the company provide a substituted road in terms of the 49th section to the satisfaction of the local authority, the General Road Acts have no application.

I do not think that that proposition can be disputed in cases where a road or part of a road has actually been used for the construction of railway works. The present case furnishes an example of such a use of a road, because, as I have already pointed out, the cutting in which the line is laid occupies the site of part of the road. The complainers admitted that they could not maintain that that part of the road was still vested in them for the public interest, and that amounts to an admission that a public road may, under the Railway Acts, cease to exist, although it has not been shut up in the manner provided by the Road Acts. The complainers, however, maintain that if a piece of the road, however small, and however useless for the purposes of a road, is not actually used by the Railway Company, that piece remains a road vested in the Road Trustees, and cannot be used for any purpose whatever unless the statutory procedure for shutting up a public road is adopted. Accordingly, although the acquisition by Eadie of the ground upon the north side of the road has put an end to the only interest in the road which remained after the substituted road was provided, and although there is now no human being by whom the road can be used for the purposes of a road, the complainers maintain that it is still vested in them, and that they are entitled to demand that it shall remain open, unless they choose to set in motion the statutory procedure for having it shut up.

I am of opinion that not even a technical right to the piece of road in question remains in the complainers, although, even if there were such a right it would not, in my judgment, entitle them to the interdict which they seek, because, as their counsel frankly admitted, they have no interest whatever to enforce the right. My reasons for holding that no right to the piece of road in question remains in the complainers are these—Although the Railway Company have not actually used it for railway works, they have interfered with it so that it cannot be restored—that is to say (as I understand the expression) it cannot be made fit for the purposes which it formerly served. The Railway Company were therefore bound in terms of the 49th section to supply as a substitute for the piece of road in question an equally convenient road, and they have done so. It therefore follows, in my judgment, that the "substituted road" came in place (as the very expression implies) of the road for which it was substituted, and that the latter ceased technically, as it had ceased in fact, to be a road at all.

I do not think that that view is in any way inconsistent with the case of *Campbell* v. *Walker* (1 Macph. 825), upon which the complainers founded. It seems to me that in that case the road, in so far it lay between Mr Campbell's property and Helensburgh, had not been interfered with, and that no new road had been substituted for that part of it. The present case would indeed have been somewhat analogous to *Campbell's* case if the Railway Company had tried to shut up the old road while it was still required as an access to Eadie's property. They did not however do so, and Eadie's interest being out of the way, and no other interest being suggested, and a new road having in fact been supplied and accepted as a substitute for the old road, the decision in *Campbell's* case has in my judgment no application.

I am therefore of opinion that the Lord Ordinary's interlocutor, in so far as it grants interdict in terms of the first head of the prayer of the note, should be recalled.

LORD JUSTICE-CLERK—That is the opinion of the Court (the Lord Justice-Clerk, Lord Kyllachy, Lord Stormonth Darling, and Lord Low).

The Court pronounced this interlocutor—

"... Recal the said interlocutor [dated 18th August 1905]: Repel the reasons of suspension: Refuse the interdict craved, and decern. ..."

Counsel for Complainers (Respondents)—Wilson, K.C.—Cullen, K.C.—MacRobert. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for Respondent (Reclaimer) Eadie, and for the Respondents (Reclaimers) The Caledonian Railway Company—Cooper, K.C.—Blackburn. Agents for Eadie—Campbell & Smith, S.S.C. Agents for the Caledonian Railway Company—Hope, Todd, & Kirk, W.S.

Friday, July 20.

FIRST DIVISION.

[Exchequer Cause.

MOORE (SURVEYOR OF TAXES) v. STEWARTS & LLOYDS, LIMITED.

Revenue — Income-Tax — Profits — Deductions—Payment Made to Rival Company for Commanding Interest in its Management—"Money wholly Expended for the Purpose of Such Trade"—Income-Tax Act 1842 (5 *and* 6 *Vict. cap.* 53), *sec.* 100, *Schedule D, Rules Applying to First and Second Cases, No. I.*

A company having made an agreement with another company carrying on a similar business, whereby it obtained, in return for an undertaking to make up the yearly profits of the second company to a certain amount, a commanding interest in its management, claimed to deduct from its yearly profits for the purposes of income-tax assessment the sum paid to the other company. The Income-Tax Commissioners allowed the deduction, holding that the payment had been made by the company "for the purpose of its trade, and that it might sell its goods at

a better price." The Surveyor appealed. *Held* (1) that the question was one of fact rather than of law, and (2) that the deduction had rightly been allowed.

The Income-Tax Act 1842 (5 and 6 Vict. cap. 35), section 100, enacts—"And be it enacted that the duties hereby granted, contained in the Schedule marked (D), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment.

Schedule (D)....................................

Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned.

First Case....................................

Rules....................................

Second Case....................................

Rules....................................

Rules applying to both the preceding cases. First, in estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from . . . such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purpose of such trade, manufacture, adventure, or concern . . . ."

This was a stated case taken at the instance of the Surveyor of Taxes for the City of Glasgow.

The case set forth—"At a meeting of the Commissioners for the General Purposes of the Income-Tax Acts, and for executing the Acts relating to Inhabited House Duties for the city of Glasgow, held at Glasgow on the 4th Day of December 1905,

"Stewarts & Lloyds, Limited (hereinafter referred to as 'the company'), appealed against an assessment for the year ending 5th April 1906 on the sum of £172,770 (duty £8638, 10s.) made upon it under Schedule D of the Income-Tax Acts, in respect of the profits of the business carried on by it, after allowing a deduction of £14,760 for wear and tear of machinery.

"The assessment was made under 5 and 6 Vict. c. 35, sec. 100, Schedule D, First Case; 16 and 17 Vict. c. 34, sec. 2, Schedule D; and 5 Edw. VII, c. 4, sec. 6.

"I. The following facts were admitted or proved—1. . . .

"2. The objects of the company, as set forth in the third article of its memorandum of association, are, *inter alia*, as follows:—' . . . . . (*h*) To enter into partnership, or into any arrangement for sharing profits, union of interests, reciprocal concession, or co-operation with any person or company carrying on or about to carry on any business which this company is authorised to carry on, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to take, or otherwise acquire and hold, shares or stocks in, or securities of, and to subsidise or otherwise assist any such company, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with, such shares or securities.'

"3. The liability of the company falls to be adjusted by reference to the profits of the three years ended 31st December 1902, 31st December 1903, and 31st December 1904.

"4. Wilsons and Union Tube Company, Limited (hereinafter referred to as the Wilsons Company), incorporated under the Companies Acts 1862 to 1898, and having its registered office at No. 5 Wellington Street, Glasgow, carry on a business similar to that of the company.

"5. In arriving at the profits for the year ending 31st December 1904, the company claimed deduction of a sum of £841 paid to the Wilsons Company under minute of agreement, dated the 26th day of October and the 3rd day of November 1903, entered into and executed by and between the Wilsons Company and the company. . . . .

"6. The Wilsons Company was not assessed to, and did not pay income-tax on, said sum of £841.

"II. The company contended—(1) That the agreement was entered into and the payment of £841 was made solely for the purposes of its own trade, and that it might sell its goods at a better price, and that therefore the deduction claimed was a proper one to be made from gross profits; (2) That as the arrangement made with the Wilsons Company enabled the company to make larger profits, and to an extent exceeding the payment made to the Wilsons Company, it is unreasonable to assess the larger profits to the income tax, and not allow as a deduction the sum expended by the company to earn them; and (3) That the Wilsons Company had paid dividend to their shareholders from which they deducted income tax—partly with the £841.

"III. The Surveyor of Taxes maintained—(1) That the payment of £841 was not expenditure incurred in *earning* the profits of the company, but was a payment made in consideration of the company being allowed to nominate a majority of the board of the directors of the Wilsons Company; (2) That it was not money wholly and exclusively laid out or expended for the purposes of the trade of the company, within the meaning of the first rule, applying to both the first and second cases of Schedule D, section 100, 5 and 6 Vict. c. 35 (*Rhymney Iron Company, Limited* v. *Fowler* [1896], 2 Q.B. 79, 3 Tax Cases 476); and (3) That the payment of £841 was merely an appropriation of profits earned by the company, which is required by the Income Tax Acts to pay income tax on the whole of its business profits irrespective of their destination (*Mersey Docks and Harbour Board* v. *Lucas*, 1883, 8 A.C. 891, 49 L.T.R. 781, 2 Tax Cases 25).

"IV. The Commissioners, on a consideration of the evidence and arguments submitted to them, held that the payment of £841 by the company having been made for the purpose of its trade and that it might sell its goods at a better price was a proper deduction, and, accordingly, they allowed the deduction of £841 claimed by the company . . ."

The minute of agreement between Wilsons and Union Tube Company, Limited

(first parties), and Stewarts & Lloyds, Limited (second parties), referred to in the stated case, under which the payment of £841 was made to the first parties, provided, *inter alia*:—"(*First*) The first parties agree to elect to their board of directors, and to continue to elect from time to time, and to retain as directors, such persons as may be nominated by the second parties greater in number than the other directors of the first parties. It shall be optional to the first parties at any time to decline to elect or re-elect or retain the nominees of the second parties, but in the event of their doing so, all obligations incumbent on the second parties under this agreement shall immediately cease. The second parties may from time to time change their nominees, in which case those previously nominated, one or more, so changed, shall retire, and the new nominees take their place. (*Second*) So long as, and if when required, the requisite number of nominees of the second parties are elected to the board of the first parties, and retained members thereof, the second parties agree to pay to the first parties, half-yearly on 1st March and 1st September, whatever sum is required to pay or make up a half-year's dividend on the preference shares of the first parties, according to the balance at credit or debit as shown by their balance sheets, to be made up as at thirtieth June and thirty-first December, half-yearly, and duly audited, *i.e.*, if the profit shown by the balance sheet is less than two thousand five hundred pounds, the second parties shall make up the deficiency to the first parties, and if there be no profit at the credit of profit and loss account, or if there be a debit, the second parties shall pay to the first parties the sum of two thousand five hundred pounds. But declaring that in ascertaining such credit or debit there shall not be taken into account any loss carried forward from a preceding half-year, but merely the loss, if any, arising on the half-year's trading taken by itself. The first payment shall, if required, be made on the first day of March nineteen hundred and four. The balance at debit or credit of profit and loss account shall, for the purpose of this agreement, be ascertained by the auditors of the first parties. It is hereby expressly declared that the liability of the second parties in each half-year shall not exceed the sum of two thousand five hundred pounds. . . ."

The case came before the First Division.

Argued for the appellant (the Surveyor of Taxes)—The sum in respect of which deduction was claimed did not fall under Rule 1 applying to both the First and Second Cases under Schedule D, sec. 100, of the Income Tax Act, 1842—Dowell's Income Tax Laws, 5th ed., p. 152—but under Rule 3 applying to the First Case—Dowell, *ut supra*, p. 145—and it was therein enacted that such payments were not to be deductible. But taking Rule 1 applying to both First and Second Cases, deduction was claimed here in respect of a disbursement not wholly or exclusively incurred for Stewarts & Lloyds' benefit, and necessary to the earning of their trade profits. Disbursements to be deductible must be directly concerned with the production of the article manufactured or its distribution, and not mere indirect aids to trading facilities—*Watney* v. *Musgrave*, L.R., 5 Ex. D. 241, 1 Tax Cases, 272—or must be for the purposes of carrying on a business, not an insurance against loss in the event of its profits ceasing or diminishing—*Rhymney Iron Company Limited* v. *Fowler*, [1896] 2 Q.B. 79, 3 Tax Cases, 476; *Brickwood & Company* v. *Reynolds*, [1898] 1 Q.B. 95, 3 Tax Cases, 600, *per* Pollock (B), 604. The expenditure under consideration was not of a character for which deduction could be claimed in view of these decisions. Further disbursements necessary to earn profits might be deducted, but this was an application of profits already earned—*Strong & Company, Limited* v. *Woodifield*, [1905] 2 K.B. 350, *per* Collins (M.R.), 356. Nor was the result of the expenditure necessarily to earn a profit; the company might have to recoup Wilsons Company for loss owing to general depression of business or imprudent trading. It was in their power to have specially arranged only to pay when loss was the result of keeping up prices for their mutual benefit, but they had not done so. In certain circumstances the agreement might even be against the company's earning increased profits. There was no case where a payment of this character, which was not for making or putting on the market the goods manufactured, but was for preventing a loss, or for creating a state of the market through the transactions of a rival business, had been held deductible.

Argued for the respondents—The finding of the Commissioners showed that in fact the expenditure in respect of which deduction was claimed was made for the purposes of profit-earning in their trade, and it was wholly and exclusively for these purposes in the meaning of Rule 1 applying to First and Second Cases under Schedule D, sec. 100, of the Income Tax Act 1842. It was to be noted that the rule did not use the word "necessary" in prescribing the nature of deductible expenses, but merely observed a distinction between outlay to earn profit and the application of profit earned—*Mersey Docks* v. *Lucas*, L.R., 8 A.C. 891, *per* Lord Selborne (L.C.), 903. In the present case the earning of increased profit was the only possible motive for the expenditure, so the rule laid down by Collins (M.R.) in *Strong & Company, Limited* v. *Woodifield*, *ut supra*, p. 356, was in their favour. The true meaning of the words "profits or gains" in commercial trading was laid down in *The Gresham Life Assurance Society* v. *Styles*, [1892], A.C. 309, *per* Lord Halsbury (L.C.), 316, and that of the "profit of trade" was defined in *Russell* v. *Town and County Bank*, April 26, 1888, 15 R. (H.L.) 51, Lord Herschell, 52, 25 S.L.R. 451. These definitions showed that the expenditure here was deductible, and that the amount was not assessable to income tax. As to the cases quoted for the appellants, the *Rhymney Iron Company, Limited* v. *Fowler*, *ut*

supra, was distinguished, for in the present case a working agreement was of importance to the company. Pollock (B) laid it down in *Reid's Brewery Company* v. *Male*, [1891], 2 Q.B. 1, p. 8, 3 Tax Cases, 279, that the case of *Watney* v. *Musgrave*, *ut supra*, went too far, and that argument had been accepted by the Bench in the case of *Southwell* v. *Savill Brothers, Limited*, [1901] 2 K.B. 349. Every authority supported the proposition that any expenditure necessary for earning profit, or without which profit would not have been gained, falls to be deducted before assessing profits for income tax, and that was the character of the payment in question. The whole question was indeed primarily one of fact, the agreement could not be considered *per se*, and the finding of the Commissioners who had considered the full facts was conclusive since there was no error in law proved. The agreement was to further the trading interests of the company, though benefit might accrue to the Tube Company thereby, and consequently the sum paid thereunder should be deductible in calculating income tax.

At advising—

LORD M'LAREN—This case raises a question under the Income Tax Acts, which may or may not be of frequent occurrence, but which to my thinking has much more the complexion of an issue of fact than of a question of law.

The question is, whether a payment of £841 made by the respondent company to another company in the same line of business is to be held to be a payment out of profits, or is in fact a payment of the nature of current expenditure, which was made with a view to the earning of profits. In the former view of its character the payment would be subject to taxation, in the latter view it would not.

I observe in the first place that this was a payment made in fulfilment of an agreement. The respondent company by agreement with the Wilsons and Union Tube Company obtained the right to nominate a majority of the members of their board of directors, and in consideration of this privilege they undertook to make an annual payment, which was equivalent to the guarantee of a dividend to the affiliated company. *Prima facie*, a payment made in fulfilment of an agreement and for the purposes of business is a part of the commercial expenditure of the company making the payment, and in a profit and loss account would be set against gross profits, the assessable profit or income being the difference between the gross profits and the expenditure incurred for the purpose of earning profits.

If the payment made to the affiliated company could be regarded as charity my opinion would be that it was a payment out of income, and that it was subject to income-tax. But mercantile companies are not in the habit of subsidising competing companies from motives of benevolence. Such a payment would not be a legal application of the shareholders' money, and in the absence of evidence or an admission to the contrary effect I think it is a just legal inference that the payment in question was a payment made for the advancement of the respondent's business, and with a view to augmenting its capital or its income. As this is an annual payment, it would, as a matter of accounting, be regarded as a payment made with a view to the increase of income, and would be properly entered in the annual accounts. The Commissioners have found in fact that the payment was with a view to earning larger profits.

The consideration appearing on the face of the agreement is the right of nominating a majority of the directors of the affiliated company. I do not think we are much concerned with the question in what precise way this nomination operated for the benefit of the respondent company. But it is easy to see that the trade of the respondent company would be promoted by such an arrangement. It would certainly have this effect, that the two companies would co-operate in their trade instead of competing for business against one another. Then it would naturally tend to the fixation of a common system of remunerative prices, which would be preferable to having the prices liable to be cut down by competition. Or, again, the management might result in a distribution of the different branches of their manufacture between the two affiliated companies under which their industrial work would be more economically carried on.

In these and other ways that may be imagined what is called a working agreement may be profitable to one or both of the companies concerned, and if such a working agreement can only be arrived at by mutual concessions, or by a payment on on one side, and the concession of privileges on the other, I see no reason why the pecuniary consideration should not be treated as an item of proper business expenditure.

I may add that in my opinion the question whether the expectation under which the agreement was made was fulfilled does not in any way affect the ground of judgment. The arrangement may or may not have been a prudent speculation on the part of the respondent company; it may or may not have resulted in the expected increase of profit. But if the agreement was entered into with a view to profit, as I think it was for the reasons which I have stated, then the annual charge to the respondent company is in my view a part of their business outlay or expenditure and is not subject to assessment. I am accordingly of opinion that the decision of the Income-tax Commissioners ought to be affirmed.

LORD PEARSON—The question is whether in making this payment to Wilsons Limited the company was expending money wholly and exclusively for the purposes of their trade. That is mainly, though not entirely, a question of fact, and I hold that it must be answered in the affirmative. It was contended that the money was not laid out by the company for the purposes of their trade at all, but

that it was an application of profits already earned, which resulted in a definite benefit to the shareholders of Wilsons Limited, but not necessarily in any profit or benefit to the other company. I think that is much too narrow a view of the case. The real question is not where the money came from, nor whether any and what profit in fact resulted to Stewarts & Lloyds from its application, but to what purpose Stewarts & Lloyds applied it. Now, the agreement under which the money was paid is a mutual agreement, obviously intended to prevent the cutting down of prices by competition. It was for that purpose that the agreement was entered into and the money paid. It may be impossible to ascribe any particular items of the profits earned by Stewarts & Lloyds to the operation of that agreement. But the statute does not require the party claiming the deduction to show that any profit was in fact earned by the expenditure in question. It is enough that it shall have been laid out for the purposes of his trade, as this expenditure clearly was. But then it must be laid out wholly and exclusively for those purposes; and it was argued that the agreement was, at least in part, for the benefit of Wilsons, Limited. It may have operated to their benefit. But we have to do only with Stewarts & Lloyds' part of it; and even with that, not as a definite source of ascertainable profit, but as inferring the expenditure of the sum of money here in question for the purposes of their trade. I think it clear that from their point of view the expenditure was made for those purposes and for no other.

LORD PRESIDENT—I am bound to say that I have found this case, as far as I am concerned, attended with considerable difficulty, but in the end I have come to the same conclusion as that expressed by your Lordships; and I have done so because I agree entirely with what your Lordships have, I think, all said, that the determination of this question really depends upon a determination of a question of fact and not a question of law at all. The law, I think, is not doubtful, and I do not think it could have been better put than it was put by Mr Macmillan, the junior counsel for Stewart & Lloyds, when he said that it all depended on whether this expenditure was really an outlay to earn profit or was an application of profit earned. Well, that is a question of fact, and it is a question of fact which is not solved by a mere perusal of the document under which the money is claimed. If it could be so solved it might be one of those sort of mixed questions which, although fact in one case, yet depending on construction or what construction comes to, might be said to be law in another; but, as I say, I do not think it depends upon that. One cannot tell from the mere perusal of the document. You have to know something more. Now, I find that the Commissioners, who are the first judges on this matter, and who are chosen because they are business men, and who have the right to get before them such evidence as they like, and which we have not before us, say that on a consideration of the evidence they held that this payment was made for the purpose of trade and that the company might sell its goods at a better price. That seems to me equivalent to being really what would be the finding of a jury as between those two alternatives, namely, that this was an outlay *bona fide* made to earn profit and not an application of profit earned; and accordingly I think this case falls on that finding of fact on the one side of the line, just as the case quoted to us, the *Rhymney Iron Company*, [1896] 2 Q.B. 79, fell on the other, where it was held that a payment which was made really not for earning profits during the year but for an insurance in bad times, when there came a time when low profits would be earned, was not an outlay to earn profit but an application of profits earned. On the whole matter I agree with the opinions that your Lordships have expressed and think that the determination of the Commissioners should be affirmed.

LORD KINNEAR concurred.

The Court affirmed the finding of the Commissioners.

Counsel for the Appellant (the Surveyor)—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—The Solicitor of Inland Revenue.

Counsel for the Respondents (the Company)—The Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—J. & J. Ross, W.S.

Friday, July 20.

SECOND DIVISION.

[Dean of Guild Court, Glasgow.

MACTAGGART & COMPANY *v.* HARROWER AND OTHERS.

Property — Real Burden — Restriction on Building—Restriction Imposed in Disposition of Portion of Disponer's Lands—Enforcement of Restriction by Subsequent Disponees of the Other Portions of the Lands with Special Assignations—Restriction not Stated to be in Favour of any Particular Lands — Validity — "Tenements of First-Class Self-Contained Dwelling-Houses."

An association owning lands, in 1879 sold and conveyed, by disposition subsequently recorded, a portion of these lands to A under the restriction "that no buildings shall be erected upon the said plot of ground other than tenements of first-class self-contained dwelling-houses." This restriction was declared to be a real burden affecting the lands, but was not declared to be in favour of any lands. The association continued to hold the remainder of