Acts, income none the less than if the question was raised under any other of the schedules. Now if this be so there is no room for argument. The view of the appellants really implies that the tax under Schedule A is not income tax at all, and I am not sure that the reasoning would not tend to the shareholders' own part of the proceeds being taxed over again, this time as income tax. I entirely agree in the judgment of Buckley, J.

LORD LINDLEY—I am entirely of the same opinion. The reasoning of the judgment of Buckley, J., appears to me to be absolutely unanswerable, and although I have listened with great respect to what is an intellectual conjuring trick, I am satisfied that there is nothing at all in the appellants' argument.

Judgment appealed from affirmed.

Counsel for the Appellants—H. Terrell, K.C.—W. M. Cann. Agents—Burgess, Cozens & Co., Solicitors.

Counsel for the Respondents—Danckwerts, K.C.—R. J. Parker. Agents—Sharpe, Parker, Pritchards, Barham, & Lawford, Solicitors.

HOUSE OF LORDS.

Wednesday, November 22.

(Before the Lord Chancellor (Halsbury), Lords Robertson and Lindley.)

CHARLESWORTH AND ANOTHER *v.* WATSON AND ANOTHER.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Mines and Minerals — Mining Lease — Construction — Undertaking to Win, Work, and Get Fairly, Duly, and Honestly the Whole of the Coal.

A lease for a term of twenty-one years of a seam of coal provided that the lessees should, as soon as they commenced working the coal, pay a yearly rent of £100 per acre of coal, and until then a yearly rent of £5. They undertook that they would "at all times during the said term hereby appointed fairly, duly, and honestly win, work, recover, obtain, and get the whole of the said mine . . . or seam . . . in a proper and workmanlike manner." It ultimately turned out to be impossible to work the coal except at a loss, and the lessees declined to do so.

Held that on a true construction of the lease they were bound to work the coal (the words "fairly, duly, and honestly" adding to rather than detracting from their obligation), and that accordingly they were liable to the lessors in damages for breach of contract.

The respondents on 18th December 1885 leased to the appellants for the term of twenty-one years a certain seam of coal, the lessees "yielding and paying therefor, as soon as the said lessees shall commence working the said coal, yearly and every year during the said term . . . the clear annual rent of £100 for an acre of the said coal by two half-yearly payments . . . the first payment thereof to begin and be made on the half-yearly day next after the said lessees shall have commenced working the said coal, and yielding and paying yearly and every year during the continuance of this demise the further sum of £100 for every acre of the said coal . . . and also yielding and paying yearly and every year during the said term until the said lessees shall begin to work and get coal from and out of the said mine . . . the annual rent of £5 to be paid and payable at the time and in the manner aforesaid." The lessees covenanted, *inter alia*, that they and "their several agents, servants, colliers, and workmen shall and will at all times during the said term hereby appointed fairly, duly, and honestly win, work, recover, obtain, and get the whole of the said mine, bed, vein, or seam of coal hereby demised in a proper and workmanlike manner, and also that they, the said lessees, shall not or will not desist from working and using any of