their mind that they were going beyond their powers, and that they acted in entire good faith. At the same time it is all the more obvious that the pursuers have an interest, as they undoubtedly have a title, to complain of work being executed by an authority which exists for specified purposes and which is protected by the rates against possible loss. It is highly probable that if the defenders had taken up what I think ought to have been their attitude, one or more plumbers in Edinburgh, and possibly one or more of the pursuers, might have successfully tendered for the work and secured a profit by executing it.

A great deal was said as to the reasonableness of the attitude of the defenders in the letter written by their clerk on 8th June 1916. If they had been acting within their statutory authority I think no exception could be taken to the terms of their letter, but if they were not I think the pursuers were well warranted in raising the present action. After all, the assurance which the defenders offered was of no value during the continuance of a state of war. It is well known that since May 1916 when the complaint was made, no large contracts have been on the market except to supply military requirements or requirements of Government departments generally. The construction of private undertakings and buildings has been suspended. Accordingly what the defenders reserved to themselves a right to do was all kinds of plumbing work which was likely to be required during the war; and, in short, to enter into competition with the tradesmen who made a livelihood by such work so long as the war lasted. In my opinion the offer that the pursuers made before raising the action, and which was replied to by the letter of 8th June, was an eminently fair one and ought to have been accepted. If the defenders are willing now to give the assurance asked for by the pursuers' agents I should be disposed not to subject them to a formal interdict. Short of this I think the pursuers are entitled to decree in terms of the whole conclusions of their summons.

LORD GUTHRIE—I agree that the pursuers are entitled to declarator and interdict as now craved.

It being admitted that the proceedings complained of, so far as they apply to ordinary plumbing work, were *ultra vires* of the defenders' statutory and common law powers, and therefore unjustifiable apart from a case of emergency, it appears to me that no possible question can arise unless the defenders can prove a formal requisition by the proper Government authority or its obvious equivalent, proceeding on a statement of emergency, to do the work at their own hand and not by contractors. But the defenders do not aver any requisition, or anything equivalent to a requisition. Even the request on which they found came from a subordinate. And that request neither alleged any emergency, as distinguished from that urgency which is alleged by all employers, nor did it exclude the employment of plumbing contractors. It is not necessary to decide what would have been the defenders' position had a formal requisition, after a representation by the defenders of the limited scope of their statutory and common law powers, been served on them by the proper authority, say in a case of invasion, to do the work at their own hands. Even in that case I do not think the defenders would have been entitled to go beyond their statutory and common law powers unless they were unable to delegate the work to contractors, and I am not satisfied any more than Lord Salvesen that even their duty would not be fulfilled by handing over their plant and tools and making their servants available for employment by the proper Government authority or their contractors.

LORD JUSTICE-CLERK—I have had an opportunity of reading Lord Dundas's opinion, and I concur in it. I would say only a word with regard to the argument founded on the proclamation. In my opinion the law in regard to that is well stated in Dicey "On the Constitution." After referring to the repeal of 31 Henry VIII, cap. 8, the author says that "rendered governmental legislation with all its defects and merits impossible, and left to proclamations only such weight as they may assume at common law. The exact extent of this authority was indeed for some time doubtful. In 1610, however, the solemn opinion or protest of the judges established the modern doctrine that royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law; they cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament.

The Court adhered.

Counsel for Pursuers and Respondents—Blackburn, K.C.—W. J. Robertson. Agent—J. Ferguson Reekie, S.S.C.

Counsel for Defenders and Reclaimers—Wilson, K.C.—W. T. Watson. Agent—William Boyd, W.S.

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*Wednesday, May* 29.

SECOND DIVISION.

[Bill Chamber.

BEATTIE *v.* LORD ADVOCATE.

*War—Process—Interdict—Competency—Military Service—Exemption—Military Service Act* 1916 (5 *and* 6 *Geo. V, cap.* 104), *secs.* 1 (1), 2 (2), 3 (1)—*Army Act* 1881 (44 *and* 45 *Vict. cap.* 8), *sec.* 190 (31)—*Reserve Forces Act* 1882 (45 *and* 46 *Vict. cap.* 48), *sec.* 15.

A coal miner held a departmental certificate of exemption from military service granted on 29th April 1916. The Home Secretary issued a Decertification Order cancelling all exemptions of post-war coal miners. An appeal by the coal miner to the Colliery Recruiting Court

on the ground that coalmining had been his sole occupation prior to the war, an interruption being due to temporary illness, was dismissed. Having received a notice calling him up for service with the colours, he presented a note of suspension and interdict on the ground that he being a pre-war coal miner was not affected by the Order decertifying post-war coal miners. *Held* that the note was *incompetent*.

Edward Beattie, coal miner, Banknock, Stirlingshire, *complainer*, presented a note of suspension and interdict against (1) the Right Honourable James Avon Clyde, Lord Advocate, as representing the Ministry of National Service, and the Director-General of National Service, (2) the Minister of National Service, and (3) the Director of Recruiting for Scotland, *respondents*, craving suspension of a notice dated 19th April 1918 calling him up for service with the colours, and also interdict against the issue to him of any further calling-up notice, or requiring him to join the colours, until such time as the complainer should become liable at law to be called up for active service.

The complainer *pleaded*, *inter alia*—"1. The complainer not being liable to military service, the calling-up notice complained of should be suspended, and interdict granted as craved."

The respondents pleaded, *inter alia*—"1. The note is incompetent. 4. The complainer's certificate of exemption having been validly withdrawn, the complainer is liable for military service, and the note of suspension and interdict should be refused."

The *facts* of the Case are given in the opinion (*infra*) of the Lord Ordinary (ANDERSON) who, on 2nd May 1918, sustained the first plea-in-law for the respondents and refused the note.

*Opinion.*—"This is a note of suspension and interdict at the instance of Edward Beattie, who describes himself as a coal miner, Banknock, Stirlingshire, and it is directed against the public authorities who are responsible for the obtaining of recruits for the British army.

"In the prayer of the note the complainer craves that the Court should suspend the calling-up notice dated 19th April 1918 which is addressed to him—a notice calling him up as a recruit for the army—and in the second place the Court is asked to interdict the public authorities responsible for recruiting from issuing to the complainer any further calling-up notice or requiring him to join the colours, and to grant interim suspension.

"Counsel for the complainer moved that the note should be passed, and that interim suspension should be granted. On the other hand the respondents' counsel maintained that the note was incompetent for reasons which I shall consider later, and he moved that it be refused at this stage.

"The facts which have given rise to this question are set forth in the pleadings, and they are to this effect—That the complainer is now thirty-two years of age, and he avers that he has been an underground coal miner since he was eighteen years of age. He says that is his sole occupation. At the time when war broke out he states that he was not in point of fact working in a coal mine, which he says was due to a temporary illness, and he avers that since 29th April 1916 he has been continually employed in that capacity. On 15th August 1915 the complainer registered himself under the National Registration Act of that year as a professional prize fighter and boxer.

"The matter depends in a great measure on the effect which the Military Service Act 1916 (5 and 6 Geo. V, cap. 104) had upon the position of the complainer at the time it came into operation with reference to his liability to military service.

"The complainer at the date when the Act affected him seemed to fulfil the conditions of military service which are set forth in the first section of the statute. It ought to be noted that the said Act is dated 27th January 1916, and by the provisions contained in the fourth section of the statute the Act came into operation not later than 10th February following, and the appointed date—that is to say, the date at which on considerations of age a man either did or did not become affected by its provisions—was a date not later than 3rd March following.

"Now, as I have said, the complainer at the date when that Act came into operation, and at the appointed date, seemed to satisfy the conditions making it incumbent upon him to be regarded as incorporated in the British army. He was then a male British subject. He had been on 15th August preceding ordinarily resident in Great Britain. He was of the appropriate age, being then twenty-nine years of age, and on 2nd November of the preceding year he was unmarried.

"The complainer's counsel maintained that he did not fall within the provisions of that section because of this clause which it contains—'Unless he is within the exceptions set out in the First Schedule of this Act.'

"If the exceptions set forth in the First Schedule are looked at it will be found that by the sixth clause of the schedule the Act did not apply to men who held certificates of exemption under the Act 'for the time being in force.'

"It is plain that this could not apply to the complainer when the Act came into force because his certificate is produced, and it shows that he did not obtain it until 29th April 1916. But if regard is had to the words 'for the time being in force' and to the common-sense of the thing it is manifest that the effect of a certificate of exemption is just this, that it suspends the operation of the statute so long as the certificate remains in force, but that if the certificate is withdrawn the provision of the Act revives and becomes applicable to the person who had held the certificate. That seems to me to be the ordinary effect to be attributed to these words 'for the time being in force,' and is in consonance with the common-sense view of the matter.

"Now it was resolved by the Home Department, who have control of mining matters in this country, to exempt gener-

ally those who were employed as coal miners, and the complainer received as I have said a certificate of exemption on 29th April 1916. In May 1917 the Home Secretary issued what has been called a Decertification Order, the effect of which was to recal or withdraw certificates of exemption which had been granted to men who had become miners subsequent to the outbreak of war. Post-war miners were to be called to the British Army, and only those miners who had been actually engaged in the industry of mining at the time when war broke out were to retain the privilege of being exempted from military service.

"The recruiting authorities considered that the complainer was a post-war miner, and that he was not entitled to the privilege of exemption in respect of having been engaged in mining at the time when war broke out, and, treating him as a post-war miner, had called him to the colours in the beginning of this year. What happened subsequent to that seems to be I think correctly set forth by the respondents in their fourth answer.

"When the complainer was called to the colours in the beginning of the present year he lodged a form of appeal No. 26 with a Special Court, called the Colliery Recruiting Court, which had been set up to deal as a Military Tribunal with this question of recruiting from coal miners, and the ground of his appeal was that he was being improperly regarded as a post-war miner, that he was a miner at the time when war broke out, and therefore was entitled to continued exemption.

"That was a question of fact, and the Colliery Recruiting Court was the appropriate tribunal to deal with that question of fact. The question so raised was considered by the Colliery Recruiting Court at a sitting at Edinburgh on 12th January 1918, and they then adjourned the case to enable the complainer to adduce evidence that he was not within the class decertified by the Home Secretary's Order of May 1917. They then held a subsequent sitting on 13th April 1918, and having then considered further the question, the Colliery Recruiting Court dismissed the complainer's appeal in respect that he had produced no evidence to satisfy the Court that a mistake had been made as to the date of the complainer's entry into the coal mining industry.

"That was a decision reached upon a question of fact, and on the only question on which the parties are at issue in the present proceedings. The respondents' counsel maintained that the note was incompetent on two grounds. In the first place, it was argued that this was a matter of administration, and therefore a court of law had no right to interfere with any decision which had been come to by the administrative body.

"In my judgment that proposition is too broadly stated. There is abundant authority, especially in decisions of the English Court since these Acts were passed, to the effect that if error in matter of law is alleged, or if unjust and improper procedure is complained of on the part of an administrative body charged with the administration of these Acts, it is competent for the party aggrieved to appeal to a court of law. That is based upon the inherent constitutional right of the subject to appeal to a law court where injustice has been suffered, even from the action of a body charged with purely administrative duties. And if complaint had been made here that the Colliery Recruiting Court had gone wrong in law or had erred in the matter of procedure, I should have had no hesitation in upholding my jurisdiction to consider that complaint and to give the appropriate remedy. But that is not the complaint.

"The second ground upon which the respondents' counsel maintained that the note was incompetent seems to me to be unassailable, and that ground is just this—that this Court is debarred from reviewing on a pure question of fact a decision which has been properly arrived at by the military tribunal.

"I think that proposition is sound both on a consideration of the statutory provisions and of the decisions pronounced in the English Courts. The second schedule of the Military Service Act of 1916 deals specially with the matter of appeal, and it provides for appeal from a local tribunal to an appeal tribunal, and from an appeal tribunal to a central tribunal. It is implied that there is no further appeal to a court of law with reference to the matters with which these tribunals are charged, to wit, determination of questions of fact. If further authority on this point were necessary, it is to be found in such a decision of the English Courts as that of *ex parte East*, 86 L.J. (K.B.), 598, where the Court of Appeal decided in terms that they were not a court of review of a decision of a military tribunal on a pure question of fact. (See also *ex parte Burns*, 86 L.J., 158.)

"The case of *ex parte East* is exactly in point, and holding as I do that I have no power to review the disputed question of fact which has been determined by the Military Tribunal, I decide that the note is incompetent, and on that ground I refuse it."

The complainer reclaimed, and referred to the following authorities:—*Institute of Patent Agents* v. *Lockwood*, (1894) 21 R. (H.L.) 61, 31 S.L.R. 942; *Rintoul* v. *Scottish Insurance Commissioners*, (1913) 7 Adam 210, 1913 S.C. (J.) 120, 50 S.L.R. 892; *Caledonian Railway Company* v. *M'Gregor*, 1909 S.C. 1010, 46 S.L.R. 721; *Tasker* v. *Simpson*, (1904) 7 F. (J.) 33, 42 S.L.R. 228; *Chivas* v. *Duke of Gordon*, July 11, 1804, F.C.; *Imray*, March 2, 1811, F.C.; *ex parte Burns*, (1916) 86 L.J., K.B. 158, *per* Lord Reading, C.J.; *Flint* v. *Attorney-General*, [(1918)] 1 Ch. 216; *Rosin* v. *Attorney-General*, (1918) 34 T.L.R. 417; Ersk. Inst. i, 2, 7.

Counsel for the respondents cited the Military Service Act 1916 (5 and 6 Geo. V, cap. 104), sections 1 (1), 2 (2), 3 (1).

At advising—

LORD JUSTICE-CLERK — In this case it follows from what I have said in *Green's* (55 S.L.R. 647) case that in my opinion the note

is incompetent. But the complainer will in my opinion be entitled, if he is convened before the proper "civil court," to raise the question as to whether he falls within the exemption clause, or any other question he may be advised to raise, and to ask a judgment on such questions with a right of appeal if any point of law is involved. It appears to me, however, that the only point the complainer desires to raise is a pure question of fact and a very simple question of fact, and if we had any discretion in the matter I do not think it would be right to encourage the litigation of such a question through all the courts by a note of suspension and interdict, with all the expense and delay that would involve, when it can be so speedily and economically disposed of otherwise.

LORD DUNDAS—I think the interlocutor reclaimed against is right, but I do not agree with all that the Lord Ordinary says in the course of his opinion. I shall therefore state briefly my own grounds of judgment. The complainer claims to be exempt from military service because he is within the sixth exception contained in the First Schedule of the Act of 1916, being the holder of a certificate of exemption, still in force, under the Act. His certificate was granted by the appropriate Department of the Government, in virtue of section 2 (2) of the Act, as to one belonging to a class of men employed in a work of national importance. But section 3 (1) of the Act empowers the Department to review and withdraw such certificates if they are of opinion that in the circumstances of the case that should be done. In May 1917 the Home Secretary issued what is called a Decertification Order to the effect that exemptions to coal miners who had entered the industry after the war should be cancelled. The complainer says that in January 1918 he was informed by the Inspector of Mines that he was considered to fall under the Order. He avers, however, that he did not in fact fall under it as he was a pre-war miner. He appealed on this ground to the Colliery Recruiting Court, but that body dismissed his appeal. This procedure was all *ex facie* in order; and the result of the withdrawal of the complainer's certificate of exemption was that, as provided by section 3 (3) of the Act, he was after the lapse of two months "deemed to have been enlisted and transferred to the Reserve in the same manner as if no such certificate had been granted," and that takes one back to the terms of section 1. The complainer has now received notice calling him up for military service, and he brings this suspension and interdict with the view of proving in the Court of Session that the decision of the Colliery Recruiting Court was wrong, and that he was in fact a pre-war miner. It would certainly be a serious matter for the authorities if objections of this kind can be made the subject of litigation in the Court of Session and perhaps the House of Lords. I do not, however, think that such procedure can competently be resorted to. But the complainer is not in my judgment without an appropriate and sufficient remedy. His proper course is, I apprehend, to appear before the Sheriff in answer to the notice calling him up. The procedure is that which is appointed by the statutes (see, *inter alia*, the Reserve Forces Act 1882, section 15, and the Army Act, sections 167 and 190, subsections (33) to (37)), including an appeal in the usual way to the Court of Justiciary. The complainer will thus have ample opportunity of proving if he can that a mistake has been made, and that he is not liable to be called up. But the procedure to which he has here resorted is in my judgment wholly incompetent.

LORD SALVESEN—The facts in this case are somewhat different from those in *Green's* case, but the question of competency appears to me to be the same. I do not propose to add anything to what your Lordships have said on that point, but merely express my concurrence in the judgment proposed.

The Court adhered.

Counsel for the Complainer (Reclaimer)—Christie, K.C.—Ingram. Agent—R. D. C. M'Kechnie; Solicitor.

Counsel for the Respondents—Lord Advocate (Clyde, K.C.)—Solicitor-General (Morison, K.C.)—Pitman. Agent—George Inglis, S.S.C.

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*Wednesday, June* 26.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

## CENTRAL MOTOR ENGINEERING COMPANY AND OTHERS *v.* GIBBS AND OTHERS.

(*See* 1917 S.C. 490, 54 S.L.R. 384.)

*Bankruptcy—Sequestration—Reduction—Competency—Relevancy—Firm and Partners Jointly Sequestrated—Citation of Partners—Oath of Petitioning Creditor—Mora—Bankruptcy (Scotland) Act* 1913 (3 *and* 4 *Geo. V, cap.* 20) *secs.* 20, 24, 25, *and* 26.

A joint sequestration of the estates of a firm and of the two partners thereof was awarded on 14th January 1915. The partners had been cited by a copy of the petition and warrant for each of them being left at the firm's place of business. The firm and the partners on 16th June 1917 brought an action for reduction of the award, but saving certain transactions entered into between the trustee and certain creditors of the partners subsequent to the date of the award. The pursuers alleged that the partners had not been duly cited to the bankruptcy process, because being furth of Scotland they should have been and were not cited edictally, and that the petitioning creditor being a company the affidavit upon which the award proceeded had not been signed by a principal officer of the company. They further alleged that if the sequestration was reduced *ab initio*