renewed the lease under the hypothetical conditions I have figured except on the basis of paying one-third of the pre-war rent. That evidence appears to me to be contradictory, and it is certainly not convincing. I take it that a temporary dislocation of this kind may occur from purely trade causes, as for instance when the selling price of the article falls below the cost of production. In such cases, which occasionally occur, the best course for the producer is to close his premises for the time, or in some cases to restrict his output. The mere fact that he does not in a given year make any profit from his business, or that he actually closes his business premises for the purposes of manufacture, does not necessarily, if the circumstances are not believed to be permanent, affect the value of the subjects as heritable subjects. The rent which a hypothetical tenant will give for premises which are equipped for purposes of a particular trade will depend upon the future prospects of the trade. I find nothing in the evidence which leads me to adopt any different conclusions from those at which the Valuation Committee arrived.

[*His Lordship here dealt with one of the cases with which this report is not concerned.*]

On the whole matter I am of opinion that these appeals should be refused, and that we should hold that the Valuation Committee was right.

LORD CULLEN—I agree. [*His Lordship here dealt with one of the cases with which this report is not concerned.*] As regards the other cases, although the distilleries are temporarily unproductive, there is no evidence to show that if the matter had become one of actual letting, the present proprietors as hypothetical tenants would not have been willing to pay the amounts appearing in the valuation roll, and so hold on for the future rather than give up their premises and their businesses. The more prosperous the businesses have been in past years the less likely would they be to take the latter course, and it is significant that in response to a request for a disclosure of what their profits have been in the past no disclosure was made.

LORD HUNTER—I agree. I see that the values of those distilleries were fixed about 1885, and that in 1910 the different distillers made application for a reduction in the valuation upon two grounds—(1) that the price of whisky had for some time been very low, and (2) that the licence duty imposed upon distillers by the Finance Act of 1910 had been greatly increased. Now they make the present application in these circumstances. In 1910 the price of whisky was 3s. 10d. per gallon, in 1917 it was 20s. per gallon, and in 1915-16, and 1916-17 it has been something like 25s. per gallon. If it was a legitimate consideration for a reduction in the valuation that the price of whisky had gone down, it is equally a matter for consideration, when a further application for a reduction is made on the ground of restricted output whether that is not more than counter-balanced by the enormous rise in price.

If the appellants found on loss of profit I should have expected that the profit and loss account would have been put before the Committee. But that was not done. Not only was it not done, but the Committee find as a fact that the increased prices obtained, during at all events two years, had prevented any possible loss, and had increased the normal profits during these years. It is to be remembered that some of these distilleries had large stocks of whisky, although no doubt some of it was held for customers.

In that state of matters it does not seem to me that there was any material before the Valuation Committee to enable them to say, as Lord Cullen has put it, that these different proprietors if they had been tenants would not have been willing to continue to pay for these particular premises the amounts that were entered in the valuation roll rather than clear out and give up their businesses altogether because of a temporary restriction caused by the regulations made in the interests of the country generally. I therefore agree in the judgment proposed by your Lordships.

The Court were of the opinion that the determinations of the Committee were right.

Counsel for the Appellants—Moncrieff, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Assessor—Macmillan, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

COURT OF SESSION.

Thursday, December 5.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

DUMBARTON HARBOUR BOARD *v.* COX.

Revenue—Income Tax—Deductions—Harbour — Dredging — Wear and Tear — Repairs on Premises — Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 60, *Schedule A, No. III, Rule Third, and sec.* 100, *Schedule D, Case I, Rule Third—Revenue Act* 1866 (29 *and* 30 *Vict. cap.* 36), *sec.* 8—*Customs and Inland Revenue Act* 1878 (41 *and* 42 *Vict. cap.* 15), *sec.* 12—*Finance Act* 1907 (7 *Edw. VII, cap.* 13), *sec.* 26 (3) *and* (4).

A harbour board expended money in removing silt from the bed of an artificial harbour which was mainly used as an access to a shipbuilding slip. The Crown conceded that the cost of the operation (which greatly exceeded the annual income) was revenue expenditure, and it had been allowed to the extent of the profits in 1916-17, the first year in which it could be so allowed. The harbour board claimed that they were entitled to make a deduction in the taxing year 1917-18, in respect of the

debit balance arising therefrom outstanding on the previous year's income. *Held* (1) that the silting-up of the harbour was not wear-and-tear of plant in the sense of the Customs and Inland Revenue Act 1878, sec. 12, and the Finance Act 1907, section 26 (3) and (4), so as to make the expenditure in question a competent deduction under these Acts; (2) that the harbour board having been assessed upon the profits of the year preceding the year of assessment under the Income Tax Act 1842, Schedule A, No. III, Rule Third, and not having claimed to be assessed under the Income Tax Act 1842, Schedule D, First Case, Rule First, upon the average of three years' profits, it was not consistent with the nature of the assessment laid upon them to allow them to make deductions in respect of repairs on premises on the basis of a three years' average under Schedule D, First Case, Rule Third, and that accordingly the provision in the Revenue Act 1866, section 8, as to the application of the rules prescribed by Schedule D was inapplicable.

Opinion per the Lord President that the expenditure upon removing silt was of the nature of capital expenditure.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 60, enacts—"The duties hereby granted and contained in the said Schedule marked A shall be assessed and charged under the following rules. . . . Schedule A—No. III. Rules for estimating the lands, tenements, hereditaments or heritages hereinafter mentioned, which are not to be charged according to the preceding general rule. 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 herein limited. . . . (*Third*) Of . . . canals, inland navigations, docks, . . . railways and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments or heritages, on the profits of the year preceding." Section 100—Schedule D, First Case, Rule First—"The duty to be charged . . . shall be computed on a sum not less than the full amount of the balance of the profits or gains . . . upon a fair and just average of three years . . . and shall be assessed, charged, and paid without other deduction than is hereinafter allowed. . . ." Rule Third—"In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from . . . such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made. . ."

The Revenue Act 1866 (29 and 30 Vict. cap. 36), section 8, enacts—"The several and respective concerns described in No. III of Schedule A of the Income Tax Act 1842 shall be charged and assessed to the duties hereby granted in the manner in the said No. III mentioned, according to the rules prescribed by Schedule D of the said Act, so far as such rules are consistent with the said No. III."

The Customs and Inland Revenue Act 1878 (41 and 42 Vict. cap. 15), section 12, enacts—"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."

The Finance Act 1907 (7 Edw. VII, cap. 13), section 26, enacts—"(3) Where, as respects any trade, manufacture, adventure, or concern, full effect cannot be given to the deduction for wear-and-tear in any year owing to there being no profits or gains chargeable with income tax in that year, or owing to the profits or gains so chargeable being less than the deduction, the deduction or part of the deduction to which effect has not been given, as the case may be, shall, for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear-and-tear for that year, and deemed to be part of that deduction, or if there is no such deduction for that year, be deemed to be the deduction for that year, and so on for succeeding years. (4) In this section the expression 'deduction for wear-and-tear' means the deduction allowed, or which would be allowed, under section 12 of the Customs and Inland Revenue Act 1878, as representing the diminished value by reason of wear-and-tear during the year of machinery or plant used for the purposes of any trade, manufacture, adventure, or concern."

The Dumbarton Harbour Board, incorporated by the Dumbarton Harbour Act 1881, *appellants*, being dissatisfied with an assessment under the Income Tax Acts of £505, 10s. upon the sum of £2022 made upon them by the Commissioners for the General Purposes of the Income Tax Acts for the Western Division of the County of Dumbarton, in respect of the profits of the business carried on by the appellants for the year ending 5th April 1918, took a Case in which Walter George Cox, surveyor of taxes, was *respondent*.

The Case stated—"The following *facts* were admitted— . . . 2. The statutory duty of the appellants is the maintenance of the

harbour of Dumbarton 3. The appellants make up their accounts to 31st August in each year. 4. Periodical dredging of the harbour is necessary to earn income. 5. The appellants having no dredging plant of their own arrange from time to time at intervals with outside contractors to do necessary dredging. 6. Under contract with an outside contractor the appellants, between November 1914 and February 1915, dredged from the bed of the harbour 142,315 cubic yards of soil at a cost of £15,417. 7. Of the dredging referred to 41,131 cubic yards, costing £4455, 17s., were applicable to new or capital works representing an increase beyond the original depth, and 101,284 cubic yards, costing £10,962, 3s., were applicable to maintenance—removing of silt from the harbour bed. 8. The free revenue for the appellants' financial year ending 31st August 1915, without taking into account the foresaid sum of £10,962, 3s., was £1441, but taking that sum into account there was a debit balance of £9520, 17s. 9. No assessment was imposed for the income tax year 1916-17 by reason of the revenue of the year to 31st August 1915 being exceeded by the expenditure so that in relation to that year there was no opportunity of appeal or of determining by the finding of the Commissioners questions now in issue. 10. The appellants' revenue for the year ending 31st August 1916, income tax year 1917-18, without taking into account the foresaid sum of £9520, 17s., was £2022, the assessment of £505, 10s. on which is the subject-matter of the appeal. 11. The assessment charged is upon the profits of the appellants as shown in their accounts for the year ending 31st August 1916 without, as stated, any deduction in respect of the debit balance of £9520, 17s. before mentioned. 12. The sum of £12,962, 3s. was met by the board by borrowing from the bank with the intention of repayment being spread over a number of years subsequent to that in which the work of the contractors was performed and the account to them incurred. 13. No claim or allowance was made for or in respect of depreciation during the tax year 1914-15 or during the tax year 1915-16. . . .

"The Commissioners on consideration of the facts and arguments submitted were of opinion—in fact—1. That the expenditure for which the deduction is claimed was necessary to maintain the harbour as a profit-earning concern, and, in law—2. That the removing of silt from the bed of the harbour was not, in the sense of the Acts, tear and wear of plant and machinery, And *separatim*, 3. Having been allowed deduction in accordance with No. III of the Act of 1842, further deduction was not claimable under the statutes, and accordingly dismissed the appeal."

Argued for the appellants—Originally no deduction was allowed in respect of wear and tear of plant—Income Tax Act 1842 (5 and 6 Vict. cap. 35), Sched. D, First Case, Rule 3; *Forder* v. *Handyside*, [1876] 1 Exch. D. 233. Later a deduction representing the diminished value by reason of wear and tear of machinery or plant was allowed—Customs and Inland Revenue Act 1878 (41 and 42 Vict. cap. 15), section 12. When the sum representing wear and tear exceeded the annual income, then it could be deducted over a number of years until wiped out—Finance Act 1907 (7 Edw. VII, cap. 13), section 26 (3) and (4). The harbour in question was artificially constructed and its main use was to enable vessels to get off the slips. As such the harbour was plant in the sense of the sections referred to, as construed by the decisions—*Blake* v. *Shaw*, 1860, Johnson 732, *per* Page Wood, V.C., at p. 734; *Carter* v. *Clarke*, 1898, 78 L.T. 76; *Yarmouth* v. *France*, 1887, 19 Q.B.D. 647, *per* Lindley, L.-J., at p. 658; *John Hall Junior & Company* v. *Rickman*, [1906] 1 K.B. 311; *Earl of Derby* v. *Aylmer*, [1915] 3 K.B. 374. The sum of £10,963, 3s. had undoubtedly been expended on maintenance and it represented either the depreciation due to wear and tear or the expenditure for renewal and repair. Silting up of the harbour bed was wear and tear—for the sections must be widely construed—and silting up depreciated the profit-earning capacity of the harbour. If so, no deduction for wear and tear should be allowed until the money was spent, and thereafter a deduction should be allowed if necessary over a series of years—*Caledonian Railway Company* v. *Special Commissioners of Income Tax*, 1880, 8 R. 89, *per* Lord Justice-Clerk (Moncreiff), at p. 96, 18 S.L.R. 85. Depreciation might be estimated on a yearly basis—*Cunard Steamship Company* v. *Coulson*, [1899] 1 Q.B. 865. The taxing authorities had allowed the sum of £10,962, 3s. as reasonable for the year ending in April 1917, and the appellants were consequently entitled to carry over the expenditure not met in that year into succeeding years. Alternatively, on the footing that the appellants were to be charged upon the profits for the year preceding the year of assessment under the Act of 1842, section 60, Sched. A, No. III, Rule Third, the rules applicable to the computing of profits under Schedule D were made applicable to profits under Schedule A, No. III, by the Revenue Act 1866 (29 and 30 Vict. cap. 36), section 8. But by Schedule D, First Case, Rule III, a deduction for repairs on a three years' average was allowed. If the expenditure in question was not for repair of plant, then it was for repair of premises, and consequently one-third could be deducted each year. In any event the tax was upon profits which were only to be ascertained after deducting the expenses necessary to earn the profits, and dredging was such an expense—*Ashton Gas Company* v. *Attorney-General*, [1906] A.C. 10; *Strong & Company, Limited*, v. *Woodifield*, [1906] A.C. 448; *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309, *per* Halsbury, L.C., at p. 313, Lord Watson at p. 317, and Lord Herschell at p. 323; *Hall* v. *King's Lynn Harbour Moorings Commissioners*, 1875, 1 Tax Cas. 23. *Coltness Iron Company* v. *Black*, 1881, 8 R. (H.L.) 67, 18 S.L.R. 466, was distinguishable.

Argued for the respondent—Section 12 of the Act of 1878 did not apply. The harbour was not plant—*Earl of Derby* v.

Aylmer (*cit.*); *Yarmouth* v. *France* (*cit.*), *per* Lindley, L.-J., at p. 658. Silting up was not wear and tear, it was a natural phenomenon, whereas wear and tear implied degeneration of physical condition owing to use—*Earl of Derby* v. *Aylmer* (*cit.*), *per* Rowlatt, J., at p. 378; *Burnley Steamship Company* v. *Surveyor of Taxes*, 1894, 21 R. 965, 31 S.L.R. 803; *Caledonian Railway Company* v. *Special Commissioners of Income Tax* (*cit.*). Further, the appellants' claim was for deduction of the whole £10,962, 3s. That did not represent wear and tear during the year of assessment, but was an expense incurred at wide intervals of which only a portion was applicable to the year in question, and as such could be deducted—*Caledonian Railway Company* v. *Special Commissioners of Income Tax* (*cit.*), *per* Lord Gifford at p. 99. Further, it was an expense to earn future profits and was not referable to profits earned in the year in which they were incurred—*Vallambrosa Rubber Company* v. *Farmer*, 1910 S.C. 519, 47 S.L.R. 488. In any event the expenditure in question was of the nature of a capital charge—*Highland Railway Company* v. *Balderston*, 1889, 16 R. 950, 26 S.L.R. 657. The case was stated on the footing that the appellants fell to be assessed under the Act of 1842, section 60, Sched. A, No. III, Rule Third, *i.e.*, taxation was upon the profits for the year preceding the year of assessment. That being so it was inconsistent to introduce the principle of averaging over three years contained in Sched. D, Case I, Rule 3. Accordingly section 8 of the Act of 1866 had no application—*Coltness Iron Company* v. *Black* (*cit.*), *per* Lord Blackburn at p. 76.

At advising—

LORD PRESIDENT—In this case as stated and argued to us I have no doubt that the decision of the Commissioners is sound and ought to be upheld. It appears that the Dumbarton Harbour Board have no dredging plant of their own, and in order to keep their harbour free from silt they arrange with outside contractors to do the necessary dredging. Between November 1914 and February 1915, under contract, the Harbour Board expended £10,962 in removing silt from the harbour bed. At the close of their financial year on 31st August 1915 their free revenue was £1441. But if from that free revenue there be deducted the £10,962 spent on raising silt then there was a large debit balance on the year's work. In the case before us we have to deal with the annual value of the harbour for the year ending 5th April 1918, which it is agreed must be fixed by computing the profits of the harbour for the year ending 5th April 1918; and it is further agreed that the basis of assessment is the profit for the financial year ending 31st August 1916. The precise question now before us is—Ought the debit balance brought out at the end of the financial year terminating on 31st August 1915 to be carried forward and deducted from the earnings of the succeeding year? If it is carried forward, then there will be no profits on which to assess. In other words, for that year this harbour will have no annual value. I am of opinion that the Commissioners have correctly decided that the cost of dredging out silt in the year ending 31st August 1915 cannot be set against the earnings of the harbour for the year ending 31st August 1916.

The annual value of the harbour for the year in question is arrived at in terms of Schedule A, No. III, of the Income Tax Act 1842 by taking "the profits of the year preceding," *i.e.*, of the year ending 31st August 1916. And it was contended that the expenditure on dredging to which I have referred ought to be deducted in striking these profits on the ground that it was wear and tear of plant and machinery used for the purposes of the concern within the meaning of the Customs and Inland Revenue Act 1878, section 12, and the Finance Act of 1907, section 26, sub-sections (3) and (4). I am quite unable to accept this view. A harbour bed is neither plant nor machinery, nor is silt wear and tear.

Next, the deduction was sought to be justified as "repairs on premises." For my part, and speaking for myself alone, I am equally unable to accept that view. According to the ordinary use of language—and we are not dealing here with technical phraseology—to dredge out silt from a harbour cannot be accurately or even intelligibly described as making "repairs on premises." This expenditure was, we are told, necessary to maintain the harbour as a profit-earning concern, *i.e.*, as a harbour. It was therefore exactly of the same nature as the expenditure incurred in originally making the harbour. Had that £10,962 not been expended the harbour would have ceased to exist as a profit-earning concern. The money was spent and the work was done in order to re-create the undertaking. In short, the harbour was by this dredging re-made. It was therefore plainly capital expenditure, just as much as the cost of originally making the harbour. Now it is really the annual value of the harbour which has to be ascertained, and it is certain that in ascertaining it the original cost of the making of the harbour cannot be taken into account. I refer for the principles upon which the assessment of such an undertaking as this ought to be made to the opinion of Lord Penzance in the *Coltness Iron Company*—a case which appears to me to be directly applicable to the case before us. Counsel on both sides, however, agreed that in this Stated Case as it stands we must regard the £10,962 either as "wear and tear of plant and machinery" or as "repairs on premises. . . ." If, then, I am to regard this dredging expenditure on the bed of the river Leven as "repairs on premises," which for the reasons I have given it seems to me it was not, then there remains for consideration the question whether the amount of the repairs to be deducted in order to ascertain the profits of the year ending 31st August 1916 is to be computed in accordance with Schedule D, Case I, rule 3, or not. That rule in express terms applies to the case where an estimate is being made of the balance of profits and gains chargeable under Schedule D, and provides that no sum is to be deducted

from such profits or gains on account of any sum expended for repairs on premises "beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made." It is contended that this rule, although expressly applicable to an assessment under Schedule D, is by the 8th section of the Revenue Act 1866 made applicable to an assessment under No. III of Schedule A. That section runs as follows—"The several and respective concerns described in No. III of Schedule A of the said Act passed in the fifth and sixth years of Her Majesty's reign, chapter thirty-five (*a*), shall be charged and assessed to the duties hereby granted in the manner in the said No. III mentioned, according to the rules prescribed by Schedule D of the said Act, so far as such rules are consistent with the said No. III." The question therefore comes to be—Can Schedule D, Case I, rule 3, be consistently applied to a case such as we have before us of a harbour the annual value of which is to be taken as represented by the amount of "the profits of the year preceding." That might be a difficult question. But, for the reason which I shall presently give, no difficulty arises in the case before us. In ascertaining the amount of the profits of such a concern for a particular year I for my part can, as at present advised, see no inconsistency in computing the amount of the "repairs on premises" on a three-yearly average and not on their actual amount, or in computing the earnings of the concern also on a three-yearly average. It seems to me to be nothing to the purpose to say that the profits under Schedule D are estimated on a three-yearly average, and that under Schedule A in the case before us they are the "profits of the year preceding," and therefore there is an inconsistency, for it is simply a case of the method of computation to be followed in ascertaining the profits of a particular year. And the 8th section of the 1866 Act says, as I read it—Do so "according to the rules prescribed by Schedule D" unless you are confronted by some inconsistency between these rules and No. III of Schedule A. No such inconsistency was even attempted to be pointed out in the debate to which we listened; and none seems to have occurred to the mind of Lord Blackburn when in the *Coltness* case he said—"Any rule expressed as to the mode of computing the balance of the profits and gains during the period of three years given in Schedule D which is not inconsistent with No. III may perhaps be made in future to apply to the mode of computing the annual profits of properties chargeable under No. III." Lord Blackburn, it will be seen, offered no final opinion upon this question. Nor do I. For in the present case we were invited by counsel on both sides to assume—it was taken for granted in the argument—that in computing "the profits of the year preceding" the three-yearly average under Rule 1 of Schedule D, Case I, was not to be taken because it was inconsistent with No. III of Schedule A. If that be so, and that is the condition of the argument, it is apparent that Rule 3 of Schedule D, Case I, is equally inconsistent with No. III of Schedule A. In short, you cannot compute the earnings of this harbour in one way and the "repairs on premises" in another way. If rule 1 is inconsistent with No. III of Schedule A, so is rule 3. If the former is confessedly inapplicable because inconsistent with No. III of Schedule A, the latter must be so likewise. If therefore I am bound, as I think I am, owing to the form in which this case is presented to us, to regard the expenditure of £10,962 in removing silt as an expenditure on "repairs of premises," it falls to be deducted from the earnings of the harbour in the year in which it was actually incurred, and no part of it can be set against earnings in any other year in computing the profits of the harbour in order to fix its annual value for tax purposes. I am therefore for refusing this appeal and affirming the decision of the Commissioners.

LORD MACKENZIE—Upon the first question argued I am of opinion that the Commissioners were right in determining that the removing of silt from the bed of the harbour was not in the sense of the Act of 1878, section 12, and the Act of 1907, section 26 (3), tear and wear of machinery. It certainly would not be so regarded in the popular use of the terms, and none of the cases cited to us are authorities for the proposition which the Harbour Board endeavour to establish. The next question is how the cost of dredging the silt from the harbour bed so far as applicable to maintenance and not to new works ought to be dealt with. It must be noted that the Solicitor-General took it as the basis of his argument that this was a proper charge against revenue. We are therefore relieved from the duty of deciding whether it could have been successfully maintained that the charge was properly one against capital. Taking it as a charge against revenue, the Harbour Board maintained that although their undertaking is assessed under the Income Tax Act 1842, No. III, Schedule A, yet they are entitled in virtue of the Revenue Act 1866, section 8, to take advantage of the provision as to deductions contained in section 100, Schedule D, Case I, rule 3, of the 1842 Act. Section 8 of the 1866 Act directs that, *inter alia*, harbours shall be charged and assessed for income tax in the manner in the said No. III (of Schedule A of the 1842 Act, section 60) mentioned, according to the rules prescribed by Schedule D of the said Act, so far as such rules are consistent with the said Schedule A. No. III, rule 3, enacts in regard to harbours that their annual value shall for the purposes of assessment be understood to be the profits of the year preceding.

The footing on which this case is presented is that the basis on which the annual value is to be taken are the profits for one year. The contention is that in making the deductions for repairs an average of three years is to be taken. There appears to me to be an inconsistency in this within the meaning of section 8 of the 1866 Act. Schedule D, Case I, rule 3, is a pendant to rule 1. It is not maintained by the Harbour Board

that they had right to have recourse to rule 1, and take as the basis of their assessment the balance of their profits upon an average of three years. Unless they do this I am unable to hold that they can have recourse to rule 3, which provides that "in estimating the balance of profits and gains chargeable under Schedule D" no sum is to be deducted for repairs "beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made." I am accordingly of opinion that the determination of the Commissioners on the second point is correct.

LORD SKERRINGTON — This litigation relates to a sum of £10,962 which was expended by the appellants in paying a contractor for dredging their harbour. It was admitted by the Inland Revenue that this outlay was "applicable to maintenance." Further, the Commissioners express the opinion that this expenditure was "necessary to maintain the harbour as a profit-earning concern." Seeing that the amount largely exceeded the revenue (£1441) of the financial year in which the whole of it was expended, no assessment was imposed upon the appellants for the first income-tax year which followed that financial year. The appellants, however, are not content with this allowance. They claim that the remainder of the £10,962, viz., £9520, must be carried forward as a charge against the revenue of the second and of every succeeding income-tax year until the whole £10,962 has been thus wiped out. Alternatively, they maintain that the £10,962 must be treated in the same way as expenditure for maintenance is treated in the case of assessments imposed under Schedule D, and that one-third thereof forms a good deduction from the revenue of each of the three income-tax years immediately following the financial year in which it was expended. This latter argument, if well founded, would result in the appellants obtaining complete exemption from the assessment under appeal, and also probably from any assessment in the following year.

The validity of the appellants' primary contention depends upon whether the £10,962 in question can be held to represent "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," within the meaning of section 12 of the Customs and Inland Revenue Act 1878, and section 26 (3) of the Finance Act 1907. Though the fact does not appear in the case, counsel agreed that the harbour of Dumbarton consists of a stretch of the river Leven with some slips built upon its bank at which vessels load and discharge. It was necessary to dredge in order that ships might get access up and down the river to and from these slips. I cannot think that the portion of the harbour so dredged can be described as plant used for the purposes of the harbour. I therefore agree with the finding in law of the Commissioners in regard to this question. It is unnecessary to consider whether the mere accumulation of matter in a wrong place can be described as wear-and-tear, or whether silt which was allowed to accumulate for about five years can be regarded as representing wear-and-tear "during the year" in which it was removed.

As regards the appellants' alternative claim, the difficulty in the way of admitting it is due to the fact that the assessment under appeal was imposed under Schedule A and not (as is erroneously stated in the case) under Schedule D. In the case of a dock "or other concern of the like nature" it is enacted that its annual value shall be understood to be the full amount of the profits received therefrom within the preceding year—Income Tax Act 1842, section 60, Schedule A, No. III, rule 3. The word "profits" is here used in its ordinary sense, viz., as meaning the receipts on revenue account during a particular period, under deduction of the proper charges on revenue for the same period. In the case of a dock the actual profits of the preceding year are the measure of the annual value, but if the subject had happened to be a coal mine the measure would have been (by rule 2) the average of the profits of the five preceding years—in other words, the average of the receipts on revenue account less the average of the revenue charges for the quinquennial period. Accordingly, until the year 1866, when the statute founded on by the appellants was passed, it could not have been suggested that the cost of maintenance in the case of a dock or of a mine should be estimated according to an average of three years. It was, however, enacted by section 8 of the Revenue Act 1866 that the concerns described in No. III of Schedule A of the Act of 1842 should be assessed "in the manner in the said No. III mentioned, according to the rules prescribed by Schedule D of the said Act, so far as such rules are consistent with the said No. III." The appellants maintain that there is no inconsistency between the enactment in Schedule A, No. III, to the effect that the annual value in the case of a dock shall be understood to be the amount of its profits for the preceding year, or in the case of a mine the average of the profits for the last five years on the one hand, and the direction in section 100, Schedule D, Case I, rule 3, to the effect that in estimating the balance of profits and gains chargeable under Schedule D no sum shall be deducted on account of repairs "beyond the sum usually expended for such purposes according to an average of" the three preceding years. I do not agree. There is, of course, no arithmetical difficulty to prevent us from stating the receipts of a harbour at the sum actually received in a particular year, or the receipts of a mine according to an average of the preceding five years, and from them deducting the cost of repairs according to an average of three years. But this operation does not give us the result which No. III of Schedule A directs us to attain, viz., in the case of a dock its actual profits for a particular year, or in the case of a mine its average profits during a quinquennial period. Accordingly the appel-

lants' contention involves nothing more nor less than a repeal by the Act of 1866 of the leading enactment of Schedule A, No. III, which fixes the principle according to which the annual value of the concerns therein mentioned shall be ascertained. Rule 3 of Schedule D, Case I, must be read along with rule 1 of the same case. Its sole purpose is to explain the manner in which a balance-sheet should be made up, with the object of showing the taxable profits of a trade or business according to an average of three years. As might be expected, this rule leads to nothing but confusion and contradiction if it is applied to a balance-sheet which falls to be made up for an entirely different object. Accordingly I agree with the decision of the Commissioners as regards the appellants' alternative contention. The appeal thus fails in both its branches. I may say that my opinion on the second question would have been the same if the appellants had maintained that both the expense of upkeep and the receipts from their harbour should be taken, not at their actual amount for the preceding year as directed by the Act of 1842, but according to an estimate based on an average of the preceding three years.

LORD CULLEN—The assessment for income tax of the concern of Dumbarton Harbour for the year 1917-18 here in question is one under Schedule A, No. III, rule 3, of the Act of 1842, although it is stated in the Case, wrongly as is admitted, to be an assessment under Schedule D. The 8th section of the Act of 1866, as has been authoritatively decided, did not transfer such concerns from Schedule A to Schedule D.

According to Schedule A, No. III, rule 3, the annual value for such concerns is for any year of assessment to be taken to be the full amount of the profits for the year preceding. The year preceding in the present case is the harbour year to 31st August 1916.

If the profits of this harbour for the year to 31st August 1916 are to be estimated on the basis of the actual receipts and the actual allowable expenditure during that year, the soundness of the assessment appealed against is not challenged.

The appellants, however, contend that the estimation of their profits for the year to 31st August 1916 is affectable by certain expenditure made by them during the year 1914-15 in removing silt of sand from the bed of the river Leven, forming part of the harbour, amounting to £10,962, 3s., in so far as not effectively taken into account in reducing profits during the latter year. The contention assumes that the said expenditure was of the nature of revenue expenditure on repairs, as contrasted with capital expenditure. It may perhaps be that the soundness of this assumption is not beyond doubt, but as counsel for the Crown expressly accepted it for the purposes of the present case, it is unnecessary to consider the matter, and I desire to express no view regarding it.

The first ground on which the appellants submit that the said expenditure of £10,962, 3s. should be allowed to affect the estimation of profits during the year to 31st August 1916 is that it represents the making good of wear and tear of plant of the concern within the meaning of section 12 of the Act of 1878 and section 26 (3) of the Act of 1907. I think this view untenable. The bed of the river Leven is not in my opinion plant of the concern. It is part of the heritable subject itself which is under annual valuation. The silting of sand on it is one of its natural conditions. And the removal of the silt is an operation aimed at modifying the natural conditions of the heritable subject so as to make it artificially useful as part of a harbour. There is no definition of the word plant in the Acts. One has to fall back on the ordinary use of language, according to which I think it would be a solecism to speak of the bed of the river forming part of the harbour as plant of the harbour concern. I do not think it necessary to labour the point.

The second ground advanced for the appellants' proposed treatment of the said expenditure involves an appeal to rule 3, Case I, of Schedule D, which they say is made applicable to their concern by the 8th section of the Act of 1866. This rule says that "in estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from . . . such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure or concern . . . beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made," &c. The Act of 1866, by section 8 thereof, enacts that the concerns described in No. III of Schedule A of the Act of 1842 "shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Schedule D of the said Act, so far as such rules are consistent with the said No. III."

The appellants, as I understand, construe and apply the Act of 1866 and the above rule 3 of Schedule D as authorising them, in estimating the profits of their concern for the year to 31st August 1916, which rules the present assessment, to place on the expenditure side of the account a sum on account of repairs not expended in that year but representing one-third of the cumulo amount expended on repairs in that year and the two preceding years all taken together, being "the average of the three years preceding the year in which such assessment is made." This application of rule 3 does not seem to me to be consistent with No. III of Schedule A. Under No. III, rule 3, the assessable annual value of the harbour for 1917-18 is the full amount of the profits for the preceding year, *i.e.*, the year to 31st August 1916. The estimation of these profits must, I take it, proceed on the receipts and expenditure of the year to 31st August 1916 treated by itself, whereas the appellants' proposed operation would affect the estimation with a fictitious item drawn in part from other years. The principle of

assessment applicable to a harbour under No. III, rule 3, would thus be altered by adopting *quoad hoc* the different principle of proceeding on an average of years which figures under Schedule D. I am unable to read the 8th section of the Act of 1866 as authorising such an alteration.

While the appellants' proposed application of rule 3 of Schedule D is as above stated, it may be noticed that the rule deals with the topic of a deduction claimed on account of a "sum expended" for repairs, and provides that it is not any sum so expended, however large, that is to be allowed. A sum expended is not to be allowed in so far as it goes beyond the amount usually expended for repairs, as gauged by a three years' average. The sum expended by the appellants for repairs during the year to 31st August 1916 was £13, which has been allowed in the estimation of profits for that year under consideration.

Following the views above expressed, I am of opinion that the challenge which has been offered of the assessment in question is not well founded.

The Court refused the appeal.

Counsel for the Appellant—Watson, K.C. —A. M. Mackay. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondents—Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Tuesday, December 10.

FIRST DIVISION.

[Lord Anderson, Ordinary.

ROSS *v.* GLASGOW CORPORATION.

Reparation — Negligence — Remoteness of Injury—Shock Caused by Apprehension of Collision between Tramway Cars.

The driver of a tramway car failed to shift certain points before he started his car, with the result that his car proceeded along the rails, upon which there was another car bound in the opposite direction but at the moment stationary. The moving car proceeded about 30 feet and was ultimately drawn up within a yard of the stationary car. In an action by a lady seated at the front of the upper deck of the stationary car it was averred that owing to the negligence of the driver in starting his car before he had shifted the points, the pursuer, through reasonable apprehension of a collision, had received a serious mental and nervous shock, which had resulted in permanent injury to her health. There was no averment of excessive speed or want of control or that the driver was not keeping a proper look-out. *Held* (*rev.* judgment of Lord Anderson, Ordinary) that the averments were irrelevant in respect that the injury alleged was not a natural and probable consequence of the negligence founded upon.

Mrs Elizabeth Ross, with consent of her husband as her curator and administrator-in-law, *pursuer*, brought an action against the Corporation of Glasgow, *defenders*, concluding for decree for £500 damages for personal injuries.

The pursuer *averred, inter alia*—"(Cond. 2) On the afternoon of 14th February 1918, at about 4 o'clock, the pursuer was a passenger on a tramcar belonging to the defenders which was proceeding from Glasgow to Uddingston, and she occupied a seat at the front on the upper deck of the said car. (Cond. 3) The said tramcar came to a standstill near the Tollcross terminus. There cars which are coming from Glasgow in an easterly direction turn by means of points and proceed by a set of rails running to Glasgow in a westerly direction. When the said tramcar on which the pursuer was travelling came to a standstill the east-going rails were blocked by a Tollcross car which had not passed over the points on to the west-going rails. (Cond. 4) The driver of the said Tollcross car was leaning against the south side of his car smoking. On the approach of the Uddingston car on which the pursuer was a passenger the driver of the said Tollcross car jumped on the driving platform and set his car in motion. He proceeded with considerable speed towards the Uddingston car, but he had not, as was his duty, shifted the points so as to take his car on to the west-going set of rails, and he drove over the points towards the Uddingston car. The pursuer, who saw that he had not shifted the points and that the Tollcross car was coming at an increasing speed towards her car, was justifiably alarmed as to what would happen. She thought that a serious accident was inevitable, and she was greatly agitated and in terror of personal bodily injury from a collision of the cars. The action of the driver of the Tollcross car was such as to reasonably excite in her as it did the fear that a serious collision was about to take place, especially as the Tollcross car did not stop until it was about one yard from the Uddingston car in which she was travelling, although there was a distance of 30 feet between the points and the front of the Uddingston car. . . . Explained that even if the driver did shift the points, which is denied, he failed in his duty to drive slowly over them and to have his car under such control that he could draw it up almost immediately in the event of it not taking the points. As above averred, when he started the car he proceeded with it at considerable speed and did not draw it up till it was within about one yard of the car in which the pursuer was seated. The result was to put the pursuer in reasonable fear that a collision was about to take place. (Cond. 5) Through the careless and reckless action of the driver of the Tollcross car, for whom the defenders are responsible, the pursuer, owing to her apprehension of an accident, received a serious mental and nervous shock, which has resulted in permanent injury to her health. She had to go