the category of cases where machinery was held heritable prior to the passing of that Act. The language used in the statute seems to me to preclude us from giving effect to this contention. In *Michael Nairn & Company* v. *Assessor for Kirkcaldy* (1915 S.C. 801) Lord Johnston took the view that in the case of plant for producing or transmitting first motive power, or for heating or lighting, we are no longer concerned with the question of its fixture or attachment. "It is enough if it is plant of such nature and is in or on the lands or heritages." There appears to me to be considerable force in this contention. It is not, however, necessary for us to decide this point. In the same case Lord Cullen thought that some degree of fixture or attachment was required. From the description of the motors given in the case I think this criterion has been satisfied.

The respondent also contended that he was not liable to assessment for any of the motors, because although proprietor of the machinery he was only tenant of the premises in which it is situated. Under the Valuation Act of 1854 a lessee of lands or heritages under a lease of twenty-one years or under was not liable to assessment for erections or structural improvements made by him on the subjects let. The law was altered by the Lands Valuation (Scotland) Amendment Act 1895, section 4, which treated such erections or improvements as lands or heritages within the meaning of the Act and the lessee as proprietor thereof. I have found the point whether the motors in question are erections or structural improvements on the subjects in terms of the above Act attended with considerable difficulty, but for the reasons given by your Lordships I am prepared to concur in the conclusion which you have reached.

The Court pronounced this interlocutor—

"... We are of opinion that the determination of the Valuation Committee is wrong, that the annual value of the Hobart machine should not be entered in the valuation roll, and *quoad ultra* of consent fix the annual value of the remaining machines for the current year at the sum of nine pounds, ten shillings."

Counsel for the Appellant—Fraser, K.C. —Crawford. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—MacRobert, K.C.—King Murray. Agents—Patrick & James, S.S.C.

COURT OF SESSION.

Saturday, July 10.

SECOND DIVISION.

[Exchequer Cause.

SMALL *v.* INLAND REVENUE.

Revenue—Excess Profits Duty—Deductions—Capital Expenditure—"Balance of the Profits or Gains"—"Money Wholly and Exclusively Laid Out for the Purposes of such Trade"—Legal Expenses Attendant on Assigning Bond and Disposition in Security over Shop Owned by Trader—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule D, Case* 1, *Rule* 1, *and Rule* 1 *Applying to both First and Second Cases.*

Held (*dis.* Lord Salvesen) that an outfitter in estimating "the balance of the profits or gains" of his trade chargeable with excess profits duty was not entitled to deduct the amount of the legal expenses incurred by him in connection with the assignation of a bond and disposition in security over the shop where he carried on his trade, and of which he was the proprietor, in respect that the payment was (1) of the nature of capital expenditure, and (2) not "wholly and exclusively laid out or expended for the purposes" of his trade.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), Part III, deals with *Excess Profits Duty*, and sec. 40 (1), therein, enacts—"The profits arising from any trade or business to which this Part of this Act applies shall be separately determined for the purpose of this Part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and to any other provisions of this Act."

The Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, First Case, Rule 1, applying to the first case, enacts —"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade . . ." Rule 1 applying to both the First and Second Cases, enacts—"In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade."

David Alexander Small, carrying on business under the name of William Small & Son at 106 Princes Street, Edinburgh, *appellant*, being dissatisfied with an assessment to Excess Profits Duty in the sum of £904, made upon him under Part III of the Finance (No. 2) Act 1915, in respect of the profits of his business as outfitter, for the

accounting period of twelve months ending 19th February 1917, appealed by Stated Case in which Alexander Easson, surveyor of taxes, on behalf of the Inland Revenue, was *respondent*. He claimed that in computing the said assessment the sum of £83, 19s. should be deducted in respect of expenses incurred in replacing a bond over the property used for the purposes of the business, which bond had been called up on the death of the bondholder.

The Case stated—"1. The following *facts* were admitted or proved—(1) David Alexander Small is the sole proprietor of the business of outfitter carried on at 106 Princes Street, Edinburgh, in the name of William Small & Son. (2) He is also the sole owner of the premises at the said address in which the said business is carried on. He purchased the said premises for the purpose of the business, and never at any time used them except as an asset of the business and the vehicle of the trade. The premises are entered in the valuation roll for the year 1916-17 as owned by D. A. Small, the appellant, and as occupied by William Small & Son. (3) For some time prior to the beginning of said accounting period the premises at 106 Princes Street were bonded to the extent of £23,300 under five separate bonds. (4) In 1915 James Kenneth, one of the bondholders, died, whereupon his executors proceeded to call up the money due under a bond amounting to the sum of £9300. There was repaid by the appellant £300 thereof at Martinmas 1915, and the executors allowed payment of the balance of £9000 to be postponed for six months. Thereafter Robert Kenneth, one of the beneficiaries of the said James Kenneth, entered into an arrangement whereby he agreed to take over the said bond, which was further reduced by the repayment of £500 to £8500. He duly obtained an assignation of the said bond, the arrangement with the appellant being that the latter was to pay an increased rate of interest and to repay the principal sum at the first term of Whitsunday or Martinmas after the war. (5) In connection with the assignation of the said bond certain legal expenses were incurred by the appellant amounting to the said sum of £83, 19s.

"2. It was *contended* on behalf of the appellant — (*a*) There are two questions which must be investigated and answered, and which must on no account be confused The *first* question is—whether the sum proposed to be added to the total represented as the 'balance of profits and gains' of the firm in the sense of the Acts is one of the prohibited deductions? The *second* question, assuming this to be answered in the negative, is—whether in ascertaining profits of a trade, on the ordinary principles of commercial trading, the legal expenditure incidental to maintaining borrowed capital (*a*) were profits or gains in any known business sense; or (*b*) were rather expenditure necessary to earn the actual income shown in the balance sheet? (*b*) As regards the first question the only prohibited heading referred to by the surveyor in correspondence or in argument was that part of rule 3 under the 1st Case of section 100 of the 1842 Act, which prohibits deduction 'for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern.' The appellant has never understood how it can be maintained that the expenses once and for all incurred in maintaining or renewing a sufficient working capital, when it is in danger of being withdrawn, are sums employed as capital. They yield no annual return, and are never expected to do so. Such expenses are expenditure for work done, and are in no sense income or gain except in so far as they enter into the profits of the legal firm engaged where they yield tax. They are strictly of the same nature as the repairs and renewals of premises or implements which are recognised on an average of three years by the same rule. (*c*) As regards the second question, the statutory provision is that the tax is to be computed on a sum 'not less than the balance of profits and gains.' For the appellant it is argued that the sum in question cannot be in any sense part of the balance, and it was maintained that where a firm or concern is carrying on a business on a scale beyond the possibilities of its own private capital, the inevitable expenses involved in obtaining a supply of working capital is plainly expenditure necessary to the earning of the profits which (roughly speaking) vary with the size and turnover of the business. The charges and expenses of obtaining working capital on loan from a bank have never been and ought not to be computed as part of profits. They are not profits in any sense whatever.

"3. The Surveyor of Taxes, Mr A. Easson, contended on behalf of the Crown—(*a*) That the deduction was inadmissible, as not being money wholly and necessarily laid out or expended for the purpose of the trade, within the meaning of the first rule of the rules applying to Cases 1 and 2 of Schedule D, section 100, of the Income Tax Act 1842. (*b*) That the expenditure fell upon the appellant in his capacity as owner of the property in which the business was carried on, and not as proprietor of the business, and was consequently in the nature of a capital expenditure and not a trading expense; and quoted in support of his contentions the cases of *Anglo-Continental Guano Works* v. *Bell*, 1894, 70 L.T.R. 670, 3 T.C. 239, and *Texas Land and Mortgage Company* v. *Holtham*, 1894, 63 L.J., Q.B. 496, 3 T.C. 255.

"4. The Commissioners on consideration of the facts and arguments submitted to them were of *opinion* that the amount claimed was not an admissible trading expense, and confirmed the assessment accordingly."

Argued for the appellant—The expression "balance of the profits or gains" in the Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Sched. D, First Case, Rule 1, meant the balance of profits or gains of the business as estimated on ordinary principles of commercial trading, except in so far as expressly altered by the Act — *Usher's Wiltshire Brewery, Limited* v. *Bruce*, [1915] A.C. 433,

per Lord Loreburn at p. 444, Lord Atkinson at p. 452, Lord Parker at p. 457 *et seq.*, Lord Sumner at p. 467 *et seq.*, and Lord Parmoor at p. 473 *et seq.* In the present case the expense of assigning the bond was a proper charge against revenue on ordinary principles of commercial trading, and there was nothing in the Act which prohibited its being charged against revenue. The expenditure was incurred "wholly and exclusively" for the purposes of the business within the meaning of the First Rule of the rules applying to both the First and Second Cases of Schedule D. It was incurred primarily and mainly for the purposes of the business. It was necessary to maintain sufficient working capital for the purposes of the business, and the paramount purpose of the expenditure was to protect the business premises, because if the appellant had not got the bond assigned, the creditor might have sold the business premises, a proceeding which would have ruined the business. Therefore the expenditure was incurred "wholly and exclusively" for the purposes of the business within the meaning of the rule—*Smith* v. *Lion Brewery Company, Limited*, [1911] A.C. 150, *per* Lord Atkinson at p. 161 *et seq.* The mere fact that benefit may have enured to the appellant as owner of the property did not affect the matter — *Usher's Wiltshire Brewery Company, Limited* v. *Bruce* (*cit.*), *per* Lord Sumner at p. 469 *et seq.*, Lord Loreburn at p. 444 *et seq.*, and Lord Atkinson at p. 451. In *Usher's Wiltshire Brewery Company, Limited* v. *Bruce*, the legal expenses of assigning leases and tenancy agreements were held to be proper charges against revenue, and an allowable deduction. See *ibid.* at [1915] A.C. 437, and report in 6 T.C. at p. 404. *Anglo-Continental Guano Works* v. *Bell*, [1894] 3 T.C. 239, was doubted in *Scottish North-American Trust, Limited* v. *Inland Revenue*, 1910 S.C. 966, 47 S.L.R. 832, *aff.* 1912 S.C. (H.L.) 26, 49 S.L.R. 114. See Lord Salvesen, 1910 S.C. 971 and 972, 47 S.L.R. 835 and 836; and Lord Johnston, 1910 S.C. 974, 47 S.L.R. 837, and Lord Atkinson, 1912 S.C. (H.L.) 31 and 32, 49 S.L.R. 116 and 117. Moreover, if interest on a loan was an expense analogous to the expense of assigning a bond, the analogy favoured the view contended for by the appellant, because interest on a loan was an allowable deduction in calculating profits in the case of excess profits duty—Finance Act (No. 2) 1915 (5 and 6 Geo. V, cap. 89), sec. 40 (1), Fourth Schedule, Part i, 2. *Texas Land and Mortgage Company* v. *Holtham* (1894) 3 T.C. 255, was distinguishable; it merely decided that the expense of procuring additional capital was not an allowable deduction. In the present case the expenditure was incurred, not for the purpose of securing new or additional capital, but for the purpose of preserving and maintaining existing capital. The expenditure was not incurred once and for all, but was of the nature of a recurring charge. The bond might be called up on a fortnight's notice. *Thomson, Black, & Company* v. *Inland Revenue*, 1919 S.C. 289, 56 S.L.R. 185, was also distinguishable. In that case the expenditure was incurred in connection with the distribution of the profits of the trade. *Moore & Company* v. *Inland Revenue*, 1915 S.C. 91, 52 S.L.R. 59, was also distinguishable. In that case the expenditure "was money which was laid out for the purpose of establishing a new and independent business," *per* Lord Skerrington, 1915 S.C. 99, 52 S.L.R. 63. Moreover, Lord Johnston dissented.

Argued for the respondent—The expense of assigning the bond was not an allowable deduction, because it was not expenditure necessary to earn the profits of the trade. Where expenditure had been allowed as a deduction, there had always been a direct relationship between the expenditure and the earning of the profits, but in the present case there was no such direct relationship between the expenditure and the profits of the appellant's outfitting business. Expenditure was not allowable as a deduction unless it had been incurred "wholly and exclusively" for the purposes of the trade, but in the present case the expenditure had not been incurred "wholly and exclusively" for the purposes of the appellant's business. It had been incurred by him in his capacity of owner of the shop. Expenditure was not allowable as a deduction unless it was annual, but in the present case the expenditure was not an annual outlay—*Thomson, Black, & Company* v. *Inland Revenue* (*cit.*); *Dumbarton Harbour Board* v. *Inland Revenue*, 1919 S.C. 162, 56 S.L.R. 122; *Moore & Company* v. *Inland Revenue* (*cit.*); *Strong & Company, Limited* v. *Woodifield*, [1906] A.C. 448; *Ashton Gas Company* v. *Attorney-General*, [1906] A.C. 10; *Texas Land and Mortgage Company* v. *Holtham* (*cit.*).

At advising—

LORD JUSTICE-CLERK (SCOTT DICKSON)—I think the result at which the Commissioners arrived was not erroneous in point of law.

The amount of money in question was paid for legal expenses in connection with the re-arrangement of part of a bond for money lent over a property belonging to the appellant where he carried on his business from which were derived the profits on which he has been assessed.

I think this was not a payment in the nature of income expenditure, but was of the nature of capital expenditure in the sense in which that term was used by Lord Dunedin in the *Vallambrosa* case, 1910 S.C. 519. That criterion has been approved of and accepted in several cases since. Rowlatt, J., amplified Lord Dunedin's language in *Ounsworth* v. *Vickers, Limited*, [1915] 3 K.B. 267, at p. 273, where he said—"I take it, and indeed both sides agree, that no stress is there laid upon the words 'every year'; the real test is between expenditure which is made to meet a continuous demand as opposed to an expenditure which is made once for all." Lush, J., in *Hancock* v. *General Reversionary and Investment Company*, [1919] 1 K.B. 25, at p. 37, using the phrase "a continuous business demand," agreed with this view and allowed the deduc-

tion there claimed, because the amount sought to be deducted "was paid to meet a continuing demand which was itself an ordinary business expense." In *Arizona Copper Company* v. *Surveyor of Taxes*, (1891) 19 R. 150, Lord President Robertson (at p. 153) made the following observations — "There cannot be said to be any complexity or ambiguity in the application of the money or in the source from which it was paid. It was paid in a lump payment as one of the considerations stipulated for a loan of capital employed in the adventure—to wit, in the completion of the works—the other consideration being interest at 10 per cent. per annum, and it is in terms admitted in the case to have been paid out of the profits of the company. Now at this stage of the development of the law of the income tax, it is not to the purpose to consider whether such a payment is a proper deduction from the point of view of a business concern, making up its own balance-sheet for its own purposes. The question is whether such a payment out of profits is an authorised deduction in estimating the balance chargeable under Schedule D. It appears to me, as a sum paid in return for a loan on capital, to be entirely heterogeneous to those outlays the deduction of which is permitted as being necessarily incidental to the earning of profit; and I think to deduct it would be contrary to the prohibitions laid down in Schedule D and in the 159th section of the same Act." Lord M'Laren had probably this view before him when he said in the case of the *Granite Supply Association* ((1905), 8 F. 55, at p. 57) that "a thing not done for the benefit of the trade of the particular year is not a proper deduction from income."

Applying these views to the present case I am of opinion that the deduction here in question is a capital expenditure and ought not to be allowed.

Further, I do not think it can be regarded as money wholly and exclusively laid out for the purposes of the trade. I cannot hold it to have been money "incurred in earning profits" or incident to the earning of profit in carrying on the trade. In my opinion the reasoning of Collins, M.R., and Lord Loreburn, L.C., in *Strong & Company* v. *Woodifield*, [1906] A.C. 448, also applies, and on this further ground the deduction, in my opinion, ought not to be allowed.

Reference may also be made to *Moore & Company* v. *Inland Revenue*, 1915 S.C. 91.

I am of opinion that the appeal fails.

LORD DUNDAS—The pecuniary amount here at stake is small, but the case like many of its kind is not unattended with difficulty. I think the Crown is right, and that the appeal must fail. I agree with the Lord Justice-Clerk in thinking that the expenditure here in question must be held to have been in the nature of capital expenditure in the sense in which that term has been explained and defined by the authorities. Further, I am unable to affirm that the legal expense attending the assignation of this bond was "money wholly and exclusively laid out or expended for the purposes of" the appellant's trade. No doubt if the appellant could not pay the amount contained in the bond and did not arrange for an assignation of it, he would run a risk of the building in which his trade is carried on being taken from him. In a sense, therefore, the expense of the assignation was connected with the trade, and was incurred for its benefit. But that is not enough by itself to comply with the words of the rule, and I am unable to hold that the expenditure was really incidental to the appellant's trade as an outfitter. It seems to me that it fell upon him rather in his character of house-owner than in that of a trading outfitter.

Some of the observations made by noble and learned Lords in *Strong & Company* v. *Woodifield*, [1906] A.C. 448, *per* Earl Loreburn, L.C., at p. 452, *per* Lord Davey at p. 453, seem to me to be very much in point here. *Usher's* case (*Usher's Wiltshire Brewery* v. *Bruce*, [1915] A.C. 433), strongly relied on by the appellant's counsel, does not appear to me to aid them. A small sum of "legal and other costs" was there allowed as a deduction, and it seems to have included, *inter alia*, solicitor's costs in respect of "terminations and assignments of leases or tenancy agreements." But these were incurred as part of a complicated arrangement between Usher's Company and the tenants of their tied houses, the payments under which by the company to the tenants were held by the House of Lords to have been necessary incidents of the profitable working of the company's business notwithstanding the fact that they also enured to the benefit of the tenant's separate trade in their tied houses.

I think the determination of the Commissioners was right.

LORD SALVESEN—The appellant in this case carries on the business of outfitters in premises of which he is sole owner, but which are bonded to the extent of £23,000 under five separate bonds. One of the bondholders having died, his executors called up the money due under the bond, amounting to £9300. £800 was paid by the appellant in reduction of the sum due, and he was thereby enabled to make arrangements under which the bond for the balance of £8500 was assigned to a new creditor. In connection with this assignation he incurred legal expenses amounting to £83, 19s. The question in the case is whether this forms a proper deduction from the profits and gains on which he is liable to be assessed for income tax and excess profits tax.

The Crown contended that the deduction was inadmissible as not being money wholly and exclusively laid out or expended for the purpose of the trade within the meaning of the First Rule of the rules applying to cases 1 and 2 of Schedule D, section 100, of the Income Tax Act 1842. On the other hand, the appellant maintained that the expense had been incurred in maintaining sufficient capital for the purpose of his business, and was therefore in no sense income or gain but was a proper charge on the gross profits,

which depended on the employment of an adequate working capital. From a commercial or accounting point of view I cannot doubt that the appellant is right. No commercial man would treat this item in any other way than the appellant has done. A limited liability company could not have legitimately divided the sum in question as part of the profits earned during the year. In order to provide the means of doing so they would have to trench on capital, assuming they divided their whole profits as they are entitled to do. This may not be conclusive if the deduction is one which is prohibited by the Income Tax Acts, but the only prohibition which is appealed to is that founded upon the money not being wholly and exclusively laid out or expended for the purpose of the trade. I am unable to hold that that prohibition has any application to the facts of the present case. If, instead of renewing the bond, the appellant had paid it off and borrowed from his bankers at overdraft rates, the extra interest which he would have to pay would undoubtedly have been charged upon his profits. If he adopted the more economical method of finance for business requirements, I cannot see why the expense attendant upon rearrangement should not be held as incurred for the purpose of the trade. The whole object of the expenditure was to maintain in the business the amount of borrowed capital that he had found necessary to enable him to purchase the premises solely occupied for business purposes, and on the occupation of which his profits must have largely depended. I am quite unable to see how such expenditure is in the nature of capital expenditure looking to the identity of the ownership of the premises and of the business.

With reference to your Lordship's observations, it is by no means certain that this may not be a recurrent and even a yearly expenditure. That depends entirely on the attitude the bondholders may take up. No doubt if the appellant could secure money on the footing that the bonds were not to be called up for a given time he would avoid such expenditure during that period. But it does not in the least follow that he would be able to make arrangements of such a permanent or quasi-permanent nature, and there being several bondholders here the same thing might happen to them that has happened in the case of the one who has died, whose executors were compelled to call up the bond. That, however, is only by the way, because I think there are many charges connected with a business which might only occur at intervals of time and yet are proper deductions from the profits of the business.

On the whole matter I am of opinion that the determination of the Commissioners is wrong.

The Court dismissed the appeal and affirmed the determination of the Commissioners.

Counsel for the Appellant—Mackay, K.C. — Milne. Agents — Kinmont & Maxwell, W.S.

Counsel for the Respondent—Lord Advocate (Morison, K.C.)—Candlish Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

HIGH COURT OF JUSTICIARY.

Tuesday, July 13.

(Before the Lord Justice-General (Clyde), Lord Mackenzie, and Lord Cullen.)

[Sheriff Court at Glasgow.

O'MALLEY *v.* STRATHERN.

Justiciary Cases—Process—Timeous Objection — Relevancy — Objection Stated in Appeal Court — Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65), *sec.* 75—*Spirits (Prices and Description) Order* 1919, *S.R. & O.* 1919, *No.* 517.

Held (1) that an objection to the relevancy of a summary complaint, if arising *ex facie* of the complaint or proceedings, and such as to render the proceedings upon the complaint *funditus* null, might competently be stated on appeal, whether the appeal were by stated case or otherwise, though not stated in the court below, notwithstanding the provisions of section 75 of the Summary Jurisdiction (Scotland) Act 1908, but (2) that an objection to a complaint charging a breach of the Spirits (Prices and Description) Order 1919, on the ground that the Order was *ultra vires* of the Food Controller, was incompetently stated on appeal, as such objection was not *ex facie*, but required for its explanation reference to a large number of Acts of Parliament and to the various powers and functions of different departments of Government.

Justiciary Cases — Public-House — War— Emergency Legislation—Relevancy—Proof —Spirits (Prices and Description) Order 1919 (*S. R. & O.* 1919, *No.* 517), *Articles* 2, 4 (*a*), *and* 7, *and Second Schedule, Part I.*

A complaint charged an accused that he did sell in response to a demand for two glasses, *i.e.*, one gill, of whisky, "whisky of a strength under 43 degrees under proof, which measured only 3 fluid ounces, 6 fluid drachms, and was 1 fluid ounce, 2 fluid drachms deficient in measurement of the quantity demanded, and that for 1s. 8d., being at the rate of 2s. 2½d. per gill, and in excess of the maximum price of 1s. 8d. per gill for such spirits, contrary to Clause 4 (*a*) of the" Order of 1919. It was proved that the whisky in question was taken from a cask on which, in accordance with Article 7 of the Order, was displayed conspicuously a placard inscribed "1s. 8d. per gill. Strength less than 43 degrees under proof." No other evidence was led as to the strength of the whisky in question. The Order of 1919, Article 2, prohibits selling spirits except by imperial measure or by aliquot parts of a gill, and Article 4 (*a*)