No. 32*.—COURT OF SESSION, SCOTLAND.—1ST AND 2ND DECEMBER, 1920, AND 24TH JANUARY AND 5TH FEBRUARY, 1921.

HOUSE OF LORDS.—21ST AND 23RD FEBRUARY, 1922.

THE GLENBOIG UNION FIRECLAY CO., LTD. *v.* THE COMMISSIONERS OF INLAND REVENUE.[1]

Excess Profits Duty—Pre-war standard—Computation of profits—Compensation for sterilisation of capital asset—Damages for wrongous interdict—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* V, *c.* 89), *Section* 40 (1) *and* (2), *and Fourth Schedule, Part* I, *Rule* 1, *and Part* II, *Rule* 1.

The Appellant Company carried on business as manufacturers of fireclay goods and as merchants of raw fireclay, and was lessee of certain fireclay fields over part of which ran the lines of the Caledonian Railway.

In 1908 *the Railway Company, to whom the lands belonged, though not the minerals beneath, instituted an action to restrain the Appellant Company from working the fireclay under the railway, contending that the fireclay was not a mineral and consequently formed part of the Railway Company's property. Pending the settlement of the action the Appellant Company was interdicted from working under the railway. In* 1911 *the House of Lords decided against the Railway Company, which thereupon exercised its statutory powers to require part of the fireclay to be left unworked on payment of compensation. The amount of compensation was settled by arbitration and duly paid to the Appellant Company in* 1913.

For the years 1908 *to* 1911, *during which the action was proceeding, the Appellant Company charged in its trading accounts the expenditure incurred in keeping open the fireclay field which formed the subject of the proceedings, and in the year* 1913 *it received a sum from the Railway Company as damages in respect of such expenditure.*

The sums received by the Appellant Company in respect of compensation and damages were included in their trading accounts for the year 1913, *and in their profits for that year as computed for Income Tax purposes. In computing the pre-war standard of profits of the Appellant Company for Excess Profits Duty purposes, however, the Commissioners of Inland Revenue eliminated the said payments, contending that they did not constitute profits arising to the Company from the produce of the fireclay fields.*

(1) Reported Ct. Sess., 1921 S.C. 400, and H.L., 1922 S.C. (H.L.) 112.

Held, (1) *in the House of Lords, that the amount received for compensation in respect of the fireclay left unworked was not a profit earned in the course of the Company's trade, but was a capital receipt, being a payment made for the sterilisation of a capital asset;*

and (2) *by a majority in a Court of seven Judges of the Court of Session (Lords Salvesen and Ormidale dissenting), that the amount received as damages for the wrongous interdict was not a trading profit of the Company, but was merely the equivalent of expenditure incurred in protecting a capital asset which subsequently turned out to be unproductive owing to the exercise by the Railway Company of its statutory powers.*

No decision was given by the House of Lords on the damages point, an agreement being reached between the parties by which a portion of the sum paid for damages was treated as a trading receipt of the Appellant Company.

STATED CASE.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on 28th June, 1919, for the purpose of hearing appeals, The Glenboig Union Fireclay Company Limited (hereinafter called "the Company") appealed against an assessment to Excess Profits Duty in the sum of £32,157, less earlier (net) deficiencies, viz. £5,837, or £26,320 net duty, for the accounting period commencing on 1st September, 1916, and ending on 31st August, 1917, made upon the Company by the Commissioners of Inland Revenue under the provisions of Part III of the Finance (No. 2) Act, 1915, and subsequent enactments.

I. 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, is annexed hereto and 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 1,835 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.

7. 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 August, 1910, 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 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 are annexed hereto, and form part of this Case.(1)

18. On 9th April, 1913, the Caledonian paid to the Company the above sum of £15,316 11s. 4d., together with interest thereon at five 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 Cale-
> " donian 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."

(1) The decree arbitral, which was in the terms of the final findings of the oversman, is omitted from the present print.

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, is annexed hereto, and forms part of this Case.

22. In May, 1913, the Company paid an interim dividend of ten 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 the 29th August, 1913, the Company received payment from the Caledonian of the sum of £4,500 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 £4,500 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 £4,500, 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 contentions 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 £1,568 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 £2,632, 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 £4,377, less Income Tax adjustment of £438, bringing out a net amount of £3,939 as due by the Company.

II. Mr. R. Henderson, solicitor, Glasgow, contended on behalf of the Appellants :—

PRELIMINARY.

1. That the Inland Revenue, by accepting Income Tax on the sums in question in this case, is barred from now maintaining that these sums do not fall to be treated as revenue under Income Tax principles.

ON THE MERITS.

2. That the sums received in name of compensation and damages fell to be dealt with as income, and not as capital, for Excess Profits Duty purposes, and should be included in ascertaining the pre-war standard of profit of the Company in respect :—

(*a*) *Compensation.*

(1) That the transaction between the Company and the Caledonian was not a sale of any part of the capital assets of the Company, that no right of property in the fireclay passed to the Caledonian, and that this sum was therefore not capital.

(2) That, on the contrary, the compensation represented what would have been earned, *qua* profit, by the Company if the fireclay had actually been worked and had not been reserved by the Caledonian under its compulsory powers, and that it had been actually assessed on this basis, and that this sum was therefore revenue.

(3) That this sum had been treated by the Company as income (*a*) in their business book-keeping; (*b*) in using it to pay a dividend; and (*c*) for the purposes of the return for Income Tax made by the Company, and that therefore it fell to be treated as income in arriving at the pre-war standard of profit of the Company.

(4) The following authorities were relied on in support of this branch of the Appellants' contentions :—

Finance (No. 2) Act, 1915, Section 40 (1).
Fourth Schedule, Part I, Rule 1.
,, Part II, Rule 1.
Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict., c. 33), Sect. 71.

The Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd. v. *The Pontypridd Waterworks Company*, [1903] A.C. 426.

Duke of Hamilton's Trustees v. *Caledonian Railway Company*, [1905] 7 F. 847.

(*b*) *Damages.*

(1) That the expense incurred by the Company during the period of interdict was a daily recurring expenditure, and was correctly debited against income as incurred.

(2) That it was necessarily incurred to earn profit in the then current and future years.

(3) That the expense having been properly debited against income, this sum when received from the Caledonian was properly credited to income.

(4) That there is no principle for determining the profits of a business for the purpose of Income Tax whereby the credit must be allocated to the year in which the debit was made or to any year other than that in which it is received.

(5) The following case was referred to in support of this branch of the Appellant's contentions :—

The Vallambrosa Rubber Company Limited v. *Farmer*, 1910 S.C. 519, 5 T.C. 529.

III. It was contended on behalf of the Commissioners of Inland Revenue :—

(1) That the payments in question did not constitute profits or revenue arising to the Company from the produce of the fireclay fields.

(2) That, even if they did constitute profits to the Company, such profits did not arise in the year ended 31st August, 1913, but would fall to be spread over the periods during which they would have normally accrued.

(3) That the assessment had been made on a correct basis, and should be confirmed.

(4) The following provisions of the Finance (No. 2) Act, 1915, were relied on :—

Section 38 (1).
,, 39.
,, 40 (1).
Part I of the Fourth Schedule, Rules 1, 3, and 11.
Part II ,, ,, ,, ,, Rule 1.

(5) The undermentioned cases were referred to in the course of the Respondents' arguments :—

Foley v. *Fletcher*, (1858) 3 H. and N. 769.
Smith v. *Westinghouse Brake Company*, (1888) 2 T.C. 357.

M'Gregor v. *Macfarlan*, (1889) 16 R. 438, 2 T.C. 435.
Royal Insurance Company v. *Watson*, [1897] A.C. 1, 3 T.C. 500.
Secretary of State for India v. *Scoble and Others*, [1903] A.C. 299, 4 T.C. 618.
Inland Revenue v. *Western Steamship Company*, 1907 S.C. 1005, 44 S.L.R. 715.
The Hudson's Bay Company Limited v. *Stevens*, (1909) 25 T.L.R. 709, 5 T.C. 424.
Vallambrosa Rubber Company, Limited v. *Farmer*, 1910 S.C. 519, 5 T.C. 529.
Assessor for County of Lanark v. *The Duke of Hamilton and Others*, 1918 S.C. 624.
Harvie v. *The Assessor for the Upper Ward of Lanarkshire*, (1893) 20 R. 630, and (1894) 21 R. 803.

IV. Having considered the whole of the facts and contentions as herein set out, we were of opinion that the assessment—the subject of the appeal—had been computed on a proper basis. We accordingly confirmed the said assessment.

V. The Company immediately upon the determination of the appeal declared to us its dissatisfaction therewith as being erroneous in point of law, and having duly required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, this Case is stated and signed accordingly.

A. GRASEMAN, G. F. HOWE, } Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2,
23rd February, 1920.

APPENDICES.

1. COPY MEMORANDUM OF ASSOCIATION of THE GLENBOIG UNION FIRECLAY COMPANY LIMITED, so far as relating to the objects for which the Company was established.

III. The objects for which the Company is established are :—

1st. The acquiring on the terms and conditions expressed in an agreement dated 18th and 19th August, 1882, made between James Dunnachie, fireclay manufacturer, Glenboig; John Wilson of Hillhead House, Hillhead, and merchant in Glasgow; and James Craig, fire brick maker and iron master, Kilmarnock, carrying on business as copartners at the "Star Fire Brick Works" at Glenboig, under the copartnery, name or firm of "James

Dunnachie " of the first part; John Hurll, fireclay manufacturer at Glenboig and carrying on business there under the firm of " The Glenboig Fireclay Company " of the second part, with consent of Peter Hurll, Mark Hurll, and Alexander Hurll, all fireclay manufacturers, Glenboig; and Walter Ness, engineer, Glasgow, of the third part; the businesses presently carried on by the first and second parties, the feus and leases of the subjects on which said businesses are carried on, and the fireclay and other minerals let in connection therewith, the trade marks of the said businesses, the patent rights presently wrought in connection therewith, and generally the whole assets of said businesses, except the debts due to them respectively.

2nd. The carrying on, on the ground and buildings so to be acquired, or in any other premises in Scotland, England, or elsewhere, which the Company may hereafter acquire by purchase, lease, or otherwise, of the trades or businesses of manufacturing and trading in fireclay and other kinds of clay goods, the quarrying of rocks, stones, and sand, and vending the same, the acquiring and working of coal and iron pits and vending the products thereof, and of whatever processes have been or may hereafter be carried on in combination with these trades or businesses, or either of them.

3rd. The purchasing and manufacturing of chemical products and all machinery, articles, or things relating to or used in the carrying on of the company's trades or businesses.

4th. The purchasing, leasing, or otherwise acquiring of any lands, clay, minerals, buildings, or other premises, or any estate or interest therein for the purposes of the company's businesses or trades.

5th. The purchasing or otherwise acquiring, or working, or selling of any patents or patent rights relating in any way to the company's businesses or trades, or the carrying on thereof, and the acquiring or granting any licence or licences to use any such patents or patent right.

6th. The purchasing of the goodwill of, or any interest in, any trade, business, or invention of a nature or character similar to the above trades or businesses which the company is authorised to carry on.

7th. The draining, building on, or otherwise dealing with, improving, and realising of all or any part of the lands and premises at any time held by the company as proprietors, tenants, or otherwise, and the managing, cultivating, leasing, exchanging, selling, and otherwise dealing with, and disposing of all or any parts of the company's businesses, estates, and effects of whatever nature these may be, in such manner for such considerations, on such terms, and for such purposes as the company may think proper.

8th. The making and carrying into effect of arrangements with respect to the union of interest, or amalgamation, either in whole or in part, of the company with any company, corporation, or person, carrying on any business of the same or like sort as the businesses undertaken by the company.

9th. The establishing in the United Kingdom or abroad and regulating of agencies for the purposes of the company.

10th. The borrowing or raising of money upon or without mortgage of any property of the company, and in case of mortgage the same to be with or without power of sale, or by the issue by the company of debentures, bonds, or other money-securing documents; and

11th. The doing of all such other things as are incidental or conducive to the attainments of the above objects.

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2. PROPOSED FINDINGS by the OVERSMAN in Arbitration, GLENBOIG UNION FIRECLAY COMPANY LIMITED and CALEDONIAN RAILWAY COMPANY.

Edinburgh, 21*st December* 1912.—The arbiters having differed and devolved the determination of the matters embraced in the reference upon the oversman, and the oversman having, as empowered by the Joint Minute, No. 39 of process, been present at the proof and hearing, and having thereafter, as empowered by the said Joint Minute, met with and heard the views of the arbiters, and the arbiters having lodged in process their notes, the oversman, having considered the claim and answers, the proof and productions, the arguments of counsel for the parties, the notes prepared by the arbiters, Nos. 80 and 81 of process, and the whole matter embraced in the reference, proposes to find the respondents the Caledonian Railway Company liable for and bound to pay to the claimants the Glenboig Union Fireclay Co. Limited (*First*) the sum of £11,889 10s. 9d. as compensation for the red and compound fireclay left unworked in the area covered by notice A; (*Second*) the sum of £794 4s. 3d. as compensation for the red and compound fireclay left unworked in the area covered by notice B; (*Third*) the sum of £5,760 7s. as compensation for the white fireclay left unworked in the area covered by notice C; and (*Fourth*) the sum of £414 1s. as compensation for the white clay adjoining the said last-mentioned area, and rendered unworkable by the reservation of the white clay under said notice C, the said four sums amounting to £18,858 3s., with interest thereon at the rate of 5 per cent. per annum from this date till paid, this sum being proposed to be found due to the claimants on the footing that the respondents shall pay and so free and relieve the claimants of the rents and lordships, wayleaves, or other payments falling to be made to the landlords in respect of the subjects embraced in the reference; and the oversman further proposes to find the respondents liable for and bound to pay the whole expenses of the reference and

incident thereto, and also the clerk and assessor's account of charges and outlays in connection with the reference, all as the same shall be adjusted by and between the parties, or, failing adjustment, as the same shall be taxed by the Auditor of the Court of Session in terms of the statute; and the oversman appoints the parties or either of them who desire to be heard upon these proposed findings or to represent against the same to make intimation to that effect to the clerk and assessor within ten days from this date, failing which intimation the oversman will, if so advised, proceed to declare these proposed findings final without further notice or procedure.

JAMES A. FLEMING.

Note.—The oversman has arrived at the conclusions embodied in the foregoing proposed findings on the following figures and reasons:—

It is agreed that the area under notice A is 1·306 acres of red clay and the same of compound; that the area under notice B is ·109 acres of red and the same of compound; and that the area under notice C is 1·222 acres of white clay.

The thickness of the seams is agreed on as 28·5 inches as regards compound clay, and the oversman accepts the figures shown in No. 71 of process, namely, the red clay under notice A 107·6 inches, under notice B 84·66 inches, and white 67 inches.

The specific gravity of the minerals is agreed on as 270 tons per inch per acre. These figures produce the following total tonnage reserved:—

	Red.	Compound.	White.
Under Notice A...	37,942	10,050	
Under Notice B...	2,490	837	
	40,432	10,887	
Under Notice C...			22,766
To this the oversman adds for white fireclay not reserved by the railway company, but rendered unworkable in respect of the reservation they have made			1,637
or a total for white of ...			24,403

The oversman arrives at the figure of 1637 thus:—The area of the white seam in the reserved block which the railway company has not required to be left is ·543 acres (Proof, page 108). A thickness of 67 inches gives 9,822 tons. 18 inches on each side of a 12-ft. room is one-fourth or 2,455 tons. Of this one-third would be won, leaving 1,637 tons which would not be worked. For the remainder of the 9,822 tons, that is 8,185 tons, the claimants are entitled to increased cost of working, but the oversman has set that claim against the cost to them of making good the subsidence in the public road crossing the area, which

would almost certainly occur were they to work these seams out. The calculation is extremely rough, but the oversman has no means in the process of getting any closer to an equitable result.

The respondents contend that the clay in these areas could not be fully worked out, that to avoid crushing and disastrous subsidence part of the stoops must be left, and they calculate that on the basis of stoops 60 feet square and cross rooms of 12 feet being driven through them, the remaining quarter stoops would be sufficient to prevent the crushing and subsidence, but would only give as the yield to the claimants 36 per cent. of the tonnage contained in the original stoops. To this the claimants reply that, as a matter of fact, they have worked their mine on the principle of complete extraction, and the oversman is satisfied in the evidence that this has been done and could be done in the reserved area.

The next point is whether, on the footing of drawing the stoops completely, there would be any loss in working. The respondents do not deal with this point, their evidence being directed solely to the question of whether or not the stoops could be drawn or merely subdivided, and the oversman might hold that the respondents had failed to prove any loss in working. But it is matter of common knowledge that rarely can minerals be worked out to the last ounce, and that in stoop and room working the loss in the earlier step of driving the rooms is very small compared with that in the later steps of subdividing and drawing the stoops. The oversman, in giving effect to this view, takes 5 per cent. as a reasonable figure for loss in working out a virgin area. For the later steps of the process with which alone this reference is concerned, he by very rough methods reaches a figure of 10 per cent. as the proper deduction from the total tonnages mentioned.

As regards the white clay, however, a prior deduction must be made. The method of working this seam spoken to requires a floor of at least 3 feet thick. In the reserved area the silicious band is of less thickness than 3 feet at several of the points where measurements were taken. To obtain a floor of the necessary thickness must mean leaving part of the white clay seam unworked. The oversman calculates this at 13½ per cent. over all.

The oversman, therefore, has reduced the tonnage already given by a deduction of 13½ per cent. from the white clay, and 10 per cent. from the balance, and a single deduction of 10 per cent. from the red and compound clays.

The net figures, therefore, are :—

	Red.	Compound.	White.
Under Notice A...	34,148	9,045	
Under Notice B...	2,241	753	
	36,389	9,798	
Under Notice C...			18,998

The oversman may say here that, as regards the white clay seam, the fact that it has been worked, the method employed, the use to which the material is put, and its value in manufacture, he cannot discard the claimants' evidence of fact in favour of the respondents' evidence, which is practically entirely founded on theory.

No material part of the clay from these seams is sold as raw clay at the pit head. All of it goes through some process of manufacture. The parties are therefore forced to take as the basis of their calculation the profit made on the sale of the manufactured products. But they do not agree on that basis figure, nor do they agree as to what deduction, if any, is to be made from it when ascertained as representing manufacturing profits.

The claimants claim that in ascertaining the net profit no deduction is to be made for fixed "oncost," that is, all charges which do not depend directly on the amount of output, but remain more or less permanent even in the event of a large increase of output. They say that this fixed oncost has already been met by the profit in the present production, and that every additional ton of output represents clear profit.

This claim seems to the oversman to assume two propositions —first, that the mineral reserved in such circumstances is to be valued as if it were additional output, that is, additional to the usual and ordinary output of the mineral owner; and second, that the gross profit on the sales can be treated as yielding no net profit until the point is reached when the whole oncost has been met, and that the gross profit in all sales made after that point becomes net profit. The oversman is unable to accept either of these propositions.

In the *Rugby Cement* case (*Rugby Portland Cement Co.* v. *L. & N.-W. Railway Co.*, [1908] 2 K.B. 606), a case very like the present, the contention which was sustained by the Court was that the value is to be assessed on the basis of what the claimant company might fairly be expected to have made out of the property by working it in the ordinary and reasonable manner in which it would have been worked, but for the notice to treat. The oversman thinks that that statement of the proper mode of assessing the composition payable by a railway company is sound. The circumstances in which such claims arise must be the same, that the claimant company in the natural course of its working comes to an area which the railway company desires to reserve, and the statutory notices are served. The amount of compensation payable for this reservation of mineral has been decided to be what the minerals would have sold for if worked, less the cost of working them (*Eden* v. *North-Eastern Railway*, [1907] A.C. 400). Other considerations may enter into the question, such as the acceleration of the exhaustion of the seam on the one hand, or the impossibility of working out the reserved minerals during the currency of the mineral lease on the

other, but as neither of these contingencies is to be apprehended in the present case, they need not be referred to further. As the actual mineral 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. An additional allowance is made should the substituted area be less convenient or suitable for working than the reserved area. Such an allowance was adjusted in the *Eden* case; and in the *Rugby* case, where no such allowance was made, there was an express finding that the substituted area was equally convenient and suitable.

The claim to work the reserved area on the assumption that it is to be treated as if worked in addition to the substituted area, seems to the oversman to be quite inconsistent with the condition of working the property in the ordinary and reasonable manner in which it would have been worked but for the reservation. What is ordinary and reasonable can only be found from the practice of the mineral company before and after the notice to treat. These views apply in the case of a mineral such as coal, which has a marketable value at the pit head, for which there is a demand which could not be affected by the increased production and in cases where presumably this increase would be within the capacity of the pit machinery. But in this case further consideration must be weighed. The mineral is of a special quality used only for special articles. It has no marketable value in the raw state, and the ascertainment of its value necessitates the assumption of its being manufactured and sold. The manufacturing plant is insufficient to deal with the additional quantity, and there is no evidence that the value of the manufactured article in the market would not be injuriously affected by an increased output. All the oversman knows is that notwithstanding a very substantial increase in the selling price within the last year, the Glenboig Company have taken no steps to increase their output, although there is ample mineral available.

If the oversman is right upon the first proposition, the second proposition need not be considered. If, however, he is wrong, and the reserved area is to be treated as additional output, he is unable to understand any theory on which any part of the output is not to bear its share of the oncost. Of course, the oncost being spread over a larger output, the share which each unit bears is less, and to that extent the Glenboig Company on this assumption would be entitled to claim a greater profit per unit arising from the increased output. But, to claim that a certain part of the output is to bear the whole of such oncost, and the remainder, none, is to the oversman's mind hopeless. The only method of ascertaining the profit made per unit is to distribute the total oncost for any period over the whole output for that period.

Putting this view into figures, and dealing first with red clay for the year to 31st August, 1911, the oversman finds that parties are agreed on a selling price of 17/7·7626 per ton. From this figure, the railway company deducts 10/6·4991 and 11·6067 per ton, leaving 6/1·6568 per ton, while the claimants deduct only the former figure. The latter figure represents the fixed oncost which they claim to deduct under the view which the oversman is unable to sustain. So far, the oversman accepts the respondents' figure. The respondents further deduct 5·94 per ton for selling expense. This seems to the oversman to fall under the same principle and to form a proper deduction. This figure proceeds upon an allocation to Gartcosh and Cumbernauld of 22 per cent. of these expenses, a percentage which satisfies any test which the oversman has the material for applying. The figure itself does not exceed any figure which he has arrived at by different processes, and the claim for deduction at that rate must be allowed. The result is a figure of net profit on red clay for the first period of 5/7·7168 per ton of raw clay.

A similar calculation for compound clay for the same period gives 1/8·3230 per ton of raw clay, from which must be deducted a profit made on the bags in which part of it is sold, averaging 3d. per ton, leaving a net profit on this clay of 1/5·323 per ton.

As the oversman has said, he values the white clay as equal to the red.

For the period from 31st August, 1911, to 29th February, 1912, similar calculations, which the oversman accepts, bring out the profit made on red and white clay at 6/6·4311 and compound at 1/5·6313 per ton.

The parties are agreed that the reserved area could be worked out in two and a half years. The period already dealt with by the oversman covers eight months. The prices realised for the remaining twenty-two months must necessarily be largely estimate. There is evidence that in October, 1912, the products of red and white clay were selling readily at an increase in selling price of 3s. 6d. per ton, and were realising a net profit of 2s. 3d. per ton more than in August, 1911. The oversman cannot assume that this high price will continue during the whole period, and he proposes to value the red and white clay at an increase of 1s. 9d. per ton, being 7/4·7168 per ton.

For the same period, the oversman has only selling price figures dealing with compound clay. It must, of course, bear its share of the increased cost of coal, wages, and taxation. As the oversman proposes to allow in the case of red and white clay an increase of practically one-half of the increase in the selling price, he proposes to treat the compound similarly, and allow 6d. per ton, making the figure for the period 1/11·323 per ton.

Taking then for red and white

2 months at 5/7·7168,
6 months at 6/6·4311,
22 months at 7/4·7168,

the oversman finds for the whole period 7/1·2599.

Similarly for compound

2 months at 1/5·323,
6 months at 1/5·631,
22 months at 1/11·323,

the oversman finds for the whole period therefor 1/9·784.

The other main question argued was, to what extent does the profit realised on the sale of the manufactured article consist of profit due to the manufacturing process, and should that manufacturing profit be deducted before ascertaining the value of the raw clay in the seam? Both parties agreed that there should be such a deduction, at least they agreed that the selling profit should not be taken as the measure, but only as the indication of the value of the mineral. But having done so they have not tabled any data from which a manufacturing profit can be ascertained. The oversman cannot find, except by the merest guesswork, what amount of the total capital of the company is invested in the manufacturing process, nor is any suggestion made as to the percentage on that capital which can be looked upon as a fair return. All that he can find is that the manufacturing processes at Gartcosh and Cumbernauld yield no profit, and it may be inferred from this that the claimants expect and get no greater profit from the works at Glenboig.

It seems to the oversman that the manufacturing process is not a separable business which is expected to yield profit, but is so intimately connected with the exploitation of the bed of clay, and so dependent upon its existence, that a separate profit cannot be ascertained. The oversman feels, however, that a bare interest on the capital employed in the manufacturing process at Glenboig should be charged, and he has endeavoured to do so. He confesses that his method, in the total absence of any relevant facts, begins by reducing the value to round figures. The oversman takes for red and white 6/6, and for compound 1/9, the great bulk of the manufacturing process being connected with the former. The fractions which are thus cut off amount to some £1,620, or a charge at 4 per cent., representing a capital of upwards of £40,000, which may be more or less correct, as the total sum appearing in the balance-sheet for the buildings, machinery, &c., at the three works of Glenboig, Cumbernauld, and Gartcosh, including patents and electric power plant, is about £115,000.

The view which the oversman has taken makes it unnecessary for him to deal with the request of counsel for the railway company for an alternative award. As regards the reservation in the claim for damage in respect of the interdict, the oversman does not think that it is necessary for him to make any special reservation; this claim is not embraced in the reference. The reservation which was made by the arbiters in connection with the increase of the claim during the arbitration is probably not necessary in view of the proposed findings. J. A. F.

3. FINAL FINDINGS in the ARBITRATION between THE GLENBOIG UNION FIRECLAY COMPANY LIMITED and THE CALEDONIAN RAILWAY COMPANY.

Edinburgh, 6th March 1913.—Having heard counsel for the parties upon his proposed findings of 21st December 1912, and again considered the claim and answers, the proof and productions, and the whole matters embraced in the reference, and having considered the arguments addressed to him upon his proposed findings, the oversman now finds the respondents, the Caledonian Railway Company, liable for and bound to pay to the claimants, the Glenboig Union Fireclay Company Limited (*First*) the sum of Nine thousand six hundred and forty-two pounds, eight shillings and sixpence (£9,642 8s. 6d.), as compensation for the red and compound fireclay left unworked in the area covered by notice, dated 29th June 1911, being number 13/1 of process; (*Second*) the sum of Six hundred and thirty-eight pounds, fifteen shillings and ninepence (£638 15s. 9d.), as compensation for the red and compound fireclay left unworked in the area covered by notice, dated 3rd October 1911, being number 13/2 of process; (*Third*) the sum of Four thousand six hundred and eighty-eight pounds, five shillings and tenpence (4,688 5s. 10d.), as compensation for the white fireclay left unworked in the area covered by notice, dated 3rd October 1911, being number 13/3 of process; and (*Fourth*) the sum of Three hundred and forty-seven pounds, one shilling and threepence (£347 1s. 3d.), as compensation for the white clay adjoining the said last-mentioned area, and rendered unworkable by the reservation of the white clay under said last-mentioned notice, the said four sums amounting to Fifteen thousand three hundred and sixteen pounds, eleven shillings and fourpence (£15,316 11s. 4d.), with interest thereon at the rate of five per cent. per annum from this date till paid, this sum being found due to the claimants on the footing that the respondents shall pay and so free and relieve the claimants of the rents and lordships, wayleaves, or other payments falling to be made to the landlords in respect of the subjects embraced in the reference: Further, the oversman finds the respondents liable for and bound to pay the whole expenses of the reference and incident thereto, and also the clerk and assessor's account of charges and outlays in connection with the reference, all as the same shall be adjusted by and between the parties, or, failing adjustment, as the same shall be taxed by the Auditor of the Court of Session in terms of the statute: Reserving to issue a formal award or decree arbitral if requested by the parties or either of them to do so. (1)

JAMES A. FLEMING.

Note.—The oversman has corrected the clerical error pointed out by the claimants in the letter, No. 87 of process.

On the various questions raised and discussed before the arbiters and the oversman, the oversman remains of the opinion expressed by him in his note to his proposed findings.

(1) A decree arbitral in the terms of the final findings was issued on the 2nd April, 1913. It is omitted from the present print.

On the questions raised for the first time at the hearing on the proposed findings, the oversman is of opinion (1) that the deductions for oncost should be as claimed by the respondents; (2) that a deduction should be made for depreciation to the full extent of that actually made by the claimants in the general account, and to the extent of £1,257 on the electric plant account, that sum being taken on the evidence that such plant has a fifteen years' life; (3) that there is no sufficient evidence of any increased cost of working other fireclay in place of that reserved; and (4) that the profit on bags used in the sale of the compound fireclay is 6d. instead of 3d. per ton.

The result is that after an adjustment to eliminate the sand produced and the house rents received, the oversman finds that the figure of 6/6 for red and white clay must be reduced by 12·62d., and the figure of 1/9 for compound by 11·98d.

The proportion between the value of the two qualities of clay is not true. It is upset by the mode adopted of calculating all oncost charges on the tonnage of output. As, however, nothing depends in this arbitration on the relative value of the two clays, and as the financial result is the same, the oversman has followed the mode adopted by the parties.

The motion for certification of skilled witnesses, of which notice was lodged in process, was not made. J. A. F.

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5. STATEMENT of PROFIT, for INCOME TAX ASSESSMENT under SCHEDULE D, for year ended 31st August, 1913.

	£	*s.*	*d.*	£	*s.*	*d.*
Gross Profit				57,226	13	0
Add—						
Rates on Houses for year 1912–13 ...				153	18	2
Feu-duties				26	2	6
Income and Property Tax paid for year 1912–13, viz.:—						
Glenboig Houses, £1,110 8*s.*, less £287 18*s.* = £822 10*s.*	49	19	7			
Glenboig Land, £10, less £7 = £3 ...	0	3	6			
Glenboig Farm, proportion £10, less £8 = £2	0	2	4			
Inchneuk Farm, proportion £48, less £32 = £16	0	18	8			
Glenboig Institute, £60, less £15 10*s.* = £44 10*s.*...	4	1	11			
Cumbernauld Houses, £103 19*s.*, less £28 9*s.* = £75 10*s.*	4	8	1			
Cumbernauld Farm, proportion £45, less £30 = £15	0	17	6			
Gartcosh Houses, £239 3*s.*, less £67 13*s.* = £171 10*s.*	10	5	1			
Gartcosh Land, £18, less £12 = £6...	0	7	0			
Directors' Fees, £400	22	1	8			
Profit, £23,627	1,378	4	10			
				1,471	10	2
				£58,878	3	10
Carry Forward				£58,878	3	10

				£	s.	d.	£	s.	d.
	Brought forward						58,878	3	10
Deduct—									
Previous year's balance				2,591	0	11			
Directors' Fees				400	0	0			
Auditors' Fees				73	10	0			
Rents of Houses	£1,224	15	7						
Less repairs on Houses (say 5 per cent.)	61	4	9						
				1,163	10	10			
Interest on Investment in Consols				528	12	4			
Interest on Loans with Lanark County Council				598	19	4			
Interest on Deposit Receipts with the National Bank of Scotland, Ltd.				135	17	1			
Interest from Caledonian Railway Co. on £15,316 11*s.* 4*d.*, at 5 per cent. from 6th March to 9th April, 1913	£71	6	8						
Less Tax	4	3	2						
				67	3	6			
							5,558	14	0
							£53,319	9	10
Profit Year 1911				25,442	5	4			
Do. 1912				30,460	6	4			
Do. 1913				53,319	9	10			
			3/	£109,222	1	6			
				£36,407	7	2	£36,407	7	2
Add Mineral Rents from 16th May, 1913, to 15th May, 1914 :—									
Glenboig							250	0	0
Cumbernauld							360	2	9
Gartcosh									

(Sgd.) RICHD. BAXTER, 16th February, 1914.
E. & O. E.

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6. DISCHARGE by THE GLENBOIG UNION FIRECLAY COMPANY LIMITED in favour of THE CALEDONIAN RAILWAY COMPANY.

We, The Glenboig Union Fireclay Company Limited, incorporated under the Companies (Consolidation) Act of Nineteen hundred and eight, and having our registered office at forty-eight West Regent Street, Glasgow, in consideration of the sum of Four thousand five hundred pounds sterling paid to us by the Caledonian Railway Company, incorporated by the Caledonian Railway Act, Eighteen hundred and forty-five, being the sum agreed to be paid to and accepted by us 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 lying under or adjacent

to said property, in which action interim interdict was granted, conform to Interlocutors of the Lord Ordinary of the Court of Session, dated twenty-ninth February and sixteenth March Nineteen hundred and eight, and was recalled by Interlocutor of the Lord Ordinary, dated twenty-eighth November Nineteen hundred and eight, and which action was finally disposed of on Appeal by Interlocutor of the House of Lords, dated twenty-eighth April Nineteen hundred and eleven, 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 aforesaid proceedings against us: And we discharge the said railway company of the said sum of Four thousand five hundred pounds: And we warrant this discharge at all hands and against all mortals: And we consent to the registration hereof for preservation: IN WITNESS WHEREOF these presents written by Mungo Young Tait, clerk to the said Caledonian Railway Company in their solicitor's office in Glasgow, are executed by us as follows:—They are sealed with our common seal and are subscribed for us and on our behalf by James Dunnachie and David Craig two of our directors, and by Richard Baxter our secretary, all at Glasgow on twenty-ninth August Nineteen hundred and thirteen, before these witnesses James Dunnachie, Junior, our general manager, and Robert Reid, our cashier.

JAMES DUNNACHIE, JR., *witness.*

ROBERT REID, *witness.*

L.S.

JAMES DUNNACHIE, *Director.*

DAV. CRAIG, *Director.*

RICHD. BAXTER, *Secretary.*

The case came before the Second Division of the Court of Session on the 1st and 2nd December, 1920. Mr. A. M. Mackay, K.C., and Mr. Gentles appeared for the Appellant Company, and Mr. Leadbetter, K.C., and Mr. R. C. Henderson for the Crown. Their Lordships reserved judgment, and on the 11th December appointed the case to be argued before a Court of seven Judges.

The further hearing took place on the 24th January, 1921, when Mr. Macmillan, K.C., also appeared for the Appellant Company, and the Solicitor-General (Mr. C. D. Murray, K.C.) appeared with Mr. R. C. Henderson for the Crown.

The Court reserved judgment until the 5th February, 1921, when it was given in favour of the Crown, with expenses, Lord Salvesen dissenting on both points, and Lord Ormidale on the question of damages.

I. INTERLOCUTOR.

Edinburgh, 5th February, 1921. The Lords of the Second Division with the addition of three Judges of the First Division having considered the Stated Case on Appeal and heard Counsel for the parties :—In conformity with the Opinions of the majority of the seven Judges, Dismiss the Appeal, Affirm the determination of the Commissioners, and Decern; Find the Appellants liable to the Respondents in expenses, and remit the Account thereof to the Auditor to tax and to report.

(*Sgd.*) CHARLES SCOTT DICKSON, I.P.D.

II. OPINIONS.

The Lord President (Clyde).—The taxpayer is a company whose fixed assets consist of the leasehold rights in valuable fireclay seams and of works for the manufacture of fireclay goods. The Company's business consists in mining the fireclay 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 leasehold, 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 II, par. 1 and Part I, par. 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, manu- " facture, 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 Co.* v. *Black*(1), (1881) 8 R. (H.L.) at p. 72).

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(1) 1 T.C. 287, at p. 317.

(The Lord President (Clyde).)

The effect of the statutory embargo which the Caledonian Railway laid upon the working of certain areas of the fireclay leaseholds was to dedicate the fireclay in those areas to the purpose of affording natural support to the line, thus depriving both the 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 fireclay 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 accuring " 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 fireclay 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 fireclay 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 primâ 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

(The Lord President (Clyde).)

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 fireclay under the railway property, on the plea that fireclay 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 Co.* v. *Caledonian Railway Co.*, 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 fireclay 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 the 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 fireclays, 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

(The Lord President (Clyde).)

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 a 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 primâ 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 book-keeping 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.

The Lord Justice Clerk (Scott Dickson).—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(1), 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, J.'s 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*(2), 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 falls 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 have 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 on part of the soil—the subject of the so-called lease—(*Gowans* v. *Christie*, 11 M. (H.L.) 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 Co.*, 1 T.C., at p. 317, and Lord Chancellor Halsbury in *Scoble*, 4 T.C., at p. 624. 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

(1) Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd. *v.* Pontypridd Waterworks Co., [1903] A.C. 426, at p. 432.

(2) Eden *v.* North Eastern Railway Co., [1907] A.C. 400.

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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 9th April, 1913. The sum paid included not only £15,316 11*s*.. 4*d*., being the amount of compensation which the arbiter found due on 6th March, 1913, but also £67 3*s*. 6*d*., being the net interest on the principal sum from 6th 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. III of Schedule A, but by the Statute 29 & 30 Vic., 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 this change was intended to have or had the effect of changing the character of the tax. By No. III 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 case of the *Coltness Iron Co.* v. *Black*, 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, said : " I think the principle of " the Income Tax Act is to assess Income Tax no matter from " what source received, and no matter how precarious or how " temporary that income may be. . . . The broad principle

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" 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* v. *Cwmmorthin Slate Co.*, 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., at p. 271, 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," while Section 60, Schedule A, No. IV, Rule 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 dis- " charge 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 clayfield 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.

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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." These expenses were debited to revenue accounts for the years when they were incurred, 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 £4,500. Articles 23, 24, and 25 of the Case state the main facts as to this sum of £4,500, 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 the 29th August, 1913, the Company received payment " from the Caledonian of the sum of £4,500 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."

In my opinion, this sum of £4,500 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 in no way arose as 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 £4,500 paid to and accepted by the Appellants in full settlement and discharge " of all claims competent to us against the said com- " pany arising out of an action of suspension and interdict at the

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" 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 con- " nection 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 " thousands five hundred pounds."

In my opinion, the expenditure, so far as the £4,500 was paid in respect of expenditure, was, so far as appears, paid in respect of expenditure which was thrown away and unremunerative. The £4,500 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, 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 Co. 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 in 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 received, 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

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equivalent to his estimate of the capitalized 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 lies, 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 profits 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 profits 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 £4,500, 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 fireclay 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

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for Income Tax assessment under Schedule D. The Appellant Company was assessed for Income Tax on said two sums by the Surveyor of Taxes, and said 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 and 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 not 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 by 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 com- " pany." 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 compensa-

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tion were ultimately given would have heen 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.

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 (No. 2) Act, 1915, for a re-adjustment 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 present no doubt explains why the Respondents did not press their second contention.

The payment of the sum of £4,500 of damages for wrongous interdict appears to me to be in the same position. The elements which entered into the claim are explained in Articles 10 and 11 of 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 expense in pumping and keeping the ways in a proper state of repair, which expense 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.

(Lord Salvesen.)

I would only add that none of the authorities quoted seem 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) £4,500.

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 £4,500, the discharge which is printed in the Case bears to be of all claims competent to the Glenboig Company against the Caledonian Railway Company

(Lord Mackenzie.)

arising out of the interdict. From Article 10 of the Case, there at first sight seemed to be grounds for regarding the £4,500 as on-cost expenditure to which the principle of the *Vallambrosa* case(1) might apply. I am unable, however, to find sufficient ground for taking this view. In Article 23 the sum of £4,500 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 compensation 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 £4,500 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 Appellant to make expenditure in keeping open and in a workable state the area to which the interdict applied and 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 £4,500 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

(1) Vallambrosa Rubber Co., Ltd. *v.* Farmer, 5 T.C. 529.

(Lord Ormidale.)

Company as compensation from the Caledonian Railway Company falls to be dealt with as capital. For the reasons stated by your Lordships, it sems 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 field 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 bookkeeping, 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 Company having appealed against the decision of the Court of Session, the case came before the House of Lords (Lords Buckmaster, Atkinson, Sumner, Wrenbury and Carson) on the 21st and 23rd February, 1922, when Sir William Finlay, K.C., Mr. A. M. Mackay, K.C. (of the Scottish Bar), and Mr. H. H. Edmunds appeared as Counsel for the Company, and the Attorney-General (Sir Gordon Hewart, K.C.), the Lord Advocate (Mr. T. B. Morison, K.C.), Mr. R. P. Hills, and Mr. A. N. Skelton (of the Scottish Bar) for the Crown.

On the latter day judgment was given unanimously in favour of the Crown, with costs, on the question of the sum paid as compensation, confirming the decision of the Court of Session.

As regards the sum of £4,500 paid as damages, a compromise was arrived at under which a certain part of that sum was treated as a trading receipt of the year 1913 for the purpose of computing the Company's pre-war profits standard, and the point was not dealt with by the House of Lords.

JUDGMENT.

Lord Buckmaster.—My Lords, the Finance (No. 2) Act of 1915 imposed a duty, known as the Excess Profits Duty, to be levied and paid upon profits arising from trade or business. The method provided for assessment was by comparing the profit in the particular business for the period known as the accounting period with the average pre-war standard of profit, determined by taking the average of any two of the three last pre-war trade years, the difference between the two being liable to duty, which was imposed at the rate of 50 per cent.

The Appellant Company here, The Glenboig Union Fireclay Company, Limited, in making their return for the purpose of this Statute, included as one of the two pre-war years the year that ended the 31st August, 1913, and into the accounts of that year they brought as items of profit a sum of £15,316 received from the Caledonian Railway Company on the 9th April, 1913, and a further sum of £4,500 received from the same Company on the 29th August, 1913. The question that is raised upon this appeal is whether or no the Company are entitled to increase the amount of their pre-war profits by these two sums and thereby reduce the amount of the Excess Profits Duty payable under the Statute. There is no question whatever about the *bona fides* of the Appellants in this case. Both those sums had been included in their balance sheet as profit for the year 1913, and upon them they had paid Income Tax without demur.

The circumstances in which those moneys were paid may be shortly stated. The Appellants, the Glenboig Union Fireclay Company, carry on business as manufacturers of fireclay goods and as merchants of raw fireclay. Part of their property consisted of mining rights over certain beds of fireclay at Gartverrie, Glenboig, and in the course of working these fields they were at the end of 1907 approaching the line of the Caledonian Railway, and due notice was given on the 25th January, 1908, to the Railway Company of the intended extension of their working. The Railway Company, being apprehensive as to the result, required the Fireclay Company to desist from working. A dispute arose as to whether or no the fireclay in question was a mineral and litigation ensued, during which the Railway Company were able to obtain against the Fireclay Company interdicts which operated for two periods, one from the 29th February,

(Lord Buckmaster.)

1908, to the 15th April, 1910, and the second from the 12th November, 1910, to the 28th April, 1911, when the interdict was finally recalled. Upon the recall of the interdict the Railway Company accordingly became liable to pay the Fireclay Company the damages that had been caused to them by the order, and the sum of £4,500, to which I have made reference, was the sum that was paid under that head. The Railway Company now proceeded to treat with the Fireclay Company for the purpose of preventing any further working of this fireclay adjacent to their railway, and arbitration proceedings ensued for the purpose of determining what sum the Railway Company were bound to pay for this privilege, and ultimately the sum of £15,316 was fixed as the sum payable by the Railway Company, and this was accordingly paid on the 9th April, 1913.

My Lords, these two sums require some different consideration for the purposes of this appeal, but your Lordships are relieved with regard to the second sum of £4,500, because the parties to this appeal have very wisely made an arrangement upon the point, with the terms of which it is unnecessary to trouble your Lordships. The sum of £4,500 is therefore removed from your consideration.

It therefore only remains to consider whether the sum of £15,316 was properly included as a profit in the Appellants' balance sheet for the year ending 31st August, 1913. The argument in support of its inclusion can only be well founded if the sum be regarded as profits, or a sum in the nature of profits, earned in the course of their trade or business. I am quite unable to see that the sum represents anything of the kind. It is said, and it is not disputed, that the amount in fact was assessed by considering that the fireclay to which it related could only be worked for some two and a-half years before it would be exhausted, and it is consequently urged that the amount therefore represents nothing but the actual profit for two and a half years received in one lump sum. I regard that argument as fallacious. In truth the sum of money is the sum paid to prevent the Fireclay Company obtaining the full benefit of the capital value of that part of the mines which they are prevented from working by the Railway Company. It appears to me to make no difference whether it be regarded as a sale of the asset out and out, or whether it be treated merely as a means of preventing the acquisition of profit that would otherwise be gained. In either case the capital asset of the Company to that extent has been sterilised and destroyed, and it is in respect of that action that the sum of £15,316 was paid. It is unsound to consider the fact that the measure, adopted for the purpose of seeing what the total amount should be, was based on considering what are the profits that would have been earned. That, no doubt, is a perfectly exact and accurate way of determining the

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compensation, for it is now well settled that the compensation payable in such circumstances is the full value of the minerals that are to be left unworked, less the cost of working, and that is, of course, the profit that would be obtained were they in fact worked. But there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test. I am unable to regard this sum of money as anything but capital money, and I think therefore it was erroneously entered in the balance sheet ending 31st August, 1913, as a profit on the part of the Fireclay Company.

It has been stated before your Lordships that the Income Tax which was paid upon that sum will be returned by the Crown with interest, but that consideration forms no part of the matter that is now before this House, and I have only to ask your Lordships to dismiss this appeal with costs.

Lord Atkinson.—My Lords, I concur.

Lord Sumner.—My Lords, I concur.

Lord Wrenbury.—My Lords, the mining leases which the Appellant Company held of some 1,835 acres of fireclay fields in or near Glenboig were capital assets of the Company. The Company's objects were to acquire profit by working the mines under and by virtue of the title and rights which they held under the leases. By acts done by the Caledonian Railway Company the Appellants were, as to part for a time and as to part altogether, precluded from working the mines and acquiring profit in so doing, and this in two ways: First, the Railway Company obtained from the Court of Session an interdict which precluded the Appellants from working for some two or three years. Ultimately this interdict was, by judgment of your Lordships' House, recalled, and was held to have been wrongful, or, as this is a Scotch case, I ought to say, wrongous, from the first. The Appellants recovered from the Railway Company £4,500 as damages in respect of the operation of the interdict. Secondly, the Railway Company, after the interdict was recalled, gave the Appellants notice under Section 71 of the Railway Clauses Consolidation (Scotland) Act, 1845, not to work a certain area of one and a half acres, and compensation in respect of this was assessed by arbitration at £15,316. These two sums of £15,316 and £4,500 were paid in April and August, 1913. The Appellants included them as income in their return for the purposes of Income Tax and paid Income Tax upon them. The Inland Revenue received and retained the Income Tax so paid.

The question now is as to Excess Profits Duty. The year 1913 is one of the two years upon the average of which the pre-war standard of profits is to be ascertained. It is to the

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interest of the Appellants to contend that the profits in the pre-war years were large, for the excess profits would be to that extent less. They therefore contend that these sums were profits of the year 1913 and that they rightly paid Income Tax upon them. The Inland Revenue, however, finding that it is to their interest so to do, contend that these sums were not profit, although they have accepted and retained Income Tax upon them on the footing that they were. The question to be determined is whether they, or either of them, were in the whole or in part profits of the Appellants' business.

In the Case stated by the Commissioners for Special Purposes it appears that the Appellant Company contended before them that the Inland Revenue, by accepting Income Tax upon the sums in question, were barred from now maintaining that they were not revenue under Income Tax principles. It is unnecessary for your Lordships to express any opinion whether, as a matter of honest administration by the Inland Revenue authorities or as a matter of law, the Inland Revenue could have maintained the contention that they could take and retain Income Tax and then claim Excess Profits Duty on the ground that the sum was not income. For, in the course of the proceedings, the Appellants abandoned this plea upon the Commissioners of Inland Revenue giving an undertaking that, in the event of their recovering from the Appellants Excess Profits Duty on the basis that those sums were not profits, the Income Tax should be repaid with interest at 5 per cent. The only question before your Lordships is therefore, as before stated, whether those sums or either of them were in whole or in part profits of the year in which they were received.

First, as to the £15,316, this was compensation for being precluded from working part of the demised area which otherwise the Appellants might have worked and thereby made profit. Was that compensation profit? The answer may be supplied, I think, by the answer to the following question: Is a sum profit which is paid to an owner of property on the terms that he shall not use his property so as to make a profit? The answer must be in the negative. The whole point is that he is not to make a profit and is paid for abstaining from seeking to make a profit. The matter may be regarded from another point of view: the right to work the area in which the working was to be abandoned was part of the capital asset consisting of the right to work the whole area demised. Had the abandonment extended to the whole area all subsequent profit by working would, of course, have been impossible, but it would be impossible to contend that the compensation would be other than capital. It was the price paid for sterilising the asset from which otherwise profit might have been obtained. What is true of the whole must be equally true of part. Again, a further

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point of view is this: had the working not been interfered with, the profit by the working would have extended over, say, three years; it would have been an annual sum. The payment may be regarded as a redemption of that annuity. Is the redemption of an annuity itself an annuity? If the currency of the annuity had been, say, ten years, and the beneficiaries were A for three years and B for seven years, could A have claimed all the compensation money on the ground that it was income of the first year? Clearly not.

My Lords, in my opinion it has been rightly held that the £15,316 was not, nor was any part of it, income of 1913 or of any other year. The Income Tax was wrongly assessed and paid and received, and must be repaid, as agreed, with interest, and the pre-war standard must be calculated upon the footing that the sum was not profit.

As regards the £4,500, it is unnecessary for me to state the opinion which I had formed. The parties have come to an agreement as regards that sum, an agreement which very fairly gives effect, I think, to the rights of the parties.

Lord Carson.—My Lords, I concur.

Sir William Finlay.—May I, before your Lordship puts the question, say one sentence about costs? I desire to submit to your Lordships, without argument, in a single sentence, that with regard to the second point, while I fully appreciate the way the Lord Advocate met me, the substance, of course, of the thing is that I succeed on that point.

Lord Buckmaster.—It is not in accordance with the practice of this House to hear discussion upon costs. You must bear in mind that this House has not decided or expressed any opinion that you were right on the second point.

Sir William Finlay.—If your Lordship pleases.

Questions put:—

That the Judgment appealed from be reversed.

The Not Contents have it.

That the Judgment appealed from be affirmed, and this Appeal dismissed with costs.

The Contents have it.