Saturday, February 5.

SECOND DIVISION.

(BEFORE SEVEN JUDGES.)

[Exchequer Cause.

GLENBOIG UNION FIRECLAY COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue—Excess Profits Duty—Profits of Trade—Income of Pre-War Trade Year—Capital or Income—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 40 (1) (2), *Schedule* 4, *Part I*, 1, *Part II*, 1.

In 1913, one of the two pre-war trade years, payment was made to the Glenboig Union Fireclay Company by the Caledonian Railway Company of £15,316, 11s. 4d. as compensation in terms of the Railways Clauses Act 1845 (8 and 9 Vict. cap. 33) in respect of an embargo laid by the railway company upon the Glenboig Company against working part of their leased mineral area. This sum was entered in the revenue account of the company for the year in which it was paid, and on it the Glenboig Company paid income tax. The Commissioners of Inland Revenue in making an assessment on the company for the purposes of excess profits duty decided that this sum was wrongly included in the revenue for the year. The company appealed. *Held* (*diss.* Lord Salvesen) that the decision of the Commissioners was right, the payment not being of the nature of an annual profit arising from trade.

Revenue—Excess Profits Duty—Profits of Trade—Income of Pre-War Trade Year—Capital or Income—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 40 (1) (2), *Schedule* 4, *Part I*, 1, *Part II*, 1.

In 1913, one of the two pre-war trade years, payment was made to the Glenboig Fireclay Company by the Caledonian Railway Company of £4500 as compensation for loss and damage which the company had sustained in connection with an interdict wrongously obtained by the Caledonian Railway Company during litigation between them and the company as to the latter's right to work the fireclay under the line. This sum was entered in the revenue account of the company for the year in which it was paid, and on it the company paid income tax. The Commissioners of Inland Revenue in making an assessment on the company for the purposes of excess profits duty decided that this sum was wrongly included in the revenue for the year. The company appealed. *Held* (*diss.* Lords Salvesen and Ormidale) that the decision of the Commissioners was right.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) enacts—Section 40 (1) — "The profits arising from any trade or business to which this part of this Act applies shall be separately determined for the purposes 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. (2) The pre-war standard of profits for the purposes of this part of this Act shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the taxpayer (in this part of this Act referred to as the profits standard): Provided that . . . . Fourth Schedule—Part I (1)—The profits shall be taken to be the actual profits arising in the accounting period, and the principle of computing profits by reference to any other year or an average of years shall not be followed. Part II (1)—The profits of any pre-war trade year shall be computed on the same principles and subject to the same provisions as the profits of the accounting period are computed."

The Glenboig Union Fireclay Company, Limited, *appellants*, being dissatisfied with a determination of the Commissioners for the Special Purposes of the Income Tax Acts at London, assessing the appellants for excess profits duty for the accounting period of twelve months ending 31st August 1917, appealed by way of Stated Case.

The Case stated—"The following *facts* were admitted or proved—1. The company was incorporated on 26th August 1882 under the Companies Acts 1862 to 1880. 2. The objects for which the company was established include—(*a*) Carrying on the trades or businesses of manufacturing and trading in fireclay and other kinds of clay goods. (*b*) The quarrying of rocks, stones, and sand, and vending the same. (*c*) The purchasing or leasing of any lands, clay, &c., for the purpose of the company's businesses or trades. (*d*) The realising of all or any part of the lands held by the company. (*e*) Selling and otherwise dealing with and disposing of all or any parts of the company's businesses, effects, and estates. A copy of the memorandum of association, so far as relating to the objects for which the company was established, forms part of this case. 3. Since 1882 the company has carried on business as manufacturers of fireclay goods and as merchants of raw fireclay. 4. The company is lessee of numerous fireclay fields in or near Glenboig, the total extent of which is about 1835 acres. 5. The company was lessee of the fireclay at Gartverrie, Glenboig, and in 1908 its workings had approached the Caledonian Railway line running over that field, and notice, dated 25th January 1908, of intention to work that fireclay was given by the company to the Caledonian Railway Company (hereinafter referred to as 'the Caledonian') in terms of the Railways Clauses Consolidation (Scotland) Act 1845. 6. The Caledonian in reply to that notice took up the position that the fireclay was not a mineral, and therefore was not excluded from the conveyance of the ground which it held, and was the property of the Caledonian. The company repudiated that claim, and on its proceeding to work the fireclay underneath the railway at that

point the Caledonian raised an action of interdict against it to prevent it from working the fireclay underneath any part of the railway at Gartverrie. 8. On 29th February 1908 interim interdict was granted in the Court of Session against the company working the fireclay at the place in question, and that interdict remained operative until 15th April 1910, when after various proceedings it was recalled by the Inner House of the Court of Session. 9. The Caledonian appealed the case to the House of Lords, and on 12th November 1910 interim interdict was again granted in the Court of Session against the company pending the decision in the House of Lords appeal. This interdict remained operative until 28th April 1911 when the interdict was recalled by the House of Lords. 10. During the two periods of interdict, viz., from 29th February 1908 till 15th April 1910, and from 12th November 1910 till 28th April 1911, the company had to bear the expense of keeping open and in a workable state the portion of the fireclay field which it had been interdicted from working—in particular it had to bear the expense of pumping operations, and of keeping the roadways, airways, and haulage ways in this area in a proper state of repair—although the company was not during these periods getting any return from this expenditure. The expenses so incurred were included in the ordinary general mining expenses of the company and debited in a 'charges account,' which in turn was at the end of each year debited to the revenue account of the company. 11. These expenses were debited to the revenue accounts for the years ended 31st August 1908, 31st August 1909, 31st August1910, and 31st August 1911 in the proportions in which they had been incurred during these years. 12. Following on the decision by the House of Lords, which was to the effect that fireclay was a mineral and so was excluded from the Caledonian's conveyance, the Caledonian, by notice dated 29th June 1911, intimated, in terms of its powers under the Railways Clauses Consolidation (Scotland) Act 1845, its desire that a certain portion of red fireclay at the place in question, extending to 1·306 acres, should be left unworked, and offered compensation therefor. 13. By similar notice dated 3rd October 1911 the Caledonian reserved a further small portion of red fireclay, extending to ·109 acres, and offered compensation therefor. 14. By a similar notice dated 3rd October 1911 the Caledonian reserved an area of white fireclay overlying the red fireclay, and extending to 1·222 acres, and offered compensation therefor. The area of fireclay reserved by the Caledonian therefore extended at its greatest part to 1·415 acres, made up of the areas of 1·306 acres and ·109 acres of red fireclay before referred to. 15. The interdict proceedings related to the whole of the Gartverrie field underlying the railway, but the portions of fireclay reserved by the Caledonian under the above notices only form a small portion of the interdicted area. 16. The parties could not agree as to the amount of compensation payable by the Caledonian for the fireclay so reserved by the latter and the question went to arbitration. 17. After a proof and various other proceedings the oversman in the arbitration issued proposed findings, thereafter final findings, and finally a decree-arbitral awarding £15,316, 11s. 4d. as the amount of compensation due. Copies of the proposed findings, final findings, and decree-arbitral form part of this Case. 18. On 9th April 1913 the Caledonian paid to the company the above sum of £15,316, 11s. 4d., together with interest thereon at 5 per cent. from 6th March 1913 (being the date of the final findings by the oversman), amounting to £67, 3s. 6d. after deduction of income tax. 19. The following receipt endorsed on the decree-arbitral was given to the Caledonian by the Company: — '*Glasgow, 9th April* 1913.—Received from the Caledonian Railway Company the several sums mentioned in the foregoing decree-arbitral, amounting to fifteen thousand three hundred and sixteen pounds, eleven shillings and fourpence sterling, together with the sum of sixty-seven pounds, three shillings and sixpence, being the nett interest thereon at five per cent. from 6th March 1913 to date after deducting four pounds, three shillings and twopence of income tax.' 20. The above sum of £15,316, 11s. 4d. and relative interest were credited to the revenue account of the company for the year ending 31st August 1913. 21. Income tax was duly paid by the company on the said sum of £15,316, 11s. 4d. A copy of the statement of profit for income tax assessment under Schedule D for the year ended 31st August 1913, furnished by the company to the surveyor of taxes, forms part of this Case. 22. In May 1913 the company paid an interim dividend of 10 per cent. to its shareholders in respect of the year ending 31st August 1913. The capital of the company is £150,000, so that the amount required to pay the said interim dividend was £15,000. 23. On 29th August 1913 the company received payment from the Caledonian of the sum of £4500 as compensation for damages which the company had suffered in connection with the interdict proceedings, and the company in exchange granted the Caledonian a discharge of its claims arising out of the said interdicts. A copy of the discharge is annexed hereto, and forms part of this Case. 24. The said sum of £4500 was credited to the revenue account of the company for the year ending 31st August 1913. 25. Income tax was duly paid on the said sum. 26. In the question of excess profits duty the pre-war standard of profit of the company falls to be fixed on the average for the years ending 31st August 1912 and 31st August 1913 respectively. 27. In arriving at that pre-war standard of profit the Surveyor of Taxes contends that there should be eliminated from the company's revenue account for the year 1913 the said sum of £15,316, 11s. 4d., with the interest of £67, 3s. 6d., and the said sum of £4500, along with various sums which form charges against these amounts and which appear on the other side of the accounts. On the other hand the company contends that these items should not be eliminated. 28. The figures on the basis of each of these conten-

tions have been agreed on, but the figures have not been adjusted on the basis of the sums falling to be spread over the periods during which they would normally have accrued. 29. On the basis of the surveyor's contention as above stated being correct, the pre-war standard profits of the company (including the first £200, which is free of tax) would be £32,856, and the results for the accounting periods would be that the company had (*a*) an excess profit of £1568 for 1914; (*b*) a deficiency of £11,808 for 1915; (*c*) an excess of £771 for 1916; and (*d*) an excess of £43,850 for 1917, and that the excess profits duty would amount, as at 31st August 1917, to £26,320, less income tax adjustment of £2632, bringing out the net amount of £23,688 as due by the company. 30. On the basis of the company's contention being correct the excess profits duty due at 31st August 1917 would be £4377, less income tax adjustment of £438, bringing out a net amount of £3939 as due by the company."

The case was argued before the Second Division on 1st December 1920, when avizandum was made. On 11th December the Second Division appointed the case to be argued before a Court of Seven Judges.

Argued for the appellants—(1) Compensation for the loss of the right to work minerals was a profit of the business. It was the equivalent of the profit which it was estimated would have been made by working the minerals. It was not the purchase price of the minerals, and the transaction was not a sale. In the case of an entailed estate a sum so received had been held not to be capital. The payment therefore must be considered as income and profit of trade. The *Bwllfa and Merthyr Dare Steam Collieries* (1891) *Limited* v. *The Pontypridd Waterworks Company*, [1903] A.C. 426; *Duke of Hamilton's Trustees* v. *Caledonian Railway Company*, 1905, 7 F. 847, 42 S.L.R. 747; *Eden* v. *North Eastern Railway Company*, [1907] A.C. 400; *Great Northern Railway Company* v. *Commissioners of Inland Revenue*, [1901], 1 Q.B. 416; *Farie* v. *Farie's Factor*, 1920 S.C. 276, 57 S.L.R. 229; *Inland Revenue* v. *Henderson*, 1920, 58 S.L.R. 129. It was so dealt with in the appellants' accounts at the time, and income tax was paid on it, and accepted by the Inland Revenue. (2) The sum received by the appellants as damages also fell to be treated as profits of trade. It was the repayment of expense necessarily incurred day by day in keeping the work in order so that a profit might be earned in the future. This expense was debited against income, and the sum given in repayment of this expense must naturally be credited to the same account. The *Vallambrosa Rubber Company, Limited* v. *Farmer*, 1910 S.C. 519, 47 S.L.R. 488; *Strong & Company of Romsey, Limited* v. *Woodifield*, 1906 A.C. 448. *In re The Spanish Prospecting Company, Limited*, [1911], 1 Ch. 92; *Californian Copper Syndicate, Limited and Reduced* v. *Inland Revenue*, 1904, 6 F. 894, 691; *Tebran (Johore) Rubber Syndicate, Limited* v. *Farmer*, 1910 S.C. 906, 47 S.L.R. 816; *Commissioners of Taxes* v. *Melbourne Trust, Limited*, [1914] A.C. 1001.

Argued for the respondents—(1) Compensation, even where it was paid because the making of a profit was prevented, could not be profit arising from the trade. It was a capital payment to compensate for a loss of the capital of the company in respect that they were prevented from making the full use of the rights given by their mineral leases. (2) The sum received as damages was paid as reparation for a legal wrong, and was in no sense profit arising from the business. Even if it were regarded as repayment of the expenditure necessarily incurred in maintaining the profit-earning capacity of the subjects, it could not be treated as profits, since such expenditure was not allowed to be treated as a deduction in calculating profit for income tax purposes. The *Dumbarton Harbour Board* v. *Inland Revenue*, 1919 S.C. 162, 56 S.L.R. 122.

At advising—

LORD PRESIDENT—The taxpayer is a company whose fixed assets consist of the leasehold rights in valuable fire-clay seams and of works for the manufacture of fire-clay goods. The company's business consists in mining the fire-clay and marketing it, partly manufactured and partly raw. In one of the two pre-war years the company received from the Caledonian Railway, whose line crossed the leaseholds, an awarded sum of compensation under sections 71 and 74 of the Scottish Railways Clauses Act of 1845. The first question in the case is whether this sum should be included in computing the "amount of the profits arising from the trade or business" of the company in the pre-war years within the meaning of section 40 (2) of the Finance (No. 2) Act 1915.

It is directed by section 40 (1) that for the purposes of excess profits duty the profits shall be determined separately, but on the same principles as for the purpose of income tax, subject to certain modifications which are not material in this case. This rule applies equally to profits in the pre-war years and to profits in the accounting period (see section 40 (1) and the fourth schedule, part 2, paragraph 1, and part 1, paragraph 1). The description of "profits" given in the relevant schedule of the Income Tax Act 1853 is—"The annual profits or gains arising or accruing to any person residing in the United Kingdom from any . . . trade" (1853 Act, section 2, Schedule D); and the first case dealt with in the rules applicable to that schedule is—"Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act" (Income Tax Act 1842, section 100). The question is one to which the principle stated by Lord Blackburn as guiding the construction of all taxing Acts must be applied—"The only safe rule is to look at the words of the enactments and see what is the intention expressed by those words"—*Coltness Iron Company* v. *Black*, (1881) 8 R. (H.L.), at p. 72.

The effect of the statutory embargo which the Caledonian Railway laid upon

the working of certain areas of the fire-clay leaseholds was to dedicate the fire-clay in those areas to the purpose of affording natural support to the line, thus depriving both lessor and lessee of all their beneficial interest (mining communications apart—section 73) in the areas in question, and also to render unworkable a further area (see arbiter's award in Stated Case). In accordance with sections 71 and 74 of the Act of 1845 the compensation payable to the lessor and lessee respectively was in respect of the fire-clay in the reserved areas, and of all loss and damage occasioned by the non-working of the same, and also in respect of the loss incurred by such lessor and lessee respectively in connection with the further area, the working of which was interrupted and made impossible as the indirect result of the embargo. In short, the position so far as the company was concerned was that it had been permanently excluded from the beneficial possession and enjoyment of certain portions of its fixed assets, and the value of its undertaking was correspondingly diminished. That is the injury which the statutory compensation is provided to repair. Can that compensation be said to be part of the "profits arising from the trade or business" of the company, or of the "annual profits or gains arising or accruing to the company from its trade?" It is obvious that it did not arise or accrue by or through any of the processes whereby the company's trade or business is carried on. On the contrary, it was paid because the company was prevented from applying any of those processes to the fire-clay in the areas affected directly or indirectly by the embargo. It was not a profit derived from the carrying on of the company's trade or business; it was paid because the company was wholly deprived of the opportunity to carry on its trade or business so far as the fire-clay in the affected areas was concerned. It is, I think, a fallacy to suppose that the "profits arising from the trade or business" of the company, or the "annual profits or gains arising or accruing therefrom"—which are the proper subjects both of excess profits duty and of income tax—are identifiable with sums received as compensation in respect that parts of the company's trading assets are by the force of the railway legislation struck with sterility and rendered permanently incapable of profitable employment. We know nothing of how the company dealt with the value of its leasehold property in its books or in framing its balance sheets. But *prima facie* the sterilisation of parts of them seems to me to imply a capital loss, and the payment of compensation to repair the injury to the company's undertaking which flowed from that sterilisation seems to me to be a restoration of capital. It was argued that the compensation payable to the company being measured by the present value of the profits which the company might, and in all reasonable probability would, have made if the leasehold had not been interfered with, was really a consideration or substitute for profits. But even so it is a consideration or substitute not for profits earned or capable of being earned but for profits irretrievably lost and incapable of being ever earned. The taxing Acts deal with profits made, not with profits lost—with actual not with hypothetical profits—and it is by the words of the taxing Acts that we are bound. As paid to and received by the company the compensation was the equivalent of a destroyed portion of one of its fixed assets; I do not think it was a profit which arose from the company's trade or business at all.

The second question in the case is more intricate. It relates to a sum of agreed compensation or damages paid to the company by the Caledonian Railway in the same pre-war trade year. The history of this sum is as follows. When the company first gave the railway notice of their intention to work under the line, in terms of section 71 of the 1845 Act, the railway replied by denying that the company had any right to the fire-clay under the railway property on the plea that fire-clay did not come within the subjects ordinarily excepted from a railway conveyance under section 70. The question was fought out in the law courts (*Glenboig Company* v. *Caledonian Railway Company*, 1910 S.C. 951, 1911 S.C. (H.L.) 72), with the result that the railway's contention was held not to be well founded. But during the dependence of the dispute the company was placed under interdict at the instance of the railway against continuing to work under the line. When this interdict fell—which it did on the conclusion of the litigation about the legal quality of fire-clay as a mineral,—the railway resorted to its statutory powers, and laid on the statutory embargo under section 71 of the 1845 Act. Meantime the company had incurred expense in keeping open the interdicted portion of the workings without getting any return, and an agreed sum of compensation or damages was accordingly paid by the Caledonian Railway—as appears from the terms of the discharge in their favour—in full of all claims for loss, injury, damages, or expenses competent to the company in connection with the interdict. The question with regard to this sum is the same as the question with regard to the award of compensation—Should it be included in computing the "amount of the profits arising from the trade or business" of the company in the pre-war years, within the meaning of section 40 (2) of the Finance (No. 2) Act 1915?

It was not possible for the company to know at the time when the expenditure was incurred whether it would turn out to be productive to any extent, or whether it would turn out a dead loss. If they were successful in the law courts, and the railway did not exercise the powers of section 71, the expenditure would turn out productive at least to some extent, because it would enable the fireclay—temporarily under interdict—to be eventually worked. If on the other hand they were unsuccessful in the law courts, or if (notwithstanding their success) the railway ultimately fell back on the powers of section 71, it would turn out

to be money thrown away, and the loss of the money would be attributable, not to any commercial misadventure, but to the exercise by the railway of the rights and powers belonging to it under statute. In the former case the expenditure would be shown to form proper trading expenditure, and to be a legitimate deduction from gross profit in estimating the "profit arising or accruing from the company's trade." In the latter case it would be shown to be money spent without the possibility of return, and would therefore constitute just a loss of so much capital. In making the expenditure the company took its chance of the event. The case was, I think, one which might *prima facie* have been appropriately met by putting the expenditure to a suspense account to await the issue of the proceedings which were pending. In point of fact it was debited in the company's books, as and when incurred, to a "charges account," which in turn was debited at the end of the year to the company's revenue account. But the mode of bookkeeping followed by the company is not conclusive of the true character of the expenditure, or of the agreed sum of compensation or damages by which it was recouped, with reference to income tax or excess profits duty. Now the expenditure did turn out, as we know, to be a dead loss. The position was that the company had spent money during the currency of a wrongous interdict which—owing to the eventual exercise by the railway of its statutory powers—had been rendered wholly unproductive in character. If the expenditure had been put to a suspense account it would on the laying on of the embargo when the interdict came to an end have fallen to be debited against capital, and the capital loss thus appearing would have been set off by crediting to capital the agreed sum of compensation or damages paid by the railway. In my opinion this would have been in precise accord with the true character both of the expenditure and of the agreed sum by which it was *pro tanto* replaced.

The company included both the award of compensation and the agreed sum of damages in making up their return for assessment to income tax for the year in which they were received. For the reasons explained I think this was erroneous and unnecessary. With regard to the present case my opinion is that the company is not entitled to include either of them in the computation of the "profits arising from the trade or business" in the pre-war years for the purposes of excess profits duty. The Commissioners of Inland Revenue undertook by their counsel, in the event of their success in recovering from the company excess profits duty on the principles contended for by them in this appeal, to repay the income tax paid so far as regards these sums with interest at 5 per cent. per annum from the date of payment.

LORD JUSTICE-CLERK—Two points are raised in this Stated Case—one relating to what I shall call compensation money and the other to a payment made in respect of damage suffered.

Compensation.—The money received by the appellants as compensation was paid to them on 9th April 1913, conform to receipt of that date. It was credited by the appellants to revenue account for the year in which it was received and income tax was duly paid on it. In the *Bwllfa* case, [1903] A.C. 426, at p. 432, Lord Robertson, dealing with compensation money, said that the sum to be paid as such compensation is "whatever sum could best be made out to be the profit that would have been made by the appellants if they had been free to work"; he spoke of it "as an estimate of this profit," and he accepted Phillimore's, J., mode of stating the question, viz.—"What would the Colliery Company, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it?" In the case of *Eden*, [1907] A.C. 400, it was held that the true measure of compensation in such cases is that the mineral tenants should get the profits which they would have made by working the coal which the Railway Company prevented them from working.

The appellants founding on these considerations urged that the compensation money must be regarded as *in pari casu* with profits or income in the sense of the Income Tax Acts, and that the £15,000 in this case therefore fall to be so treated. I am not able to accept this argument. It is, no doubt, true that the measure by which the amount of compensation is fixed may be, and in the case we are now dealing with was, held by the learned arbiter to be the profits which the Railway Company prevented the appellants from making by the appellants being prohibited from working the reserved minerals. But in my opinion that is beside the real question. A lease of minerals, by the law of Scotland, truly involves a sale by the landlord to the tenant of part of the soil, the subject of the so-called lease—*Gowans* v. *Christy*, 11 Macph. 1-12; *Campbell* v. *Wardlaw*, 10 R. (H.L.) 65-68—and this view of the matter has been recognised in income tax cases—see Lord Blackburn in *Coltness Iron Company*, 1 T.C., at p. 317, and Lord Chancellor Halsbury in *Scoble*, 4 T.C., at p. 620. But that view of the law does not interfere with the incidence of income tax on the annual profits of mines as both these noble Lords quite distinctly state. Besides, it has to be kept in view that money compensation is not the only form in which the owner or tenant whose administration of his property may be interfered with by a railway company, as was the case here, can be compensated. This is referred to by Mr Cripps in his work on compensation (5th ed., p. 118), where he points out that there may be cases where the true basis of compensation cannot be reached on the basis of income derived from or probably to be derived from land, and where the principle of reinstatement must be applied.

In the present case the appellants were compensated by a money payment—a payment made once and for all—conform to the receipt dated 4th April 1913. The sum paid included not only £15,316, 11s. 4d.,

being the amount of compensation which the arbiter found due on 6th March 1913, but also £67, 3s. 6d., being the net interest on the principal sum from 5th March 1913 till the amount was paid, all in terms of the arbiter's final findings—income tax on the interest being deducted from the gross interest payable. As between the Railway Company and the appellants accordingly the compensation money was not dealt with as being subject to income tax, though the interest accrued on it was so dealt with. The appellants say that this sum of over £15,000 which was paid to them without any deduction of income tax was truly profits, that they accounted for the income tax due and payable in respect thereof to the revenue, and that they were right in doing so.

Originally under the Act of 1842 income tax on profit derived from mines was laid on in the manner prescribed by No. 3 of Schedule A, but by the statute 29 Vict. cap. 36, section 8, this was changed to the effect of making the rules for ascertaining the annual value of mines those contained in Schedule D, the result being, as Lord President Inglis said in *Miller* v. *Farie*, 6 R. 270, at p. 276, that "in so far as ascertaining the annual value is concerned it appears to me that mines, quarries, and other subjects of that kind are transferred from the one schedule to the other." I do not think that this change was intended to have or had the effect of changing the character of the tax. By No. 3 of Schedule A it was enacted that the annual value of mines 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.

Was, then, the compensation money in this case profits received from the mine in question? As appears from the report of the *Coltness* case (1 T.C., at p. 302), the notices of assessment for income tax on mines claimed a return of the annual value or profits arising from the mine or "chargeable" for the year in question. Lord President Inglis in *Miller* v. *Farie* (6 R. 270, at p. 277), said—"I think the principle of the Income Tax Acts is to assess income tax no matter from what source derived and no matter how precarious or how temporary that income may be. . . . The broad principle . . . is that income—what comes in periodically into the pocket of the party—is to be assessed." The learned arbiter in the present case awarded compensation for four areas of clay "left unworked" or "rendered unworkable" by and in consequence of the Railway Company's notices. In the case of *Jones* (1 T.C. 267), Brett, L.J., at p. 270, said—"This statute which is imposing a tax is imposing that tax upon that which is worked," and in the same case, Cotton, L.J., said the rules refer to "working and raising," and had to do with "classes of things raised from the earth," and to "profits made by raising from the earth." Section 60, Schedule A, Rule IV (5), makes provision whereby "if any such mine shall from some unavoidable cause have wholly failed, it shall be lawful for the said Commissioners, on due proof thereof, wholly to discharge any assessment made thereon."

In my opinion the tax, so far as mines are concerned, is imposed for and in respect of profits derived from what is worked and raised from the mine, and I can see no analogy so far as this tax is concerned between money got in that way and money got because you are prevented from working the mine either in whole or in part. Such money is not derived in my opinion from carrying on the working of the mine or mineral, but is compensation paid to the taxpayer because he is prevented from working the mine or mineral. If the Railway Company's notices had applied, as they well might, to the whole subject-matter of the lease, then the whole clay field would have entirely failed, and in my opinion no income in the sense of the Income Tax Acts would have been derived from it, though compensation had been paid.

The appellants by virtue of their lease had right to work the minerals in question. That was a right the value of which could be estimated in money. It was a valuable asset, and the larger the area of minerals which they were entitled to work the more valuable this right was to the appellants, subject always to its not being too large to be worked out during the duration of the lease. This asset was in my opinion a capital asset. The Railway Company by their notice restricted the area of clay which the appellants would otherwise have been entitled to work and could have worked during the currency of the lease by depriving the appellants of the right to work part of the area, viz., the reserved areas of clay. The value of the appellants' capital assets was thus diminished, and the amount by which that value was diminished has been fixed at the £15,000 odd awarded as compensation. In my opinion that sum was a capital and not a revenue or income receipt. It ought not to have been placed to revenue, and was not in my opinion subject to income tax. I am therefore of opinion that the appeal fails as to the compensation.

Damages.—While the interdict was in force the appellants made certain payments for expenditure in order to keep their underground workings in proper order. The facts as to these payments are set out in article 10 of the Case thus—"During the two periods of interdict, viz., from 29th February 1908 till 15th April 1910, and from 12th November 1910 till 28th April 1911, the company had to bear the expense of keeping open and in a workable state the portion of the fireclay field which it had been interdicted from working—in particular, it had to bear the expense of pumping operations and of keeping the roadways, airways, and haulage ways in this area in a proper state of repair—although the company was not during these periods getting any return from this expenditure. The expenses so incurred were included in the ordinary general mining expenses of the company and debited in a 'charges account,' which in turn was at the end of each year debited to the revenue account of the company," and I assume that that was done quite properly. But this case is not

directly or immediately concerned with these expenses. The appellants claimed from the Railway Company damages for the loss they had suffered by wrongous interdict, and they and the Railway Company settled this claim of damages by the latter making a payment to the appellants of £4500. Articles 23, 24, and 25 of the case state the main facts as to this sum of £4500, though not as fully as I could have wished. The appellants made certain claims against the Railway Company, and article 23 of the case is in the following terms—"On 29th August 1913 the company received payment from the Caledonian Railway Company of the sum of £4500 as compensation for damages which the company had suffered in connection with the interdict proceedings, and the company in exchange granted the Caledonian a discharge of its claims arising out of the said interdicts. . . ."

This sum of £4500 is not gains or profits in the sense of the Income Tax Acts. It did not arise from any trade or business carried on by the appellants, or from working the mine or minerals in question, and is not in my opinion subject to income tax. It was in no way income from the clayfield, or the working of it, nor was it the produce thereof or derived from the produce thereof. The discharge referred to bears that in consideration of £4500 paid to and accepted by the appellants in "full settlement and discharge of all claims competent to us against the said company arising out of an action of suspension and interdict at the instance of the said company against us to interdict us from entering or encroaching upon certain property situated at Glenboig belonging to the said Railway Company, and from working certain beds or seams of fireclay" under or adjacent to said property, we (the appellants) "do hereby discharge the said company of said claims, including all loss, injury, damages, or expenses which we may have suffered or incurred in connection with or in consequence of said action, or the granting of said interim interdict, and generally of all claims competent to us against the said Railway Company in any way connected with or arising out of the foresaid proceedings against us: And we discharge the said Railway Company of the said sum of four thousand, five hundred pounds."

In my opinion the expenditure, so far as the £4500 was paid in respect of expenditure, was paid in respect of expenditure which was thrown away and unremunerative. The £4500 was not in my opinion profits derived from working the clay, and it was not income in the sense of the Income Tax Acts. As the Case states, the appellants were not while the interdicts were in force "getting any return from" the expenditure referred to, and there is no averment in the case to the effect that the appellants ever got any return or benefit or income from the expenditure. In my opinion this branch of the appeal also fails.

LORD DUNDAS—After the first discussion in this case I thought—and upon further consideration, and having heard the fuller argument presented to Seven Judges, I still think—that the Crown is entitled to succeed.

We have to decide whether or not the two sums mentioned in the case, received by the appellants from the Caledonian Railway Company on 9th April and 29th August 1913 respectively, should be taken into computation in determining the amount of the profit arising from the appellants' trade or business in the pre-war year in which they were received, within the meaning of section 40 (2) of the Finance (No. 2) Act 1915. In my judgment that question must be answered in the negative.

The first and larger sum was received as compensation in respect of an embargo laid by the Railway Company upon the appellants against working a certain portion of the minerals held by them on leasehold. Now the appellants' lease was, I apprehend, one of their heritable capital assets. The effect of the embargo was, so to speak, to carve out a portion of that asset *quoad* which the appellants were permanently excluded from beneficial possession and enjoyment. The compensation was a surrogatum for the loss of this part of the capital asset. So viewed, the sum under consideration was surely of the nature of capital, not of revenue. The appellants' counsel pointed out that the sum was awarded by the learned arbiter as being equivalent to his estimate of the capitalised amount of profits of which by the embargo they were deprived. *Ergo*, it was contended, the sum is for loss of profits, and is not of the nature of capital. In this argument there is, I think, a double fallacy. In the first place, what we must consider is not the measure by which the amount of compensation was arrived at, but what it was truly paid for, and, as already indicated, I think the compensation was paid for the loss of a capital asset. In the second place, and this is perhaps just another way of stating the same thing, the sum can surely not be described as profits arising from the appellants' trade or business, for it arose, not from the exercise of that trade, but in respect that the appellants were prevented from dealing in their business with, and earning any profit from, a portion of their mineral estate.

As regards the smaller of the two sums in question, the matter is more difficult, but the result must I think be the same if I understand the facts aright; I wish they had been more clearly expressed. The appellants, it appears, were put to sundry expenses in keeping open and in workable condition certain parts of their field, while they were prevented by the Railway Company's interdict from actually working them. As matters turned out, the Railway Company having ultimately placed their permanent embargo upon the removal of mineral from that part of the field, the money so spent appears to me to have represented a dead loss of so much capital, and it was to recoup that loss that the Railway Company agreed to pay the sum in question. It seems to me therefore impossible to hold that it can be included

in computing the profit arising from the appellants' business during the year in which they received it.

The appeal must, in my judgment, fail, but the Solicitor-General undertook that if that course were taken the Crown would repay to the appellants the amount erroneously paid by them for income-tax in respect of the sums in question, with interest thereon at 5 per centum per annum.

LORD SALVESEN—This appeal relates to two sums of £15,316, 11s. 4d. and £4500 which the respondents claim to deduct from the profits of the appellant company for the year ending 31st August 1913, with a view to ascertaining the excess profits on which the appellant company is liable to be taxed under the provisions of Part III of the Finance (No. 2) Act 1915 in respect of the years of trading to which that Act applies. The ground upon which the respondents so contend is that the payments in question do not constitute profits or revenue of the company from the produce of the fire-clay fields, but were in the nature of capital payments.

The two sums in question were credited to revenue account for the year ending 31st August 1913 in which they were received, and formed part of the profits for that year as returned for income-tax assessment under Schedule D. The appellant company was assessed for income tax on these two sums by the Surveyor of Taxes, and income tax was duly paid. They were also treated by the company as part of the profits divisible among their shareholders. The respondents admit that if their present contention is successful they must give credit for the income tax so assessed and paid for which the company was not liable if the two sums in question were in the nature of capital payments. The appellant company on the other hand maintains that the Commissioners of Inland Revenue are barred by their proceedings from maintaining their present contention. I am unable to give effect to this plea of bar, which indeed was not ultimately pressed. On the other hand it appears to me that the mode in which the company dealt with the two sums in question—which was passed as correct by the assessing authority—puts on the respondents a certain onus to show that what they approved of in 1914 ought now to be disapproved as having been a mistake in law.

The first of the two sums was paid by the Caledonian Railway Company to the appellants under an award in an arbitration, the findings and note in which are made part of the case. The circumstances in which the claim arose were briefly as follows:—The appellants were lessees of a field of fireclay which extended below part of the railway line, and they proposed to work this fireclay in the ordinary course of their business. They gave notice to this effect, and were served with counter notices by which the Railway Company intimated their desire that certain portions of fireclay should be left unworked and offered compensation therefor. The amount of compensation was afterwards determined by arbitration, as I have already mentioned.

The question whether this compensation fell to be credited to capital or revenue in the year in which it was paid appears to me to depend entirely on what the compensation was paid for. As regards this the arbiter's note is quite explicit. He says—"As the actual minerals reserved cannot be worked, the value must be ascertained from the selling price and cost of working other mineral from the same seam and from what has been referred to in these proceedings as the substituted area—that is, the area which is being worked, but would not have been worked but for the embargo put upon the reserved area by the Railway Company." In other words, the sum awarded was for loss of profits. The minerals in the reserved area were not sold to the Railway Company, nor did they by their notices acquire the right to work them. If therefore this loss of profit had occurred exclusively in the year in which compensation was paid, I apprehend that it could not have properly entered the appellants' balance-sheet except under the heading of revenue. No doubt, in course of the ordinary working the profits for which compensation was ultimately given would have been spread over several years, but as they were only ascertained in 1913 by the arbiter's award no actual figure could have been put upon them in previous years, and in a commercial sense it was impossible for the appellants to treat the same in any other way than they did. I cannot assent to the view that the money was received in respect of part of the capital assets of the company. In the ordinary course of working a mineral field the mineral which is leased is extracted and sold, and the value of the heritable subject is diminished to the owner, who receives royalties or rent in respect of the mineral so removed, but both the owner and the lessee are subject to income tax—the one on the total royalties he receives in the course of each year, and the other on the total profit that he makes on the minerals actually worked. If his profits are less by reason of outside interference, and he is compensated for the loss of profits caused by such interference, the compensation is just part of his revenue, for his capital account is not thereby in any way affected. I may say that I think the logical result of your Lordship's judgment is that this company year by year made no profits but largely increased its capital, because each year it worked out and so sterilised a given area, and if that given area was a capital asset, the amount it had realised for that capital would be an appreciation of capital and not a profit for the company.

The respondents' second contention is more plausible, but no argument was offered in support of it. There appears to be no provision in the Finance Act 1915 for a readjustment of profits over a period of years except in one case which is specially dealt with, namely, an executory contract in which the whole expenses may have been debited to one year while the bulk of the price for the contract work is only paid in the succeeding year. The absence of any provision dealing with a case like the pre-

sent no doubt explains why the respondents did not press their second contention.

The payment of the sum of £4500 of damages for wrongous interdict appears to me to be in the same position. The elements which entered into the claim are explained in the Stated Case. The Railway Company did not acquire any of the assets of the Glenboig Company, but by their illegal interference with the working of the minerals they put them to expenses in pumping and keeping the ways in a proper state of repair, which expenses would not have been incurred but for the wrongous interdict. These expenses were debited to revenue in the years in which they occurred, and when they were paid by the Railway Company in 1913 the sum paid was credited to revenue. I cannot see how otherwise it could have been dealt with, having in view that the accounts of a company must be made up and closed at the end of each year. The agreed-on sum of damages could contain no element of a capital nature, for the interdict did not diminish the capital assets of the company but only affected their trading profits. I am therefore of opinion that as regards both sums the Commissioners have arrived at an erroneous decision, and that the appellant company's assessment ought to be corrected in terms of article 30 of the Stated Case.

I would only add that none of the authorities quoted seems to have any direct bearing upon this case. The question being whether a sum received by a trader falls to be credited to revenue or capital in the year in which he received it depends upon the subject for which the payment was made, and the solution of this must depend on the facts of the individual case.

LORD MACKENZIE — The success of the appellants in this case depends upon their being able to establish that there should be included in the annual profits arising from their trade or business as manufacturers of fireclay goods, during the years ending 31st August 1912 and 31st August 1913 respectively, the sums of (1) £15,316, 11s. 4d., with interest, and (2) £4500.

As regards (1) the sum of £15,316, 11s. 4d., this is the sum awarded in the arbitration "as compensation for . . . fireclay left unworked" in consequence of the embargo resulting from the notice served on the Glenboig Company by the Caledonian Railway Company. The argument for the appellants was that this sum must be taken as a surrogatum for profits which were not made. The statutory direction is that the pre-war standard of profits is to be based upon the annual profits or gains arising from trade or business. A sum which was paid in place of profits which would not be made does not, in my judgment, fall within the definition of annual profits arising from trade. Owing to the action of the Railway Company the Glenboig Company were prevented working part of their field at all, and received compensation. The sum so received was of the nature of a windfall, and was not received as part of the annual profits arising from trade. It is not to the point to say that the sum awarded was estimated on the basis of the profits that would have been made had the working not been stopped. In the great bulk of cases in which compensation is awarded, profit largely enters into the purchase price. Nor does the *Bwllfa* case ([1903] A.C. 426) aid the appellants, for the dicta referred to merely deal with the method of calculating profits as a means of arriving at the damage. Nor is it sufficient to say that this sum of £15,316, 11s. 4d. was credited to the revenue account and that income-tax has been paid upon it. The assets of the Glenboig Company, as is the case with all companies working minerals, are wasting assets. The effect of what the Caledonian Railway Company did was to enable the Glenboig Company to get a payment in respect of a portion of their capital assets which they were prevented making available for the purposes of their trade. The question is whether this payment is of the nature of an annual profit arising from trade. In my opinion the answer to this ought to be in the negative.

As regards (2) the sum of £4500, the discharge which is printed in the Case bears to be of all claims competent to the Glenboig Company against the Caledonian Railway Company arising out of the interdict. From article 10 of the Case there at first sight seemed to be grounds for regarding the £4500 as oncost expenditure, to which the principle of the *Vallambrosa* case (1910 S.C. 519) might apply. I am unable, however, to find sufficient ground for taking this view. In article 23 the sum of £4500 is described as compensation for damage which the company had suffered in connection with the interdict proceedings. The expenditure was incurred in protecting a capital asset which turned out to be unproductive. It simply means a capital loss. As regards this sum also the contention of the appellants fails.

It was intimated that as regards both (1) and (2) the income tax would be repaid with interest.

In my opinion the determination of the Commissioners is correct.

LORD CULLEN — I agree with the view taken by the majority of your Lordships.

The sum of £15,316, 11s. 4d. was paid by the Railway Company to the appellants as compenstation for the injurious effect of the embargo in excluding the appellants from working part of their leased mineral area and in depriving them of the profits which they might have earned through such working. It was in no sense a fruit or earning of the appellants' business, or an ingredient in the profits thereof, but on the contrary was paid because the appellants had been shorn of the opportunity of making profits *quoad* the area in question. I am unable to see how a sum so paid to compensate for such loss of profits can be regarded as being itself *de facto* profits or an ingredient in profits of the business.

The sum of £4500 was paid by the Railway Company to the appellants as compensation for the injurious effect on their

business and the profits thereof of the interdict which forced the appellants to make expenditure in keeping open and in a workable state the area to which the interdict applied, which expenditure was in fact unremunerative. The making of this unremunerative expenditure caused the profits of the business during the period in question to be less than they would otherwise have been. The payment of the £4500 did not accrue from any transaction or dealing entered into by the appellants in the course of their business, but arose from a wrongful act of aggression on the part of the Railway Company which was injurious to the profits *de facto* earned by the business. It does not appear to me that a sum so paid can be regarded as a fruit or earning of the business or an ingredient in the profits thereof.

LORD ORMIDALE—I concur in the opinions of the Lord President and the Lord Justice-Clerk, which I have had an opportunity of reading, that the sum received by the Glenboig Union Fireclay Company as compensation from the Caledonian Railway Company falls to be dealt with as capital. For the reasons stated by your Lordships it seems to me impossible to predicate of the £15,000 that they were profits arising or accruing from the trade or business of the company. On this topic I cannot usefully add anything to what your Lordships have said.

The question with regard to the sum received in name of damages is much more difficult, but I agree with Lord Salvesen that it was income and was properly credited to the revenue account of the company as an item essential to the proper computation of the profits of the year in which it was received. It was paid, no doubt, by the Railway Company as damages for the wrongous use of interdict, but its amount, as I read the case, was the equivalent of certain expenses legitimately incurred by the company in the ordinary course of working their mineral fleld for the purposes of their trade or business. It was not paid for the surrender of any asset of the company, or because of the failure in consequence of the action of the Railway Company as a profit-yielding subject of any portion of the mineral field. I agree that in the final event the expenditure was not productive. That was not because the company was unsuccessful in the litigation pending which the interdict was in force, but because of the embargo subsequently imposed. But neither was the expenditure unproductive in the sense that it constituted a loss to the company. It was neutral. It was not money thrown away. It was ultimately recovered by the company. But meanwhile, according to what appears to me to have been a perfectly competent and regular—if not the only proper—method of book-keeping, the expenditure had been debited in the company's revenue account for the purpose of ascertaining the net profits arising from their trade for the year or years in which it was incurred, with the result that those profits were diminished by the amount of it. The effect of crediting the sum in question was in effect to replace the profits so displaced, and accordingly it seems to me that for taxing purposes and in the sense of the taxing statutes it may be rightly designated profits arising or accruing from the company's trade or business.

The Court refused the appeal.

Counsel for the Appellants—Macmillan, K.C.—Mackay, K.C.—Gentles. Agents—R. S. Miller, W.S.

Counsel for the Respondents—Solicitor-General (Murray, K.C.)—R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, February 19.

FIRST DIVISION.

[Exchequer Cause.

GUEST'S EXECUTRIX *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Excess Profits Duty—"Where a Trade or Business has Ceased"—Realisation of Trading Stock—Liability of Executrix—Person Deemed to be Carrying on Trade or Business—Finance Act 1918 (8 *and* 9 *Geo. V, cap.* 15), *sec.* 35 (2) (*a*).

The Finance Act 1918, sec. 35 (2), enacts—"Where a trade or business has ceased but is deemed for the purposes of this section to have been carried on for any period—(*a*) the person by whom or by whose authority any trading stock is sold, whether as owner, agent, liquidator, trustee, or receiver, or other person acting in a similar capacity, shall be deemed to be the person carrying on the trade or business, and excess profits duty shall be assessed on and recoverable from that person, and nothing in sub-section (2) of section 45 of the principal Act shall operate so as to impose any liability to duty on the purchaser of the trading stock."

An executrix and sole trustee under her husband's will sold the goodwill, books, and papers of his business, which had ceased at his death, and the office furniture to her son. She retained the book debts and the trading stock on hand at her husband's death, and gradually sold off the trading stock. Under the agreement by which she sold the goodwill there was reserved to her the exclusive use of her husband's business premises until the liquidation of the estate should be completed. *Held* that the executrix was to be deemed to be the person carrying on the trade or business within the meaning of the section, and that she was liable to excess profits duty accordingly.

Observed (*per* the Lord President) that even if the business had not "ceased" the executrix would probably be so liable, but under sub-section (1) of section 35 of the Act.

The Finance Act 1918 (8 and 9 Geo. V, cap. 15), sec. 35 (2), is quoted *supra in rubric.*