defects, for which in certain circumstances the occupier might have been liable.

If the pursuer had proved that but for the worn condition of the cover, the accident, even looking to the condition of the granite, would not have happened or might not have happened, I should have been disposed to think that there was such liability, although the liability primarily in regard to the streets—and the covers are part of the street—is on the Corporation. In that case, if the cover had been so worn as to have been obviously unsafe, there might have been liability on the occupier as well as on the Corporation; but it seems to me that the evidence of Mr Bennett Mitchell, the leading witness for the pursuer, shows that the cover was so slightly worn that it had nothing to do with the accident.

Again, if the absence of the weight had had anything to do with the accident, that would have been clearly a matter for which the occupier and not the Corporation, primarily at least, would have been responsible; but, as Lord Salvesen has shown, the evidence clearly indicates that the presence or absence of the weight had nothing to do with the accident.

Therefore while I hold that there were two defects because of either of which in certain circumstances the occupier might have been found liable, it seems to me that neither of these defects contributed to the accident. Accordingly I agree that the Corporation alone are liable.

LORD DUNDAS was sitting in the Extra Division.

Counsel for the defenders Paull & Williamsons moved for expenses against the pursuer and against the other defenders.

Counsel for the pursuer maintained that the Town Council alone should be found liable in Paull & Williamsons' expenses, and cited *Craig* v. *Aberdeen Harbour Commissioners*, 1909 S.C. 736, 46 S.L.R. 508.

Argued for the defenders the Town Council of Aberdeen—The pursuer must take the risk of convening the wrong party into Court—*Mackintosh* v. *Galbraith & Arthur*, November 6, 1900, 3 F. 66, 38 S.L.R. 53. Further, Paull & Williamsons were called first, and these defenders only after amendment. The pursuer alone was therefore responsible for Paull & Williamsons' expenses.

The Court pronounced this interlocutor—

"Recal the . . . interlocutor appealed against: Find in fact [*ut supra*]: Find in law (1) that it was the duty of the defenders the Town Council of Aberdeen through their servants to have inspected the said coal shoot and its cover from time to time with a view of ascertaining whether it was in a safe condition; and (2) that their failure to do so and to protect the pursuer as a member of the public from accident renders them liable in damages to her; assess the damages at the sum of £50 sterling, and decern against the said defenders the Town Council of Aberdeen to make payment to the pursuer of the said sum: Assoilzie the defenders Messrs Paull & Williamsons from the conclusions of the action: Find the pursuer entitled to expenses against the defenders the Town Council of Aberdeen; and find the defenders the Town Council of Aberdeen liable in the expenses incurred by the defenders Messrs Paull & Williamsons."

Counsel for Pursuer and Appellant—Wilson, K.C.—Lippe. Agents—Robert & J. W. Stewart, W.S.

Counsel for Defenders and Respondents (Paull & Williamsons)—Morison, K.C.—A. M. Stuart. Agents—Dalgleish, Dobbie, & Co., S.S.C.

Counsel for Defenders and Respondents (The Town Council of Aberdeen)—Murray, K.C.—Chree. Agents—Gordon, Falconer, & Fairweather, W.S.

HOUSE OF LORDS.

Thursday, December 14.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Gorell, and Lord Shaw.)

THE SCOTTISH NORTH AMERICAN TRUST, LIMITED *v.* FARMER (SURVEYOR OF TAXES).

(In the Court of Session, July 16, 1910, 47 S.L.R. 832, and 1910 S.C. 966.)

Revenue—Income Tax—Profits or Gains—Deductions—Interest on Short Loans—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Sched. D, First Case.*

A financial and investment company which has obtained in the course of its business, for the purpose of paying for securities purchased by it, loans from bankers in New York for periods not exceeding six months, is entitled, in striking its balance of profits for the purpose of income tax, to deduct the interest paid on such loans, which are not to be regarded as additional capital.

This case is reported *ante ut supra.*

The defender Farmer (Surveyor of Taxes) appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—This is an appeal from a judgment of the First Division of the Court of Session, as the Court of Exchequer in Scotland, pronounced upon a case stated under the Taxes Management Act 1880 by the General Commissioners of Income Tax for the County of Edinburgh at the request of the respondents. The respondents were assessed to income tax under the Income Tax Acts for the year ending 5th April 1909 on the sum of £2404, in respect of the alleged profits of the business carried on by them.

This sum of £2404 was claimed by the appellant to be the average annual profit made by the respondents from the date of their incorporation on the 27th of July 1905 during two and a quarter years succeeding. In arriving at the sum of £2404 no deduction was allowed in respect of two sums of £80, 5s. 4d. paid during the period of trading up to the 31st October 1906, nor of the sum of £4576, 13s. 4d. paid during the year ending the 31st October 1907, as interest to bankers of the company in America on loans made by them to the company.

The respondent company carries on an investment business. It has under its memorandum of association power to deal in investments and securities of all classes, and has also power to borrow and raise sums of money by way of loan, discount, cash-credit, overdraft, &c., and further, to grant security for any sums of money so borrowed.

Its course of business during the years for which its alleged profits and gains are assessed is set forth in paragraph 4 of the case stated as follows—"4. In the course of its business the company purchased in New York certain bonds, stocks, and other securities of American railroad and other companies. The value of the purchases exceeded the amount of the company's available cash, and certain of the securities which were lying in New York were pledged to Messrs Ladenburg, Thalmann, & Company, the company's bankers in New York, in consideration of which the bankers allowed the company's bank account in New York to be overdrawn. The amount of the overdraft fluctuated from time to time as the company bought and sold securities, and the company was charged periodic interest at current rates from day to day. In September 1906 Messrs Ladenburg, Thalmann, & Company opened a loan account, in addition to the ordinary overdraft with the company in New York, on which they granted a loan not exceeding 200,000 dols. to the company for a period of six months at 6 per cent. When this loan fell due it was renewed for a further period of six months, after which the loan account was terminated and the balance was transferred to current account. Messrs Ladenburg, Thalmann, & Company collected all the dividends and coupons upon the securities in their hands, paying the interest due to themselves out of the sums so collected, the difference or net amount being credited to the company. In the event of the dividends and coupons collected not equalling the amount of the interest payable in any month, the interest was debited to the overdraft on the current account."

It will be observed that the loan was not a loan of 200,000 dols. but a loan up to 200,000 dols. The sum lent in fact might fluctuate from day to day or week to week, from cipher up to this limit. The interest payable in respect of the sum lent was not annual interest or an annuity or annual payment payable out of profits and gains within the meaning of rule 4, section 100, of the Income Tax Act of 1842, no more than was the interest paid on the periodical overdrafts fluctuating in amount. That is obvious. In *Gosling* v. *Sharp*, 23 Q.B.D. 324, it had already been decided by LL.JJ. Esher, Bowen, and Lindley in the Court of Appeal that interest upon a loan by a banker to a customer for a period of less than a year did not fall within the words "any yearly interest of money or any annuity or other annual payment" occurring in the 16 and 17 Vict. c. 40. These words are practically identical with the words of rule 4. I am therefore at a loss to understand what possible application the decision in the case of the *Alexandria Water Company* v. *Musgrave*, 11 Q.B.D. 174, so much relied upon in argument on behalf of the appellant, has to the present case, inasmuch as the question decided in that case was whether the interest payable every half-year on such a permanent security as the debentures of the company fell within the words of rule 4.

The appellant indeed does not seek to ground on that rule this wholly unprecedented attempt of his to exact taxation. He rests it on rule 3, a wholly different rule, on the ground (1) that the debit balance against the company on their current account, as well as the loans made on the loan account, constitute "sums employed or intended to be employed as capital" in the respondents' trade or business, and (2) that the interests paid by the respondents to the bank in respect of these loans "comes within the words of the rule as deductions 'for' the sum so employed—as capital."

The case of the *Mersey Docks* v. *Lucas*, 8 A.C. 595, decided that the general principle upon which the "profits and gains" of any trade, manufacture, adventure, or concern are to be ascertained for the purposes of the Income Tax Acts is this, that the taxpayer is entitled to deduct from the gross profits of his trade or business the expenses necessary to earn them.

The *Gresham Life Assurance* v. *Styles*, 1892 A.C., establishes that if a taxpayer is trading in money, selling life annuities in consideration of a price received for them, either in a lump sum or by deferred payments, the annuity he sells is precisely in the same position *quoad* this Act as is the coal sold by a coal merchant or the corn sold by a corn merchant, and are no more to be treated *per se* as "profits and gains" of his business, than are those material subjects of merchandise to be treated as the "gains and profits" of the business of the merchants who vend them.

The profits and gains of any transaction in the nature of a sale must, in the ordinary sense, consist of the excess of the price which the vendor obtains on sale over what it cost him to procure and sell, or produce and sell, the article vended; and part of that cost may consist of the sum he pays for the hire of a machine, or the services of persons employed to produce, procure, or sell the article.

The second proposition established in the last-mentioned case is that in these Acts the words "profits and gains" are, where

the context does not otherwise require, to be construed in their ordinary signification. I can see no reason for suggesting that this last-mentioned principle should not apply to the word "capital" when used in these statutes, and that it too, where the context does not otherwise require, should be construed in its ordinary sense and meaning If, then, one takes the case of an ordinary joint-stock bank, whose business consists in the daily or hourly borrowing of money from the customer who lodges money with it either on deposit or current account, for which the bank becomes the debtor, or of lending money to those whose bills or notes it discounts, or whose securities it takes in pledge, and daily, almost hourly, repaying in driblets, by the cashing of the lender's cheques, the amount borrowed, then, according to the argument of the Attorney-General, the amount borrowed, fluctuating day by day, if not hour by hour, is to be treated as capital employed in the trade, adventure, or concern of the bank, within the meaning of rule 3, section 100, of the Income Tax Act of 1842. No reduction, moreover, is to be made in respect of the sums lent by the bank on the discount side of its business. Indeed, the Attorney-General, as I understood, admitted, as he was by the necessities of his argument obliged to admit, that the result would be the same in the case of a joint-stock bank which by its charter or articles of association was absolutely prohibited from increasing its capital; that, it appears to me, simply amounts to this, that the word "capital" must in this rule be held to bear a wholly artificial meaning, differing altogether from its ordinary signification, though there be no context in the clause requiring that there should be given to it a meaning different from that which it bears in ordinary commercial transactions. In *Bryon* v. *The Metropolitan Saloon Omnibus Company, Limited*, 3 D.G. and J. 123, it was held that the borrowing of money for the purposes of the business of the defendants, a carrying company, was a mode of conducting their business within the 33rd and 34th sections of the Joint-Stock Companies Act of 1858, and the decision has been treated as having also determined that the borrowing by such a company of money by the issue of debenture does not amount to an increasing of the capital of the company. In the *General Auction Estate and Monetary Company* v. *Smith*, 1891, 3 Ch. 432, the plaintiff company was established for the purchase and sale of estates and property. It granted advances on estates, on property intended for sale, loans on deposits of securities, discounted approved commercial bills, and received money on deposit, so that its business resembled to some extent that of the company in the present case. Under its memorandum and articles of association it had no express power to borrow money; but it was held that being a trading company it had, as such, implied power to borrow money for the purposes of its business. At p. 441 of the report Lord-Justice Stirling dealt with the former of these authorities thus—he says: "Now upon that it seems to me that the case of *Bryon* v. *Metropolitan Saloon Omnibus Company* is a direct authority, because what was there done by the company was to raise money on debenture for the purpose of more effectually carrying on the business of the company, and that this is so is shown, I think, by the remarks of Lord-Justice Lindley on that very case in Lindley on Companies (5th ed. 191, 6th ed. 290)." He says, after discussing the subject of borrowing by companies, "connected with the subject of borrowing money is increasing capital; the difference between them is illustrated by *Bryon* v. *Metropolitan Saloon Omnibus Company*. In that case the capital of a limited joint-stock company had been expended, and a majority of shareholders proposed to borrow money on the credit of the company. A dissentient minority sought to restrain the majority from so doing, and reliance was placed on the doctrine that the capital of the company could not be increased by borrowing money without the consent of all the shareholders, but it was held competent for the majority to borrow money on the credit of the company, and that the doctrine relied upon had no application to the case, the capital of the company being one thing and that which was sought to be increased by borrowing (namely, the cash in hand) being a different thing.'"

These authorities show that money borrowed by such a company as the appellant company in this case, in the fluctuating temporary manner in which it has been borrowed by them, the daily borrowing and lending of money being part of their trade and business, is not to be treated under the Joint-Stock Companies Acts as "capital." There is nothing to show that that word should bear a different meaning in the Income Tax Acts when applied to the proceedings of joint-stock companies. The interest is, in truth, money paid for the use or hire of an instrument of their trade, as much as is the rent paid for their office or the hire paid for a typewriting machine. It is an outgoing by means of which the company procures the use of the thing by which it makes a profit, and, like any similar outgoing, should be deducted from the receipts, to ascertain the taxable profits and gains which the company earns. Were it otherwise they might be taxed on assumed profits when in fact they made a loss.

It only remains to refer to the case of *The Anglo-Continental Guano Works* v. *Bell* (3 Tax Cases 232), so much relied upon in argument in the Court of Session and before your Lordships. On close examination of this supposed authority it will, I think, be found that it does not apply to the present case so directly as seems to have been assumed. In that case a German company incorporated under the German law, carrying on the business of importers and manufacturers of guano, had its head office in Hamburg and branches in London and elsewhere. The

London house was carried on as a separate business, with a separate capital, and conducted the whole of the company's business in the United Kingdom. Sometimes the London house purchased cargoes of guano direct, and in order to pay for them got advances (1) from the head office, and (2) from bankers abroad, sometimes directly, but usually through the central office. What was decided in the case was that the sum paid for interest on these loans could not be deducted under rule 3, on the ground that the money borrowed was employed as capital, and that this interest was a sum deducted "*for*" this capital; but this case was treated as if it were a case between partners engaged in a partnership business, one or all of whom is or are trading with borrowed capital.

At page 244 Mr Justice Mathew, as he then was, says—"It appears to me clear when you look at the language of the Act that what are intended to be assessed are the profits of the particular business, and that those profits are to be ascertained in the ordinary way without reference to whether or not a particular partner or all the partners are trading with borrowed capital." And at page 245 he says—"It is perfectly clear that in the hands of partners deductions of that class and character are not to be made, because, if made, you would not be ascertaining what really are the profits, not of the partner, but of the business." Precisely so, when each of the different members of a firm brings a certain sum of money into partnership, the thing which concerns the company or firm as a trading entity is the amount brought in, not what it cost each of the contributing members to procure what he brings in. That is a matter as unconnected with the business of the firm as a trading body whose profits as such are to be ascertained, as is the loss a particular partner might sustain on the sale of the securities he might be obliged to dispose of to procure the money he brings into partnership. Mr Justice Cave deals with the matter in the same way. At page 245 he says—"It seems to me that that is not so—that the gains of the trade are independent of the question of how the capital money is found, that the gains of the trade are those which are made by legitimate trading after paying the necessary expenses, which you have necessarily to incur in order to get the profits; and that you cannot take into consideration the fact that the firm or trader has to borrow some portion of the money which is employed in the business." It does not appear to me that the reasoning on which this decision is based can apply to a bank whose business is the borrowing and lending of money, or to an investment company whose business is conducted as is that of the respondents in the present case. If it does apply, then I can only say I think it unsound as so applied, and am unable to concur in it. Moreover, the decision is not binding on your Lordships' House.

Mr Atkin, though not called on, pointed out that the words of the rule are "No sum shall be deducted *for* any sum employed or intended to be employed as capital," and would have argued, I presume, that these words could not apply to *interest* paid by a trading company for the use of money borrowed for the purposes of their trade. It is not necessary to decide the point. He may be right, but I prefer to rest my judgment on the broader ground. On the whole, therefore, I am of opinion that the decision appealed against was right and should be affirmed, and the appeal be dismissed with costs.

LORD GORELL—I have had the opportunity of reading and considering the judgment of my noble and learned friend which has just been read by him, and I fully concur in it.

LORD SHAW—I agree.

LORD CHANCELLOR—I agree.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellant—The Attorney-General (Sir Rufus Isaacs, K.C.)—the Solicitor-General for Scotland (Hunter, K.C.)—J. A. T. Robertson. Agents—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue in Scotland—Sir F. C. Gore, Solicitor of Inland Revenue in Ireland.

Counsel for the Respondents—Atkin, K.C.—Lord Kinross. Agents—Guild & Shepherd, W.S., Edinburgh—Linklater & Company, London.

Tuesday, December 19.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lord Atkinson, Lord Gorell, and Lord Shaw.)

CRAWFORD & LAW *v.* ALLAN LINE STEAMSHIP COMPANY, LIMITED.

(In the Court of Session, March 17, 1911, 48 S.L.R. 648, and 1911 S.C. 791.)

Ship—Bill of Lading—Through Bill of Lading—Goods Found Damaged on Arrival—Acknowledgment—Goods Received in Good Order—Onus.

Where a through bill of lading has been signed, *inter alios*, on behalf of the last carriers, the shipowners, providing that each carrier is only to be liable for damage occurring on his portion of the route, and acknowledging that the goods have been received in good order at the beginning of the transit, and the last carriers have taken no exception to the condition of the goods when handed over to them, they are liable for any damage discovered unless they prove it occurred previously.

This case is reported *ante ut supra.*

The pursuers Crawford & Law appealed to the House of Lords.