is to continue the business of letting the several houses which it serves (*Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74). That was an English case. Common stairs and the rules thereof are, I take it, of much greater antiquity in Scotland than in England, and it may still be open to argue, in view of a chain of decisions followed in still more numerous unreported cases) that the liability of the owner of a common access in the case figured is a rule of positive law in Scotland. In Scotland a common access to the dwelling-houses in a tenement on the street, though private property, is often a *quasi*-public place. It may have no door—indeed generally it has none—and the local authority may be under obligation to light it. Certain people, as, for example, postmen, are obliged to enter it upon no private busines of their own. If the question were to be regarded as open I confess I would have difficulty in holding that a proprietor who provides and maintains an open common access to a number of houses which he lets for profit does otherwise than *invite* the postman to enter. It is unnecessary, however, here to consider such questions.

The LORD PRESIDENT did not hear the case.

The Court recalled the interlocutor of the Sheriff-Substitute and dismissed the action.

Counsel for Pursuer—Morton, K.C.—Paton. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders—Watt, K.C.—Cooper. Agents—Macpherson & Mackay, W.S.

Thursday, January 17.

FIRST DIVISION.

[Exchequer Cause.

ROBERT ADDIE & SONS' COLLIERIES LIMITED *v.* INLAND REVENUE.

Revenue — Income Tax — Trade Profits — Deductions — Coal Mine — Payment to Lessor in Lieu of Restoring Surface — Capital or Income Expenditure—Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *Schedule A* (*No. iii*), *Rule* 5.

Held that in computing profits of a particular year for assessment to income tax under No. iii of Schedule A of the Income Tax Act 1918 a tenant of minerals was not entitled to deduct the amount payable by him under the lease in lieu of restoring the surface damaged by his workings.

The Income Tax Act 1918 (8 and 9 Geo. V, cap. 40) enacts—"First Schedule—Schedule A (No. iii), Rule 2—In the case of mines of coal, tin, lead, copper, mundic, iron, and other mines, the annual value shall be understood to be the average amount for one year of the profits of the five preceding years: . . . ." Rule 8—"The properties described in rules 1, 2, and 3 shall be assessed and charged in the manner herein mentioned according to the rules applicable to Schedule D so far as the same are consistent with the rules of this number." Schedule D—Rules applicable to Cases i and ii, Rule 3—"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (*a*) Any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation."

Robert Addie & Sons' Collieries, Limited, appealed to the Commissioners for the Special Purposes of the Income Tax Acts against an assessment to income tax on the sum of £53,896 for the year ending 5th April 1921 made upon them under No. iii of Schedule A of the Income Tax Act 1918 in respect of their profits as colliery proprietors.

The Commissioners confirmed the assessment, and at the request of the company stated a Case for appeal to the Court of Session as the Court of Exchequer in Scotland.

The Case set forth, *inter alia*—"The following *facts* were admitted or proved:—1. The company obtained from Lord Blythswood a lease of minerals for thirty-one years from Whitsunday 1891. Among the provisions of this lease was the following clause:—'The second parties' (*i.e.*, the company) 'bind and oblige themselves to restore all ground occupied or damaged (including the subjects hereby let in the fifth place), and that either at the termination of this lease or when no longer necessary for the use of the works, to an arable state, or in their option to pay to the first party' (*i.e.*, the lessor) 'for all ground which may not be so restored (excepting the sites of any buildings or machinery which the first party may desire to be left on the ground) at the rate of thirty years' purchase of the gross agricultural yearly value thereof free of any deduction, estimated on the supposition that the said ground had remained in the condition which it was in when it was originally taken possession of or damaged, and which ground so to be paid for shall remain the property of the first party. . . .' 2. The lease of 1891 contained a provision under which the company could if they wished terminate the lease in 1919. This they did and entered into a new lease as from Whitsunday 1919. In view of the termination of the old lease it became necessary for the company to consider what they should do with regard to the liability resting upon them under the clause quoted in the preceding paragraph, which gave them the choice of either restoring the damaged land or making a payment to the lessor. As the sum to be paid under the terms of the lease for non-restoration was likely to be less than the cost of restoring the lands to an arable state the company decided to make a payment to the lessor. The sum so paid was £6104—the item in dispute in the present case. . . . 4. This payment of £6104 represented thirty years' purchase of the annual value of 116·3 acres of land damaged. Of this area 93·7 acres were occupied by roads, footpaths, debris heaps, &c., 17·4 acres submerged by

subsidence, and 5·2 acres planted with trees to screen the coal washer from sight of the mansion-house. . . .

"For the company it was contended that this sum of £6104 was expenditure laid out to earn profits, and should be allowed as a deduction in computing the company's profits for income tax purposes.

"The Inspector of Taxes, who appeared for the Crown, contended—(*a*) That the payment of £6104 was a capital payment; (*b*) that it was a payment to the 'owner of the soil or property' within Rule 5 of No. iii of Schedule A of the Income Tax Act 1918; (*c*) that the company had merely purchased the right to take the surface value of the land; (*d*) that therefore the £6104 should not be allowed as a deduction and the assessment should be confirmed. He referred to the following cases:—*Duke of Hamilton's Trustees* v. *Assessor for Lanarkshire*, 1918 S.C. 624, 55 S.L.R. 248; *Vallambrosa Rubber Company, Limited* v. *Farmer*, 1910 S.C. 519, 47 S.L.R. 488, 5 T.C. 529; *Broughton and Plas Power Coal Company, Limited* v. *Kirkpatrick*, 1884, 14 Q.B.D. 491, 2 T.C. 69; *Coltness Iron Company* v. *Black*, 1881, 8 R. (H.L.) 67, 1 T.C. 287; *General Reversionary and Investment Company, Limited* v. *Hancock*, 1919, 1 K.B. 25, 7 T.C. 358."

The *question of law* for the opinion of the Court was—"Whether in the circumstances narrated the said sum of £6104 was a proper deduction in computing the company's liability to income tax?"

Argued for appellant—The payment being an expense in the course of working the mine, and necessarily laid out to earn profit, was a proper deduction in computing the company's profits for income tax purposes —*Coltness Iron Company* v. *Commissioners of Inland Revenue*, 8 R. (H.L.) 67, *per* Lord Penzance at pp. 69 and 70, 18 S.L.R. 466; *Dumbarton Harbour Company* v. *Cox*, 1919 S.C. 162, 56 S.L.R. 122; *Ounsworth* v. *Vickers Limited*, [1915] 3 K.B. 267; *Hancock* v. *General Reversionary and Investment Company*, [1919] 1 K.B. 25; *In re Tralee* v. *Dingle Light Railway Company*, [1894] 2 I.R. 115.

Counsel for respondents were not called on.

LORD PRESIDENT (CLYDE)—This is an appeal against an assessment to income tax under Schedule A (No. iii) of the Act of 1918. The land whereof the annual value has to be assessed consists of a coal mine, and accordingly the mode of assessment is that prescribed by Rule 2 of No iii, namely, by a computation of the profits of the concern. To that computation the rules of Schedule D are made applicable by Rule 8 of No. iii, so far as the said rules are consistent with the Rules of No. iii.

The lease held by the appellant company was recently terminated, and a new lease substituted in its place. In the lease which was terminated there were obligations upon the company to restore all ground which they had either occupied under the powers of the lease or damaged by workings under the lease, or (alternatively and in their option) to pay to the lessor for all such ground not so restored at the rate of thirty years' purchase of the agricultural value. In negotiating the new lease a figure of £6104 was arrived at between the parties as being the amount of the thirty years' purchase of the agricultural value of the land which the company had occupied or damaged, and the question in the case is whether this sum of £6104 forms a proper deduction in assessing the profits of the appellant company.

So far as the Act of 1918 is concerned the matter is regulated by the terms of Rule 3, sub-head (*a*), applicable to Cases i and ii of Schedule D. According to that rule no disbursement or expense can be deducted in ascertaining the amount of the company's profits or gains except it be "money wholly and exclusively laid out or expended for the purposes of the trade." What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure and to ask oneself the question, is it a part of the company's working expenses? Is it expenditure laid out as part of the process of profit earning? Or, on the other hand, is it a capital outlay? Is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all? It was pointed out by Lord Davey in the case of *Strong* v. *Woodiefield* ([1906] A.C. 448, at p. 453), and it has long been recognised, that in order to make deduction of a disbursement admissible "it is not enough that the disbursement is made in the course of, or is connected with, the trade, or is made out of the profits of the trade; it must be made for the purpose of earning the profits."

Now, when this company began to work its mine it was obvious that it would require to use a certain amount of the surface of the lessor's estate for a number of purposes. The first of these was the making of roads and footpaths. That was one of the conditions-precedent to starting work in the mine. The company might, if they had thought fit, have purchased or feued the land required for those purposes, or they might have acquired some form of servitude right across the surface owner's property. As is common in such a case, they did none of these things but got under the lease right to use the surface for, *inter alia*, these purposes, and as the consideration for the right so acquired they came under obligation at the end of their lease to restore the land so occupied to its original agricultural condition, or otherwise to pay to the lessor the equivalent of its agricultural value. It seems to me that on the question of the capital or revenue character of the cost of restoration, or of the compensation payable for land damaged and not restored (as the case may be), it makes no difference whether the company had acquired the property or a servitude right at the commencement of the lease in consideration of a price paid, or whether they merely acquired a personal right for the duration of the lease upon

condition that they paid for it at the end of the lease by restoring the land to its original condition, or by paying the value of the land if it was not restored. In any case the expenditure was made for the acquisition of an asset in the form of the means of access and passage, which was part of the capital establishment of the company and accordingly cannot be treated as other than a capital expense. In like manner the company was under the necessity of acquiring facilities for the disposal of the debris taken from its workings. They made the ordinary arrangement, which was that they got the right to dump that debris on the lessor's land. An attempt was made in argument to distinguish the case of land occupied by the heaps of debris from the case of lands occupied by roads and footpaths. In my opinion there is no difference for the present purpose between the two. It was contended that the use of land for dumping debris stood in a more direct relation to the regular process of working the mine for profit than the provision of roads and footpaths. I cannot see that the one is any less a necessary part of the company's capital equipment or establishment than the other. The acquisition of rights—of a permanency equal to the duration of the lease—to make use of the lessor's land for both purposes was one of the conditions-precedent to the starting of the company's business at the mine, just as much as the right to occupy his land for the purpose of the works at the pithead, and the expenditure involved does not seem to me to be any less a capital expenditure than, for example, the cost of sinking the shaft.

The £6104 also includes a payment for damage done to land by submersion consequent on the lowering of the surface by the removal of the coal. It will be observed that the damage to the land here in question is not mere occupational damage—say, to the crop of a particular year, caused by a temporary dislocation of drainage—which can be prevented from recurring by a readjustment of the drains. Occupational damage of that sort is often met by a payment to the tenant for the damage done to his crop for the year, or year by year, until the drains are re-laid. I express no opinion on the character of expenditure required to meet such payments or repairs as these. The whole terms of the lease are not before the Court, but as far as they have been put before us in the case it is clear that it was within the contractual contemplation of parties that the lessees working under the lease and in accordance with its provisions would or might cause damage to land by subsidence of a character so serious and permanent as to destroy its value unless restored in some way. A right to work the coal in such a manner as to sacrifice the value of the surface was a material asset for the company to possess, and not unnaturally or unusually the same principle was applied in the lease to the conferment of that right on the company as in the case of surface occupation by debris heaps and the like. The price of acquiring that right is a capital outlay. No distinction can, in my opinion, be drawn between the payment or consideration paid for permanent injury done by subsidence as the result of operations under the lease and permanent injury done by the depositing of debris as the result of those operations. Neither the expense of restoration nor the compensation payable failing restoration appears to me to fall within working expenses. They are, in my opinion, capital charges.

It seems to me, therefore, that the Commissioners arrived at a correct result, and that the question of law in the case should be answered in the negative.

LORD SKERRINGTON—I agree with your Lordship. The case seems to me to be a very clear one, and I do not desire to add anything to what your Lordship has said.

LORD CULLEN—I am of the same opinion. I think the money in question was all money laid out on matters entering into the permanent equipment of the mine, as distinguished from payments incurred in connection with the cost of working the mine with a view to the making of annual profits.

LORD SANDS—I agree that in accordance with income tax legislation the payment here in question must be held to be a capital one, and not deductible in a question of income tax. There is, no doubt, a certain anomaly in the principle of capital charge as applied to income tax in the case of wasting investments. If we take a long tract of time, such as the life of the mine, so much profits are made from first to last, but in estimating the real beneficial amount of these profits a payment such as that here made undoubtedly falls to be deducted. There is no capital in the end corresponding with this outlay. The money has been expended and consumed as an incident of carrying on the mine. In all mining undertakings of which the life is temporary—and that is the case of most mining undertakings—the annual dividends are really partly profit or interest, and partly a return of capital. But income tax legislation does not recognise any discrimination. Whether it is capital returned or truly income, it falls under the assessment to income tax.

The Court affirmed the determination of the Commissioners and answered the question of law in the negative.

Counsel for Appellants—Wark, K.C.—Black. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents — Leadbetter, K.C. — Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.