NO. 1348—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—
24TH, 27TH AND 28TH MARCH, 1944

COURT OF APPEAL—12TH, 13TH AND 26TH JULY, 1944

HOUSE OF LORDS—29TH, 30TH AND 31ST JANUARY AND
22ND MARCH, 1946

BEAN (H.M. INSPECTOR OF TAXES) *v.* DONCASTER AMALGAMATED COLLIERIES, LTD.[1]

Income Tax, Schedule D—Profits of coal mining—Deduction—Colliery company—Payments under agreement towards general drainage improvement scheme which obviated necessity for remedial works for which company under statutory obligation.

A Colliery Company was required by a local Drainage Act to execute or pay for works ("remedial works") necessary to obviate or remedy any loss of efficiency in a drainage system due to subsidence caused by the Company's workings. At a certain stage in the mining of a particular seam, subsidence which would cause damage to the drainage system was inevitable if mining continued, so workings ceased. After some years, in 1937, *the Company investigated the possibility of continuing the workings and prepared a scheme of remedial work, which would involve considerable expenditure, to enable this to be done. Before this could be worked out in detail the Drainage Board concerned put forward a general drainage improvement scheme for the district, the effect of which was,* inter alia, *to eliminate the necessity for the remedial works contemplated by the Company, and proposed that the Company should bear a proportion of the cost approximately equivalent to the cost of the works it would have carried out independently. After negotiation the Company agreed, by an agreement dated* 28th September, 1939, *to pay the Drainage Board a certain sum towards the cost of the general scheme by sixty half-yearly instalments.*

On appeal to the General Commissioners against assessments to Income Tax made upon it under Case I *of Schedule D for the years* 1940–41 *and* 1941–42, *the Company contended that the payments made under the* 1939 *agreement were made in respect of its statutory obligations, that no capital asset had been acquired and that the payments were admissible deductions in computing its profits for Income Tax purposes. The Crown contended that the payments were not made in respect of remedial expenditure or in discharge of the Company's statutory obligations but were contributions towards a general scheme of drainage improvement and resulted in the acquisition of a capital asset. The General Commissioners decided that the payments were made under the agreement in order to fulfil their statutory obligations and were a permissible deduction.*

Held, *that the payments to the Drainage Board were capital payments and, accordingly, not admissible deductions in computing the Company's profits for Income Tax purposes.*

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[1] Reported (K.B.) [1944] 1 All E.R. 621 ; (C.A.) 171 L.T. 214 ; (H.L.) 175 L.T. 10.

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the General Purposes of the Income Tax for the Division of Doncaster Borough in the County of York for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners held at Doncaster on 4th September, 1942, Doncaster Amalgamated Collieries, Ltd. (hereinafter called "the "Company") appealed against assessments to Income Tax under Case I of Schedule D for the years 1940–41 and 1941–42. The assessments for these two years were based upon the profits shown by the Company's accounts for the years ended 31st March, 1940, and 31st March, 1941, respectively, and the question for decision was whether in computing such profits a deduction could properly be made for sums paid to the Dun Drainage Commissioners (hereinafter called "the Board") in the circumstances hereinafter set out under an agreement dated 28th September, 1939, relating to certain drainage works carried out by the Board. A copy of such agreement is annexed hereto, marked "B"(1), and such agreement is hereinafter referred to as "agreement B."

2. The Company is a mineowner and operates the Brodsworth and Bullcroft collieries.

3. The Board was created as a statutory body in 1873, and on the passing of the Land Drainage Act, 1930, became also an internal drainage board for the purposes of that Act within the area of the River Ouse Catchment Board.

4. Under Part II of the Doncaster Area Drainage Act, 1929 (hereinafter called "the 1929 Act"), the Company is required to execute or pay for works necessary to obviate or remedy any loss of efficiency which has arisen or may arise in the drainage system and drainage works of the Doncaster district through subsidence which results or may result from the Company's workings. Such works are hereinafter referred to as "remedial works." A copy of Part II of such Act is hereto annexed, marked "C"(1).

The Central Board referred to in the said Act was the Doncaster District Drainage Board set up by the said Act.

5. Under the provisions of the Doncaster Area Drainage Act, 1933, Section 2(3), the property of the Doncaster District Drainage Board and its functions under Part II of the 1929 Act became vested in the River Ouse Catchment Board, so far as the area now under consideration was concerned, and by Section 2(1) of the said Act the Doncaster District Drainage Board was dissolved.

6. Remedial work consists largely of raising the banks of existing drains to avoid flooding when the ground level of the land subsides owing to colliery working. Such subsidence might be produced 200 to 300 yards ahead of an advancing coal face and it is accordingly necessary to build up the banks before they are undermined. The rate of advance of a coal face is between 100 and 400 yards a year.

7. There is attached hereto, marked "D"(1), a plan prepared by the Company showing the position of their workings in 1937. The chief obstacle to further workings at that date was the Mill Dyke, a drain shown on the said plan, which carried upland water and for a considerable distance ran close to the London and North Eastern Railway line. This juxtaposition created a very difficult problem from the point of view of subsidence, and for a considerable time prior to 1937 the Company's workings had stopped short of the dyke and the railway line in the position shown on the plan.

(1) Not included in the present print.

8. In 1937 the Company investigated the possibility of carrying their workings in the Parkgate seam under the Mill Dyke and the railway, and a scheme of remedial work was prepared to enable this to be done. For the reasons hereinafter set out such scheme was never worked out in detail. The cost was roughly estimated at £68,000.

9. At about the same time the Board were considering, as appears from paragraph 2 of agreement B, the preparation of a scheme for the general improvement of the drainage of the southern portion of their area. The Board were aware that the Company and also Messrs. Barber, Walker & Co., Ltd., who owned the neighbouring Bentley colliery, were preparing schemes of remedial works in discharge of liabilities imposed on them respectively by Part II of the 1929 Act. In these circumstances the Board determined that it would be advantageous to all three parties to merge the several schemes into one comprehensive scheme, and proposed that the Company and Messrs. Barber, Walker & Co., Ltd. should each bear a proportion of the cost approximately equivalent to the cost of the schemes or works they would have carried out independently. It was hoped that the cost to be shared would be reduced by a grant in aid to be sought from the Ministry of Agriculture and Fisheries. The Company and Messrs. Barber, Walker & Co., Ltd. agreed to the proposal. After negotiation the Company's contribution was agreed at £39,000, together with a proportion of the cost of the loan charges, and such agreement was embodied in agreement B. The comprehensive scheme so adopted is hereinafter referred to as " the drainage improvement scheme."

10. In reply to an enquiry from the Appellant regarding this contribution and other matters the Company sent, with a covering letter dated 23rd September, 1941, a document furnishing replies to the points raised, a copy of which is annexed hereto, marked " E "(1). This document, as will be seen, referred to and attached a copy of a letter from Mr. Farran, the Board's engineer, to the Ministry of Agriculture and Fisheries, dealing with the basis of the Company's contribution to the improvement scheme. The part of the document headed " Remedial Works Expenditure " deals with work (which is referred to in paragraph 12 below) carried out by the Board other than that provided for by agreement B. That part of the document headed " Dun Drainage " Improvement Scheme " refers to work done under agreement B.

11. The basis of the improvement scheme, as appeared from agreement B, from Mr. Farran's letter referred to in paragraph 10 and from the evidence given before us by Mr. Beevers, the Company's engineer, was the diversion of upland water from the Mill Dyke into the Old Ea Beck and the Smallholme and Tilts Drain, with consequential improvements to these two latter drains to enable them to carry the increased water, and also provision for the lifting of the water of the district into the River Don. Such scheme would solve the difficulties confronting the Company with regard to the Mill Dyke (although some further remedial expenditure might become necessary later) because it would be unnecessary to build up its banks (as the Company had proposed in the scheme of remedial works referred to in paragraph 8) when further workings took place. The only water left in the Mill Dyke after the improvement scheme had been carried out would be drinking water for cattle (for which purpose dams would be necessary), and it could therefore subside without interfering with the drainage system. The amount of coal the working of which was made practicable as a result of the drainage improvement scheme was estimated at about 5,000,000 tons, and it was estimated that the working of this coal would take six or seven years. The work on the banks of the Old Ea Beck and the Smallholme and Tilts Drain set out in the schedule to agreement B was that rendered necessary by the increase of water

(1) Not included in the present print.

expected to be carried by these two drains owing to the diversion of the upland water from the Mill Dyke, and would not have been necessary as remedial work if the diversion had not taken place.

12. At the same time that the Company entered into agreement B, they entered into another agreement with the Board of the same date (hereinafter called " agreement A ") a copy of which is hereto annexed, marked " A "(1), under which the Board carried out certain work detailed in the schedule thereto. Such work was, as described by the Company in the document of 23rd September, 1941 (exhibit " E "), remedial work and would have to have been done whether the improvement scheme were adopted or not. The work on the Old Ea Beck and Smallholme and Tilts Drain provided for therein was to be carried out at different points from those provided for by agreement B. The cost of the work done under agreement A had been allowed as a deduction in computing the profits of the Company.

13. With reference to the schedule to Mr. Farran's letter of October, 1938, to the Ministry (exhibit " E "): (1) the reduction in the guarantee of the Company from £39,000 to £36,200 in respect of their payment towards the Goosepool pump did not take place; (2) the sum of £1,456 mentioned therein in respect of work required by subsidence of the Old Ea Beck was additional to the sum of £39,000 in dispute and the cost of the works performed under agreement A, and had been allowed to the Company as a deduction. The work consisted of raising the banks of the Old Ea Beck at White Cross Bridge and would have been necessary in any event, apart from the diversion from the Mill Dyke.

14. The Company was willing to contribute to the improvement scheme solely because of its obligations under the 1929 Act, and considered that in contributing to the scheme it was carrying out such obligations in the manner contemplated by Section 9(9) of the Act.

15. The Board borrowed from the York County Savings Bank the balance of the money required to carry out the works comprised in the improvement scheme, after deducting a grant received from the Ministry of Agriculture and Fisheries. In accordance with agreement B the Company was under obligation to pay to the Board a proportion of the amounts repayable by the Board to the bank in respect of principal and interest. The amounts so payable to the Board by the Company half-yearly over a period of thirty years are shewn in a schedule, a copy of which is annexed hereto, marked " F "(1). The Company paid such of the instalments as had fallen due in the years ended 31st March, 1940, and 31st March, 1941, in full, and claimed to be allowed the sum of £1,666 13*s.* 2*d.* (£1,088 5*s.* 0*d.* first instalment as per schedule " F " plus £578 8*s.* 2*d.* proportion of second instalment to 31st March, 1934) in respect of the first of such years, and the sum of £2,176 10*s.* 0*d.* in respect of succeeding years. It was agreed by the Company that no deduction could be made of so much of such sums as was recovered from royalty owners under Section 12 of the 1929 Act, such sums being brought into account as and when received.

16. It was contended on behalf of the Company:—

(*a*) that agreement B and the payments made thereunder were made by reference to and in respect of the Company's obligations under Part II of the 1929 Act;

(*b*) that the said payments were in the nature of revenue and not capital expenditure;

(1) Not included in the present print.

(*c*) that no capital asset had been acquired as a result of such payments, and

(*d*) that the said payments (or alternatively such portions thereof as were not held to be " interest " or " annual payments ") were allowable as deductions year by year in computing the taxable profits of the Company's trade.

With regard to the portion of each instalment falling due in accordance with exhibit " F ", designated therein as " Interest ", however, we were informed by Counsel for the Company that, whilst no admission was made as to the character of this portion, it was immaterial from the Company's standpoint whether it was allowable as revenue expenditure or was in the nature of an " annual payment " within the meaning of the Income Tax Acts, since in the latter case the Company would be entitled to deduct tax on payment. For this reason no submission was made to us on behalf of the Company on the point whether the so called " interest " portion was allowable revenue expenditure or an " annual " payment.

On behalf of the Company reference was made to *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, 10 T.C. 155, and *Anglo-Persian Oil Co., Ltd.* v. *Dale*, 16 T.C. 253.

17. It was contended on behalf of the Crown that:—

(*a*) the onus was upon the Company to shew that the deduction claimed was allowable and that it had not discharged such onus, as the payments in question were not made for remedial expenditure or in discharge of the Company's obligations under the 1929 Act;

(*b*) the payments in question were contributions towards a general scheme of drainage improvement in the district, and resulted in the Company acquiring an asset or advantage for the enduring benefit of its trade and were of a capital nature (*Atherton's* case, 10 T.C., at page 192);

(*c*) alternatively, that so much of each instalment provided for by exhibit " F " as was designated interest was a repayment to the Board of interest payable by the latter, and was an annual payment the deduction of which was prohibited by Rule 3 of Cases I and II of Schedule D (*Moss' Empires, Ltd.* v. *Commissioners of Inland Revenue*, 21 T.C. 264);

(*d*) none of the payments in question was a proper deduction in computing the Company's profits.

18. We, the Commissioners, gave our decision in the following terms:—

" We are of the opinion that the payments of £1,666 13*s.* 2*d.* for the year " 1940–41 and £2,176 10*s.* 0*d.* for the year 1941–42 were made by the " Appellants as indivisible sums under their agreements with the Dun Drainage " Commissioners in order to fulfil their obligation under the Doncaster Area " Drainage Act, 1929, and are a permissible deduction."

Whereupon the representative of the Crown expressed dissatisfaction with our decision as being erroneous in point of law and in accordance with the provisions of Section 149 of the Income Tax Act, 1918, duly required us to state and sign a Case for the opinion of the High Court, which we do hereby state and sign accordingly.

THOMAS SHEARMAN, JUNIOR,
FRANK E. SHIRES, } Commissioners.

Dated this 26th day of May, 1943.

The case came before Macnaghten, J., in the King's Bench Division on 24th and 27th March, 1944, when judgment was reserved. On 28th March, 1944, judgment was given against the Crown, with costs.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot for the Company.

JUDGMENT

Macnaghten, J.—This is an appeal by the Crown from a decision of the Commissioners for the General Purposes of the Income Tax Acts for the Division of Doncaster Borough in the County of York.

By an agreement dated 28th September, 1939, the Respondent, the Doncaster Amalgamated Collieries, Ltd., undertook to contribute the sum of £65,295(1) (to be paid by sixty equal half-yearly instalments of £1,088 5*s*. 0*d*. each) towards the cost of carrying out a drainage scheme, called the Dun Drainage Improvement Scheme, which had been prepared by the Dun Drainage Commissioners—an internal drainage board within the area of the River Ouse Catchment Board under the Land Drainage Act, 1930—for the general improvement of the drainage of the southern portion of their area. The question at issue on this appeal is whether, in computing the profits of the Respondent for the purposes of Income Tax under Schedule D, those instalments should be deducted as a revenue expense. The General Commissioners held the instalments to be deductible; and the Crown appeals against that decision on the ground that the instalments should be regarded as a capital expense and excluded from the computation.

By Section 9, Sub-section (1), of the Doncaster Area Drainage Act, 1929, it is provided that "it shall be the duty of every mineowner working or proposing "to work minerals under any lands situate within the Doncaster district . . . "to construct and maintain in proper condition such works and do such things "as may, by reason of any subsidence which results or may result from the "working of the minerals be requisite, in order to obviate or remedy, so far as "having regard to all the circumstances of the case is reasonably necessary, any "loss of efficiency which has arisen or may arise in the drainage system and "drainage works of the Doncaster district."

The Respondent is a mineowner working a seam of coal under lands situate within the Doncaster district called the Parkgate seam. This seam of coal lies below a drain, the property of the Dun Drainage Commissioners, known as the Mill Dyke. The Respondent proposed to mine the coal beneath the Mill Dyke and, accordingly, in order to carry out the obligation imposed by the Doncaster Area Drainage Act, 1929, it prepared a scheme, which it was roughly estimated would cost some £68,000, whereby that obligation would be discharged. The Dun Drainage Improvement Scheme prepared by the Dun Drainage Commissioners involved the complete elimination of the Mill Dyke, and thereby relieved the Respondent from all obligation under the Act in respect of that drain. The Respondent accordingly, by the agreement dated 28th September, 1939, agreed with the Dun Drainage Commissioners to contribute the sum of £65,295(1) towards the cost of the scheme which they had prepared, such sum to be paid by the instalments I have mentioned.

The case for the Crown is that, since by the execution of the Dun Drainage Improvement Scheme the Respondent is for ever relieved from the obligation imposed by the Doncaster Drainage Act of 1929, the Respondent has by its contribution towards the cost of that scheme secured "an asset or an advantage "for the enduring benefit" of its trade within the meaning of those words as used by Lord Cave in the case of *Atherton* v. *British Insulated and Helsby Cables*,

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(1) i.e., £39,000 together with interest over a period of 30 years.

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Ltd., 10 T.C. 155, at page 192, and that the contribution must be regarded as a " capital expense ". The Crown also suggests that the scheme prepared by the Respondent must necessarily have involved it in very large capital expenditure. The Case stated by the General Commissioners does not describe the nature of that scheme ; but it does state that work of the character required by the Act of 1929 is often carried out by the simple expedient of raising the banks of a drain, such as the Mill Dyke, as and when any danger of subsidence may arise. I do not think that the fact that the Respondent contemplated the execution of a scheme which would cost about as much as its contribution to the Commissioners' scheme has any bearing on the question at issue in the present case. It is not disputed that if the Respondent year by year, as and when the drain subsided, obviated or remedied the inefficiency of the drain in consequence of the subsidence, the expense of doing so would be a " revenue " expense and would be brought into a computation of the profits of the Respondent for the purposes of Income Tax.

The Commissioners have found that the payment of these half-yearly sums was made by the Respondent in order to fulfil its obligations under the 1929 Act, and are a permissible deduction. I think they are right. Since the expenditure in repairing or obviating any damage which would be caused to the drain by reason of the underground workings of the colliery, if made as and when the occasion occurs, would be a revenue expense to be included in the computation of the Respondent's profits, it seems to me that a lump sum payable for relief from an obligation to incur such expenditure must also be regarded as a " revenue " expense. It is a matter of no importance to the Respondent that it is relieved from its obligation with regard to the Mill Dyke for all time since the obligation was only during its subsidence. When the drain had finally subsided in consequence of the Respondent's operations underground, then there would have been no further liability on the part of the Respondent to keep it in repair. What in fact the Respondent has secured is that during its operations under the Mill Dyke it will not have to incur the expenditure which it would otherwise have had to incur in either obviating or remedying damage done to the drain by subsidence.

It seems to me that the Respondent's contribution to the Dun Drainage Improvement Scheme comes within the words used by Rowlatt, J., in the case of the *Anglo-Persian Oil Co., Ltd.* v. *Dale*, 16 T.C. 253, where he was expounding the same principle as was laid down by Lord Cave in the *Atherton* case (1). At page 260 of the report he says : " Now it is abundantly clear by this time that " the circumstance that the payment is a lump sum payment " (for in that case the question was a question of a lump sum payment) " in one year in lieu of " annual payments in a number of years does not in any way prevent it from " being a deductible expense ; all the cases that we have been talking about " all day shew that ; but the question always is : What is the annual expense " that this lump sum payment frees you from ? I would refer to what I said " in *Mallett's* case (2), not because they were my words, but because they were " approved by the Master of the Rolls who quoted them. In that case there " had been a contention that royalty payments that were gotten rid of by the " arrangement there made were like payments to servants which were gotten " rid of on a lump sum payment. I said, and the Master of the Rolls approved " it, that that only applies where an annual business expense which is obviated " by the single payment is an annual business expense chargeable against " revenue. That is the question : Is what is got rid of an annual expense " which is chargeable against revenue ? "

(1) 10 T.C. 155. (2) Mallett *v.* Staveley Coal and Iron Co., Ltd., 13 T.C. 772.

(Macnaghten, J.)

In this case I think that the Respondent got rid of an annual expense by its contribution to the Dun Drainage Improvement Scheme, and that the instalments payable by the Respondent under the agreement of 28th September, 1939, are deductible just as if they were payments made year by year for remedying the loss of efficiency actually arising, or anticipated to arise, by reason of the underground workings. I therefore think that the appeal fails, and must be dismissed with costs.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Scott and du Parcq, L.JJ., and Uthwatt, J.) on 12th and 13th July, 1944, when judgment was reserved. On 26th July, 1944, judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

The Solicitor-General (Sir David Maxwell Fyfe, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot for the Company.

JUDGMENT

Scott, L.J.—This appeal raises the question of the distinction between capital and income, a familiar problem in Income Tax law, and one which is easily stated but often not easily solved. The General Commissioners decided, and Macnaghten, J., agreed with them, that a lump sum of £39,000 which the Respondents in September, 1939, agreed to pay to the Dun Drainage Commissioners (to whom I will refer as " the Drainage Board "), was not an expenditure of capital, but a revenue payment, properly treated by the Company as an expense to be deducted in calculating the Company's income for assessment. The Company had agreed to pay it as their contribution to a joint drainage scheme promoted by the Drainage Board, to which they and Barber, Walker & Co., Ltd., the owners of the Bentley colliery, lying two or three miles to the eastward of the Respondents' Brodsworth Main colliery, had agreed. The Crown contends that it was a capital expenditure and could not be deducted, and therefore appeals.

The Stated Case states the facts very fully and quite clearly, and it is not necessary to restate more than the salient points. The part of the South Yorkshire coalfield, with which the appeal is concerned, is low lying, and receives a considerable influx of upland water from the north and north-west, which has to find its way to the sea by water courses leading to the River Don. The coal seams are worked longwall, and the whole of the coal is thus extracted, with the inevitable result of a general lowering of the surface, and the dislocation of all surface drainage. This effect is not limited to the area vertically above the area of extraction, but to a degree dependent on the dip and depth of seam, and may extend a considerable distance beyond the vertical from the advancing face of the working.

The Drainage Board came into existence as a statutory body in 1873, and on the passing of the Land Drainage Act, 1930, became also an internal drainage board, within the area of the River Ouse Catchment Board. The Doncaster Area Drainage Act, 1929, was passed (*inter alia*) to deal with the additional complications of surface drainage caused by mining subsidence. It set up the Doncaster District Drainage Board; and by a series of Sections (conveniently set out in annex " C " to the Stated Case[1]) imposed on the Respondents, and other mineworkers, the duty of constructing and main-

(1) Not included in the present print.

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taining such works as might be reasonably necessary to obviate or remedy any loss of efficiency in the drainage works of the Doncaster district. This duty is obviously of a very onerous character, and might easily entail very heavy capital expenditure, not only in raising the banks of many miles of watercourses, or in constructing new raised channels, but also in erecting, maintaining and working expensive pumping stations: see particularly Section 9, Sub-sections (1), (3) and (5), of that Act. In addition, by Section 10 the Act called for the establishment and maintenance of a capital fund for such purposes in perpetuity; and Section 11 gave the Doncaster District Drainage Board default powers of a drastic kind. An amending Act in 1933 kept the above powers and duties alive, and gave jurisdiction to the Railway and Canal Commission to enquire into and enforce the proper maintenance of the drainage fund directed by the 1929 Act. It is not necessary for present purposes to consider the statutory position in the matter of the River Ouse Catchment Board.

By 1937 the Respondents had extracted the whole of the coal from large areas of the Barnsley seam, and had carried their faces in the Parkgate seam, which underlies the Barnsley seam, to within a distance of from 400 to 600 yards of an important watercourse known as the Mill Dyke, which there ran roughly parallel to the London and North Eastern Railway main line. Plan "D" annexed to the Stated Case(1) contains all necessary topographical information. To the eastward of the Parkgate face shown on the plan, there lay some five million tons of workable coal in that seam, enough to occupy the Respondents for six or seven years of continuous working: but that coal could not, commercially, be worked at all, unless the Respondents carried out very extensive drainage works on the surface under the Acts of 1929 and 1933. The coal was theirs, but it was forbidden ground. They therefore started to think out the necessary " remedial works " on the surface to enable them to get the coal without upsetting the drainage system of the surface. They arrived at a preliminary estimate of £68,000. That expenditure was the essential condition of their even beginning to get the coal. It was as if stranger-owners of the surface had possessed an absolute right of support, but had offered to give it up for a lump sum payment of £68,000; or as if that coal had by experimental boring been found to have been displaced by a huge fault, entailing either the sinking of a new shaft, or driving long tunnels through the rock. In each of such cases the expense would be preliminary to the commencement of working the area in question; and, like preliminary expenditure at the outset of a colliery's life, would be of a capital nature. The expenditure of the £68,000 in order to make possible the future working of the 5 million tons area would have been, in my opinion, exactly similar in principle.

That being the position, what happened next was a proposal from the Drainage Board of a joint scheme of extensive drainage works, including five pumping stations, to be carried out by the Board, over a wider area, but relieving the Respondents of the £68,000 liability. To this the two colliery companies were asked to contribute; the amount to be found by the Respondents being £39,000. The Respondents naturally accepted the proposal; it brought the 5 million tons of Parkgate coal into immediate accessibility instead of their remaining wholly inaccessible without a previous expenditure by them of £68,000. In addition it procured for the Respondents immunity from all the onerous duties and liabilities of the Doncaster Area Drainage Acts, to which I have already referred, including unpleasant possibilities of

(1) Not included in the present print.

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injunctions of a far-reaching character. The agreement with its £39,000 expenditure thus procured for the Respondents two " enduring advantages ". The first was in effect a large new acquisition of workable coal, for the Company's proprietary rights had no commercial reality, unless the surface drainage was maintained in accordance with the Acts. The second was permanent immunity from all the continuing expenditure entailed by the obligations of those Acts. Each of those two considerations is, in my opinion, sufficient by itself to constitute the expenditure in question a capital and not a revenue item in the Respondents' accounts; and it is on that accountancy test that the solution of the problem must nearly always depend.

It will be observed that the only legal touchstone I have used in the above reasoning is Lord Cave's helpful phrase, " an advantage for the enduring " benefit ", applied by him in *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, [1926] A.C. 205, at page 213; 10 T.C. 155, at page 192, which he there treated not as an exhaustive definition, but as a useful guide. Another such guide is that of Lord Dunedin, when Lord President, in *Vallambrosa Rubber Co., Ltd.* v. *Farmer*, 5 T.C. 529, at page 536: " that is going to be " spent once and for all ". In *Bonner* v. *Basset Mines, Ltd.*, 6 T.C. 146, Horridge, J., at pages 150/1, overruling the Commissioners, held that the deepening of a shaft, being a necessary preliminary to future working, was a capital expense. In *Ounsworth* v. *Vickers, Ltd.*, 6 T.C. 671, Rowlatt, J., at pages 676/8, regarded the works carried out in the sea channel leading to the company's shipbuilding yard as involving capital expenditure because it was not to be put against any particular work but was " to be regarded as endur- " ing expenditure to serve the business as a whole ", thus anticipating Lord Cave's " enduring advantage ". In *Robert Addie and Sons' Collieries, Ltd.* v. *Commissioners of Inland Revenue,* 8 T.C. 671, the purchase from lessors of the right to leave surface ground, which had been damaged by the lessees' operations, unrestored without paying the 30 years of rent called for by the lease for that privilege, was treated as a capital expense. In the *Atherton* case, [1926] A.C. 205, pages 212/4; 10 T.C. 155, pages 191/3, the whole of Lord Cave's judgment is exactly relevant. In *United Collieries, Ltd.* v. *Commissioners of Inland Revenue,* 12 T.C. 1248, the dewatering of a pit was treated as a capital expense—see per the Lord President at page 1253, and Lord Blackburn at page 1254. In *Mallett* v. *Staveley Coal and Iron Co., Ltd.*, 13 T.C. 772, Rowlatt, J., at page 778, treated the payment for the surrender of coal seams as being on the clearest possible principles a capital transaction; and Sargant, L.J., on pages 785/6, expressed similar views. In *Boyce* v. *Whitwick Colliery Co., Ltd.*, and *Coalville Urban District Council* v. *Boyce,* 18 T.C. 655, heard together, the company had contracted to erect waterworks to supply the council with water, under which the Council were to defray the cost incurred by the company by a series of instalments, including interest, over a period of 30 years. It was held that the total cost payable to the company was a capital item, and that the provision for the discharge of the debt by annual instalments did not change its nature—see per Romer, L.J., at page 686.

In many of these cases the Courts differed from the conclusion at which the Commissioners had arrived, but the reasoning of the judgments shows that the ground on which they differed was that, whilst accepting the findings of fact, they took the view that the Commissioners had drawn legally erroneous inferences through misunderstanding the difference in law between a capital item and a revenue item in the accounts of the particular business. The truth is that it must of necessity happen very often that the line to be drawn between the two types of item, which is distinct in law, is made indistinct in the

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particular case by reason of some of the facts under investigation seeming to point the other way. Between pure white on the one side and jet black on the other side is a penumbra of grey, shading off gradually into white and black, respectively. Within this penumbra there must, of course, often lie cases where the decision is one of fact for the Commissioners; but in others it will depend on the correct appreciation of the true character in law of some one or more of the facts. Where it is clear to the Court that the Commissioners have misread that character, the decision in law rests with the Court. Nearly all the cases I have cited are illustrations of this sort of legal discrimination. As Mr. Justice O. W. Holmes said so often, it is the business of the Courts to decide on which side of the line the particular case must be placed; with the result that the penumbra is always shrinking in width as the law draws the line more and more clearly. The reasoning in the case of *Anglo-Persian Oil Co., Ltd.* v. *Dale,* 16 T.C. 253, where the Commissioners held that the payment of £300,000 in commutation of the obligation of the company to pay annual commissions was a capital payment, but the Courts held that the mere fact of the discharge of the many revenue payments by one lump sum payment did not change the quality of the payment, is a good illustration of the process of discrimination between fact and law which I have been endeavouring to describe. The issue of " capital versus income " is not necessarily, or even often, a pure question of law, although that seems to have been said incidentally by one member of the Court of Appeal in that case. The facts of each particular case—often complicated or difficult to understand in relation to the business under consideration—have always to be ascertained and considered before the final conclusion of law can be reached; and that process may often call for inferences of fact by the Commissioners from which the Court may properly decline to differ. The reasoning of Rowlatt, J., in the *Anglo-Persian* case, 16 T.C., on pages 261/2, illustrates the attitude of the Court which seems to me right on these mixed questions of fact and law which so often arise.

In the present case the Commissioners found such facts as, in my opinion, compel the Court to say that the item of £39,000 was in law a capital liability and that each instalment payment was a capital expenditure. The appeal must be allowed, the judgment below discharged, and the Commissioners directed to adjust the assessments accordingly.

du Parcq, L.J.—The Respondents to this appeal, to whom I will refer as " the Company ", appealed to the General Commissioners against assessments to Income Tax under Case I of Schedule D for the years 1940–41 and 1941–42. The Rule applicable to Case I provides that the tax " shall be " computed on the full amount of the balance of the profits or gains " in the accounting period. The question whether a particular item is properly deductible in order to arrive at the required " balance " is often a matter of controversy. The Legislature has not thought it necessary to provide any guidance for its solution. The intention of Parliament clearly is that such items should be deducted as the trader should normally deduct in order to ascertain his profits or gains. A deduction " is to be made or not to be made according " as it is or is not, on the facts of the case, a proper debit item to be charged " against incomings of the trade when computing the balance of profits of " it "—per Lord Sumner, *Usher's Wiltshire Brewery, Ltd.* v. *Bruce,* [1915] A.C. 433, at page 468; 6 T.C. 399, at page 436.

The facts of the present case have been found by the Commissioners and are set out in paragraphs 1 to 15 of the Case Stated. There is no doubt that this Court is bound, as was Macnaghten, J., to accept those findings of fact

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as correct. No appeal lies from the Commissioners unless their determination is " erroneous in point of law " (Income Tax Act, 1918, Section 149). Mr. Talbot devoted part of his most able and lucid agument to a contention that the Commissioners could not be shown to have erred in point of law; and that contention cannot be answered off-hand by saying that we think that the Commissioners were wrong. We must be sure that there was indeed an error of law.

Mr. Talbot's submission derived some support from the words of Lord Cave, L.C., in *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, [1926] A.C. 205, at page 213; 10 T.C. 155, at page 192. There, as here, the question was whether a sum expended was " in substance a revenue or a capital ex- " penditure." " This ", said Lord Cave, " appears to me to be a question " of fact which is proper to be decided by the Commissioners upon the " evidence brought before them in each case ". In the case then before the House there had been no express finding by the Commissioners, and Lord Cave went on to say that, in the absence of such a finding, the question " must be " determined by the Courts upon the materials which are available and " with due regard to the principles which have been laid down in the authori- " ties." It seems to follow, that even if there had been a finding by the Commissioners, the House of Lords would have felt themselves free to review it if it had not commended itself to them. Further, it was pointed out by the Solicitor-General that in the more recent case of *Van den Berghs, Ltd.* v. *Clark*, [1935] A.C. 431; 19 T.C. 390, the distinction between a capital disbursement and an income disbursement, for Income Tax purposes, seems to have been regarded by the House of Lords as a question of law, even in those borderline cases to which Lord Macmillan referred in his speech (at page 438; 19 T.C., at page 428).

Now, a borderline case is one in which the opinions of traders, and even of accountants, may be expected sometimes to differ. In such cases the task of assigning a sum expended to income or capital may, as Lord Macmillan said, " become one of much refinement ". Apart from authority, it might have been thought that the answer given by Commissioners to the question propounded in these doubtful cases would be a finding of fact which the Courts would have no jurisdiction to disturb. There might even be found some persons bold enough to say that a Judge was not to be assumed to be better qualified to resolve such a problem than a skilled trader or accountant, or a body of Commissioners. It seems clear, however, that in both the cases to which I have referred, the House of Lords regarded the question as one which, although its solution depended (as the solution of every problem must depend) on the facts found, was ultimately a question of law. This view of the matter may be expressed by saying that, when once the facts have been ascertained, then only one answer to the question posed can be right. Opinions may differ, but that is not to say that more than one of the differing opinions can be correct. Unless the Commissioners, having found the relevant facts and put to themselves the proper question, have proceeded to give the right answer, they may be said, on this view, to have erred in point of law. If an inference from facts does not logically accord with and follow from them, then one must say that there is no evidence to support it. To come to a conclusion which there is no evidence to support is to make an error in law. Thus the Courts have assumed, and must continue to bear, the burden of laying down the principles on which traders should keep their accounts in order to arrive at the balance of their profits for the purposes of taxation, and, as Lord Cave said, due regard must be paid to the principles which the authorities have laid down. Many instances may be given of " questions of fact " which have been held to admit of more answers than one, in the sense that the appropriate

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tribunal cannot be said to have made an error in point of law unless it has hit on an answer so wide of the mark that, on the available evidence, no reasonable man could have given it. On the authorities it is, in my opinion, impossible to regard the particular question which this case raises as one of that class, however much one might have been tempted, apart from authority, to do so. It remains true, I think, that in the words of Scrutton, L.J., " It " is impossible to reconcile the various statements of high authorities on the " division between fact which is unappealable and law which is appealable "—(*Rees Roturbo Development Syndicate, Ltd.* v. *Ducker,* [1928] 1 K.B. 506, at page 517; 13 T.C. 366, at page 390).

The Commissioners, it is now conceded, based their conclusion on a wrong interpretation of the facts when they said that the payments in question were made " in order to fulfil their (the Company's) obligation under the Don- " caster Area Drainage Act, 1929 "; so that, if the matter were one solely for their decision, it would probably have been necessary to remit the case to them. On the view which I have stated, however, no purpose would be served by remitting it, and this Court must determine the question for itself.

With great respect to Macnaghten, J., and with sincere diffidence, I have come to the conclusion that, though the case may be near the borderline, the expenditure in question falls within the words of the test laid down by Lord Cave in *Atherton's* case(1). It appears to me that the Company has acquired by this expenditure an advantage for the enduring benefit of its trade, since thereby it has been enabled to work about 5,000,000 tons of coal over a period of six or seven years. It seems to me to be more reasonable to regard this as capital expenditure than as a mere outlay for the purpose of earning profits in the normal course of business.

For these reasons I am of opinion that the appeal should be allowed.

Uthwatt, J.—The obligations of the Company under the Doncaster Area Drainage Act, 1929, were first to construct and maintain such works and to do such things as were necessary to obviate or remedy any loss of efficiency in the drainage system and works of the Doncaster district due to subsidence which resulted or might result from the working of minerals by the Company (Section 9), and second (subject to Sub-section (5) of Section 10), to set up a fund sufficient by its income to provide the sums necessary for the maintenance, so far as was reasonably necessary, of any such works after the mine had ceased to be worked, and to hold the capital of that fund in trust for the Board (Section 10). The agreement of 28th September, 1939, did not affect to release the Company from either of these obligations, but the execution of the works provided for by that agreement, which were to be maintained in perpetuity by the Board, would (save that possibly later some further works might be necessary) get rid of the need for works occasioned by the mining of coal near Mill Dyke. The result of the execution of the works pursuant to the agreement was that the working of some 5 million tons of coal was, in the words of the Commissioners, " made practicable "—that is, the consequences of subsidence with its attendant liabilities under the Act could for practical purposes be disregarded.

No evidence was given as to the proper accountancy practice in the case of a transaction such as the present, and I apprehend that, as the mine was a wasting asset and the actual payments were to be spread over a period of years, the effect of the transaction might be dealt with in the Company's accounts in many ways. But I cannot imagine that under any system of com-

(1) 10 T.C. 155, at p. 192.

(Uthwatt, J.)

mercial accountancy the increase in value accruing to the Company's mines as the result of the agreement would appear as a credit in the trading account or the profit and loss account, and, in my view, proper commercial accountancy would permit that increase (which might or might not correspond with the sum paid) to be reflected in the capital accounts of the Company by an appropriate addition to any value theretofore rightly attributed in those accounts to the coal measures the working of which was, as the result of the agreement, " made practicable ".

But putting aside any question of accountancy practice, the result of the transaction clearly was that the value of the particular coal measures—a capital asset remaining unchanged in character—was increased both for use and exchange. There was, therefore, as the result of the transaction, brought into existence, not indeed an asset, but " an advantage for the enduring " benefit of " the trade of the Company—see *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, 10 T.C. 155, per Lord Cave, L.C., at page 192.

Applying the principle laid down by Lord Cave in *Atherton's* case, I am of the opinion that the payments to be made under the agreement represent a capital expenditure which ought not to be deducted in computing profits or gains, unless there are some special circumstances leading to a contrary conclusion.

I do not see that there are any such special circumstances. The payments to be made are indeed level payments spread over a period of thirty years, but no stress can be, nor indeed was, laid on that fact, for it was the agreed method of satisfying an initial liability fixed at £39,000. None of the works provided for by the agreement were to be carried out on the property of the Company. That is immaterial, for the Company got an advantage from the works. Further, it is true that the coal measures benefited by the payment might be worked out in some six or seven years, but they were a capital asset. Again, the occasion for the transaction did not arise as incident to the actual working of the coal, and the liability incurred was not in any real sense a working expense incurred by the Company. Lastly, if for the purpose of determining the nature of the payment it is related to the liabilities of the Colliery Company under the Act, then, as I have said, the transaction obviates not only the doing of preventive and remedial works arising in connection with subsidence, but also the setting up of capital funds, the income of which would be applicable for maintenance of those works and the capital of which would be held on trust for the Board. The transaction is singularly like the redemption of a capital charge on the Company's undertaking, and that is obviously a capital expense.

For these reasons I am of the opinion that the sums are not deductible in ascertaining profits and gains, and that the appeal should be allowed.

Mr. Hills.—The appeal will be allowed with costs, my Lord?

Scott, L.J.—Yes.

Mr. Talbot.—I am instructed in this case to ask for leave to appeal to the House of Lords, my Lord.

Scott, L.J.—Yes.

Mr. Talbot.—If your Lordship pleases.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Simon and Lords Thankerton, Wright, Porter and Simonds) on 29th, 30th and 31st January, 1946, when judgment was reserved. On 22nd March, 1946, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Sir Cyril Radcliffe, K.C., and Mr. J. H. Stamp appeared as Counsel for the Company, and Sir Patrick Hastings, K.C., and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Viscount Simon.—My Lords, this appeal arises from a Case stated for the opinion of the High Court by the Commissioners for the General Purposes of the Income Tax for the Division of Doncaster Borough. The Commissioners decided, subject to the Case Stated, that the present Appellant was entitled to deduct two sums of £1,666 13*s.* 2*d.* and £2,176 10*s.* 0*d.* in arriving at its profits for purposes of assessment to Income Tax under Case I of Schedule D for the years 1940–41 and 1941–42, respectively. These sums were paid by the Appellant to the Dun Drainage Commissioners (hereinafter called " the " Drainage Board ") pursuant to an agreement, dated 28th September, 1939, made between them relating to certain drainage work to be carried out by the Board.

In the High Court Macnaghten, J., dismissed the Crown's appeal, holding that the deductions were justified, but the Court of Appeal (Scott and du Parcq, L.JJ., and Uthwatt, J.) reversed this decision.

The circumstances out of which the controversy has arisen are as follows. By Section 9, Sub-section (1), of the Doncaster Area Drainage Act, 1929, it is provided that " it shall be the duty of every mineowner working or proposing " to work minerals under any lands situate within the Doncaster district . . . " to construct and maintain in proper condition such works and do such " things as may, by reason of any subsidence which results or may result " from the working of the minerals be requisite, in order to obviate or remedy, " so far as having regard to all the circumstances of the case is reasonably " necessary, any loss of efficiency which has arisen or may arise in the drain- " age system and drainage works of the Doncaster district."

The Appellant, in respect of the working of a seam of coal known as the Parkgate seam, had carried its extraction forward to faces which were within 400 to 600 yards short of a position vertically under an important watercourse on the surface, known as the Mill Dyke, which there ran close to and roughly parallel with the London and North Eastern Railway main line. There remained unworked in this seam some 5,000,000 tons of coal, which would take six or seven years to extract, but the faces could not be pushed further forward without the risk of subsidence, which would destroy the efficiency of the surface drainage system unless the Appellant discharged its statutory duty of obviating this result at its own expense. It is particularly to be noticed, as Scott, L.J., observed(1), that the discharge of this duty does not necessarily involve only revenue expenditure; it might easily entail very heavy capital expenditure, not only in raising the banks of many miles of watercourses, the floor of which would be lowered by subsidence, or in constructing new raised channels, but also in erecting expensive pumping stations or the like. In 1937 the Appellant investigated the possibility of carrying forward their workings in the Parkgate seam under the Mill Dyke and the railway by first executing works to obviate subsidence of the surface such as were called for in Section 9, but, for reasons

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(1) *See* page 304 *ante*.

(Viscount Simon.)

now to be stated, the scheme was never developed in detail. The cost was roughly estimated at £68,000. Messrs. Barber, Walker & Co., Ltd., who owned the neighbouring Bentley Colliery, were also preparing a scheme to discharge their corresponding liabilities.

The areas in question were part of a much larger area for the surface drainage of which the Drainage Board had a responsibility. The Drainage Board had been created a statutory body in 1873, and, on the passing of the Land Drainage Act, 1930, became also an internal drainage board for the purposes of that Act within the area of the River Ouse Catchment Board.

The Drainage Board now devised a comprehensive scheme of extensive drainage work, including five pumping stations, covering a wider area than that with which the Appellant and Messrs. Barber, Walker & Co., Ltd. were concerned, but including that area, inasmuch as the scheme, by diverting upland water, would get rid of the necessity of preserving the use of the Mill Dyke to carry the water thus diverted. The execution of such a scheme would benefit all three parties, and, accordingly, the Appellant and the Drainage Board entered into an agreement dated 28th September, 1939, by which, in consideration of the Board's undertaking to execute and maintain the scheduled works, the Appellant was to contribute one-third of the capital cost of the scheme, the contribution not in any case to exceed £39,000, together with a proportion of the cost of the loan charges. This payment, with interest, was spread over 30 years, and the two sums now dealt with in the Case Stated represent two instalments of it. A corresponding agreement was presumably made between the Drainage Board and Messrs. Barber, Walker & Co., Ltd.

Before the Commissioners the present Appellant raised no point as to so much of the instalments as represented interest, since, if this was not allowed to be deducted as revenue expenditure, it was in the nature of an annual payment from which tax could be deducted when payment was made.

The Commissioners' decision was phrased as follows: "We are of the "opinion that the payments of £1,666 13*s.* 2*d.* for the year 1940–41 and "£2,176 10*s.* 0*d.* for the year 1941–42 were made by the Appellants as "indivisible sums under their agreements with the Dun Drainage "Commissioners in order to fulfil their obligation under the Doncaster Area "Drainage Act, 1929, and are a permissible deduction." It is from this decision that the Crown appealed as being erroneous in point of law.

The language of the decision calls for some exegesis. It is agreed by the Appellant's Counsel that the last phrase should be understood to mean "and "are *therefore* a permissible deduction." Moreover, it is not strictly accurate to say that the payments were made "in order to fulfil" the Appellant's obligations. The payments were made because, if the Drainage Board carried out its own scheme, the Appellant would be able to win coal without incurring the burden which would otherwise fall upon it under the Act of 1929. The obligations remained, but the occasion for fulfilling them was largely avoided.

But, apart from these refinements, there is, as it seems to me, a simpler consideration, which shows that the appeal must fail. No doubt the contribution made by the Appellant is not necessarily to be treated as its capital outlay merely because it counts as capital, or is spent to produce capital, in the hands of its recipient, the Drainage Board. No doubt, too, a lump sum payment may retain the quality of a revenue expenditure when it represents the

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commutation of a series of annual revenue payments, just as the discharge of a capital debt by annual instalments does not change its nature (*Boyce* v. *The Whitwick Colliery Co., Ltd.*, 18 T.C. 655, per Romer, L.J., at page 685). Here, however, expenditure by the Appellant under the Act of 1929, Section 9(1), would not necessarily be of the nature of revenue expenditure, as Scott, L.J., pointed out(1), and the actual outlay which obviated such expenditure cannot, therefore, be held to be substituted for revenue expenditure. Rowlatt, J., in *Anglo-Persian Oil Co., Ltd.* v. *Dale*, 16 T.C. 253, observed, at page 261, that, when it is contended that a single payment may be charged against revenue on the ground that it obviates a series of annual expenses, the question still remains whether the annual expense which it supplants was itself chargeable against revenue. I do not think the Act of 1929 should be construed in such a way as to exclude inquiry as to the nature of the expenditure in a particular case, and it follows that the Commissioners' decision is based on an error in law. The natural course, if circumstances admitted of it, would be to send the case back for the Commissioners to find what was the nature of the expenditure contemplated, and this would be a question of fact; but, as Sir Cyril Radcliffe admits, this reference back could not be effective, for inquiry as to the details of an unexecuted scheme which was never worked out is bound to be abortive. It follows that the Appellant has failed to prove that the deductions claimed are justified.

The same conclusion may be reached if the payments made are not regarded as substituted for the discharge of obligations under the Act of 1929, but rather as sums paid to secure " an enduring advantage " within the proper application of Lord Cave's phrase in *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, [1926] A.C. 205, at page 213 (10 T.C. 155, at page 192). " The " result of the transaction ", said Uthwatt, J., in the Court of Appeal(2), " clearly was that the value of the particular coal measures—a capital asset " remaining unchanged in character—was increased both for use and ex- " change. There was, therefore, as the result of the transaction, brought " into existence, not indeed an asset, but ' an advantage for the enduring " ' benefit of ' the trade of the Company."

I agree, and would consider it right to classify this outlay as capital expenditure on this ground also. The borderline between revenue and capital expenditure is sometimes difficult to draw, and there may be cases in which the conclusion is properly reached by the Commissioners as a question of fact which will not be disturbed. But where, as here, the Commissioners find facts which in law must lead to the conclusion that the item falls into one class and not into the other, or reach their result by misconstruing the language of a statute, the error can be corrected on appeal.

I move that the appeal be dismissed with costs.

Lord Thankerton.—My Lords, my noble and learned friend has stated the material facts and statutory provisions, and I need not recapitulate them. At the close of his able and lucid argument on behalf of the Appellant Company, Sir Cyril Radcliffe admitted that, if he failed in his leading argument, the appeal must be dismissed.

The leading argument submitted by the Appellant was that, on a proper construction of Section 9 of the Doncaster Area Drainage Act, 1929 (Part II), and in particular of Sub-section (1) of that Section, any expenditure incurred in fulfilment of the obligations thereby imposed on the Appellant must necessarily be expenditure chargeable against revenue, and not capital ex-

(1) *See* page 304 *ante*. (2) *See* page 309 *ante*.

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penditure. The Appellant agreed that this was the meaning of the decision of the Commissioners in paragraph 18 of the Case Stated.

My Lords, I am unable to find any words in Section 9 of the Act of 1929 which suggest any limitation to revenue expenditure; on the other hand it appears to me that it might very well be found that it was necessary or expedient to construct works involving expenditure of a capital nature. That is sufficient reason for rejection of the Appellant's leading argument. It follows that the decision of the Commissioners was erroneous in point of law, and, in the ordinary course, the case would have to be remitted to the Commissioners in order that the expenditure in question might be disintegrated into separate amounts of revenue and capital expenditure; but Sir Cyril has stated that such a remit would be abortive, as the sums paid to the Dun Drainage Commissioners under the agreement of 28th September, 1939, were not capable of such disintegration, and he further agreed that the necessary consequence was a failure on the Appellant's part to establish that the payments in question formed a proper deduction in computing the Company's profits.

In these circumstances the appeal fails and should be dismissed, and the Order of the Court of Appeal should be affirmed.

Lord Wright (read by Lord Simonds).—My Lords, I have had the opportunity of studying in print the opinion of my noble and learned friend, Viscount Simon. I agree with it and have nothing to add. Notwithstanding the able and persuasive argument of Sir Cyril Radcliffe, I think the appeal fails and should be dismissed.

Lord Porter.—My Lords, I concur.

Lord Simonds.—My Lords, I also concur.

Questions put :

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and that the appeal be dismissed with costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Bird & Bird, for C. M. H. Glover, Doncaster.]

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