whom they are to be proved must be particularly condescended on in the petition craving the additional proof." Some of the cases to which we were referred were cases under that Act of Sederunt. But the Sheriff Courts (Scotland) Act of 1876 made what I cannot help thinking was a substantial difference in the position, because it was provided by section 28, sub-section 3, of that Act that "It shall be competent for the Sheriff where the action is before him on appeal on any point to open the record *ex proprio motu* if the record shall appear to him not to have been properly made up, or to allow further proof." So far as I can see, no qualification on the allowance of proof was made by the statute, although I do not for a moment doubt that the exercise by the Sheriff of the power so conferred upon him was a power that he had to exercise judicially. Unless good and substantial cause was shown for the allowance of further proof, I take it that the Sheriff would not have allowed such proof. Assuming that the Sheriff apparently unwisely exercised his discretion, then the Court of Session would no doubt be entitled to put him right. But that is not the case made here. When the Act of 1907 was passed an entire omission was made to give the Sheriff such powers as he had under the Act of 1876. A correction, however, was made by the Act of 1913. Under the 27th section of the 1907 Act as amended it is provided, just as in the Act of 1876, that it shall be competent for the Sheriff when the action is before him on appeal to allow further proof.

In the present case the Sheriff, before whom the case came on appeal, considered it was right and proper to allow further proof, and as your Lordship has pointed out, in exercising his discretion he said that unless he did so there might be a miscarriage of justice. He has stated clearly that having seen the averments and heard argument upon them it was essential that there should be this allowance of proof. I think it would be improper in such circumstances, unless a far stronger case was made out than was made in this case, to interfere with the discretion of the Sheriff.

LORD ANDERSON — I agree. The Act which regulates Sheriff Court procedure at the present time is that of 1907, as amended by the Act of 1913. Section 27 empowers the Sheriff on appeal to allow further proof in a case in which the proof has been closed. Now *ex facie* of the statutory provision the Sheriff would seem to have an unfettered discretion in the matter of the allowance of additional proof. But the Sheriffs in Scotland are experienced lawyers and they will only allow additional proof for good and sufficient reasons. In the present case the Sheriff says the reason which moved him to allow the additional proof which has been led was that he thought that otherwise there would be a miscarriage of justice. As I understood Mr Scott's argument, founding upon *Miller* v. *Mac Fisheries* (1922 S.C. 157), it was that additional proof should not be allowed by the Sheriff except where there was a real case of *res noviter veniens ad notitiam*, just as in the Court of Session under the provisions of the Jury Courts Act. Mr Scott maintained with some force that this was not a case of *res noviter*, but merely a case of *novi testes*. It seems to me that Mr Scott's contention is not well founded. In my opinion the Sheriff is not limited to such a case in the way of allowance of further proof, but may allow further evidence, though it is merely that of new witnesses adduced to speak to matters already spoken to. Therefore I agree with your Lordships that we should follow the course of the decisions which were alluded to, most of which were, I think, founded upon the Act of Sederunt of 1839, the effect of these being that the Court will not lightly interfere with the discretion of the Sheriff in this matter.

The LORD JUSTICE-CLERK did not hear the case.

The Court refused the appeal.

Counsel for Pursuer and Respondent—A. R. Brown. Agents—W. & J. L. Officer, W.S.

Counsel for Defender and Appellant — MacRobert, K.C.—Scott. Agents—Ronald & Ritchie, W.S.

Tuesday, July 4.

FIRST DIVISION.

[War Compensation Court at Edinburgh.

MONYPENNY *v.* LORDS COMMISSIONERS OF ADMIRALTY.

War—War Compensation Court—Jurisdiction—Compensation for Acts Done under Defence of Realm Regulations—Explosion of Mine by Naval Authorities on Claimant's Property—Injury to Farm Steading — Competency of Claim — Averments — Relevancy—Indemnity Act 1920 (10 *and* 11 *Geo. V, cap.* 48), *sec.* 2 (1) (*b*), *and Schedule, Part II—Defence of the Realm Act* 1914 (5 *Geo. V, cap.* 8), *sec.* 1 (1)—*Defence of the Realm Regulations, Reg.* 2 (*f*), *Dated* 28*th November* 1914.

A mine which had drifted ashore on ground forming part of a farm was exploded by Admiralty officials. The explosion caused damage to the farmhouse and steading situated some little distance away, and the proprietor claimed compensation in the War Compensation Court for the damage done. The mine was a British one, and when exploded was above the high-water mark. *Held* (recalling the deliverance of the War Compensation Court) that on a sound construction of the Indemnity Act of 1920, particularly section 2 (*b*) and the Schedule, Part II, the claim was one which the War Compensation Court was competent and had jurisdiction to entertain, and that on the facts averred it could not be dismissed as irrelevant.

The Indemnity Act 1920 (10 and 11 Geo. V, cap. 48) enacts—Section 2 (1)—"Notwithstanding anything in the foregoing section restricting the right of taking legal proceedings, any person not being a subject of a state which has been at war with His Majesty during the war, and not having been a subject of such a state whilst that state was so at war with His Majesty—(*a*) . . . (*b*) who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise during the war of any prerogative right of His Majesty, or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage, and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned, and the decision of that tribunal shall be final—Provided that (1) . . . if either party feels aggrieved by any direction or determination of the tribunal on any point of law, he may, within the time and in accordance with the conditions prescribed by rules of court, appeal to the Court of Appeal, or as respects Scotland to either Division of the Court of Session, and the decision of the Court of Appeal or Court of Session on any such appeal shall with the leave of that Court, but not otherwise, be subject to appeal to the House of Lords." Schedule, Part II—"The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or in respect of loss of mere pleasure or amenity."

The Defence of the Realm Regulations provide—"2. It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety or the defence of the realm it is necessary so to do—(*d*) to cause any buildings or structures to be destroyed . . . ; (*e*) to take possession of any . . . explosive substances . . . ; (*f*) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid."

Charlton James Blackwell Monypenny, Esquire, of Pitmilly, *claimant*, lodged a claim in the War Compensation Court against the Lords Commissioners of Admiralty, *respondents*, for compensation for damages to farm buildings, of which he was proprietor, alleged to be due to the explosion by the respondents of a mine which had drifted ashore in the vicinity of the farm.

On 16th March 1922 the War Compensation Court issued a deliverance in the following terms—"This claim, dated the 7th day of January 1921, having on the 13th day of March 1922 been adjudicated upon by the Court, it is this day adjudged and declared that the claimant has suffered no loss by reason of interference on the part of the Crown with his property or business in respect of which any payment to him out of public funds can be awarded by the Court."

The claimant appealed to the First Division of the Court of Session.

The note of appeal set forth, *inter alia*—"1. The following statement is taken from the particulars of claim lodged by the claimant:—In January 1919 a mine which was washed ashore at Kilminning Farm was exploded by Admiralty officials from Rosyth. No intimation of the proposal to explode it was given to the proprietor or his factor, or even to his tenant Mr S. W. Weir, who held on lease the farm of Kilminning, including the farmhouse and steading, and who had sub-let the farmhouse to Mr W. W. H. M'Grady. Before exploding the mine the officials in question requested Mr M'Grady to open the windows and to retire with his family to a safe distance. They also assured him that they would be responsible for all damage done. As the result of the claimant not being afforded an opportunity of protecting his property by the erection of a sandbag barricade or other similar structure, or of engaging expert assistance to render the mine innocuous, the farmhouse and steading were seriously damaged by the explosion. Large portions of the ceilings and partitions of the farmhouse collapsed, and the roofs of the steading were almost entirely stripped of their tiles. The damage done was surveyed by Admiralty officials, but no compensation has been paid. The farmhouse and steading are now uninhabitable, and have not been occupied since the explosion other than a portion which has lately been repaired at the proprietor's own expense. 2. The estimated amount of the damage sustained by the claimant is stated in the claim at £1100, beiug the cost of repairing the farmhouse and steading damaged by the explosion. 3. The following statement is taken from a memorandum lodged by the respondents:—The mine was washed ashore and was discovered on the shore near Kilminning, Crail, on or about 10th January 1919. It constituted a grave and immediate danger to life and property in the locality in which it was found. It was necessary that this danger should be got out of the way. This was apparent to Mr Freemantle, gunner R.N., who inspected the mine and also to Mr W. W. H. M'Grady, the occupant of Kilminning farm, who apprehensive of the danger entreated Mr Freemantle to destroy the mine at once. Mr Freemantle found on inspection that looking to the situation in which the mine was and to the state it was in, the only practicable plan for dealing with the problem was to explode the mine. Accordingly the mine was

exploded by Mr Freemantle on 10th January 1919. Before he exploded it he gave warning of his intention to do so to the residents in the district. No undertaking to pay for damage was given. It was stated by the respondent's counsel at the hearing before the War Compensation Court on 13th March 1922 that the mine was a British one, and that when it was exploded it was above high-water mark. . . . 5. The claimant submits that the damage to the said property was sustained by reason of interference therewith through the exercise or purported exercise during the war of a prerogative right of His Majesty, or alternatively of a power conferred by the Defence of the Realm Regulations, and the appellant is aggrieved by and appeals against the decision of the War Compensation Court that the claimant has suffered no loss by reason of interference on the part of the Crown with his property or business, in respect of which any payment to him out of public funds can be awarded by the Court."

Argued for the claimant—The War Compensation Court had taken the view either that the claim was one which it was not competent to deal with or that it was irrelevant, and so did not justify an award of damages under the Indemnity Act 1920. Both views were wrong. The claim satisfied the conditions of section 2 (1) (*b*) and of Part II of the schedule. The act of the gunner in exploding the mine had not been repudiated, and must therefore be held to be an act of State done by virtue of statutory powers or of the royal prerogative, unless the respondents could show some other authority. The presumption was that it was an act of the competent naval authority under the Defence of the Realm Regulations, Rule 2. It was admittedly done to secure the safety of the public. "Public safety" meant more than "defence of the realm." If not alone under the Regulations, then the act could only be an exercise of the royal prerogative to do everything necessary for the proper conduct of hostilities, which was in no way abrogated by the statute—*Attorney-General* v. *De Keyser's Royal Hotel, Limited*, (1920) A.C. 508, *per* Lord Dunedin at pp. 523 and 526, and Lord Moulton at p. 554; *In re a Petition of Right*, (1915) 3 K.B. 649, *per* Avory, J., at p. 651, Lord Cozens Hardy at p. 659, and Warrrington, L.J., at p. 665; Chitty on Prerogatives of the Crown, p. 44, Act. 13, Car. 2, cap. 6; Halsbury's Dictionary, *s.v.* "Constitutional Law," vol. vi, p. 418; Anson, "Law and Custom of the Constitution," vol. ii, p. 3. The contention that the gunner was merely exercising his rights as a citizen was unsound. He had gone on to the claimant's property to commit an act which as a private citizen he had no common law right to commit and which was prohibited by the Defence of the Realm Regulations. Further, the loss and damage was direct, and the act of the gunner in going on to the claimant's property and causing the explosion—which he knew was dangerous to the farm buildings—was "direct" and particular interference with the claimant's property. The words in the section were to be taken in their popular sense, "direct" being the opposite of "remote"—*Weld Blundell* v. *Stephens*, 1920 A.C. 956, *per* Lord Sumner at p. 983; *Elliot Steam Tug Company* v. *The Shipping Controller*, 1922, 1 K.B. 127, *per* Bankes, L.J., at p. 131; *A. & B. Taxies* v. *Secretary for State for Air*, reported in the *Times* newspaper of 12th May 1922. The claim was not founded on negligence but on section 2 (1) (*b*) of the act. The fact of negligence on the part of the gunner did not exclude the claim under the section.

Argued for the respondents—From the averments it was clear that the claim was founded on negligence on the part of the gunner who exploded the mine. Such a claim was not within the jurisdiction of the War Compensation Court—Indemnity Act 1920, section 1. But if it was, the claim did not satisfy the conditions of section 2 (1) (*b*) and Part II of the schedule. The act of the gunner was not an exercise of the royal prerogative. He was doing what any citizen was entitled to do for the public safety—*Attorney-General* v. *De Keyser's Royal Hotel, cit. sup.*, *per* Lord Parmoor at p. 571. There was no case here of the exercise of a power under any enactment relating to the defence of the realm. The Defence of the Realm Regulations, Rule 2, (*d*), (*e*), and (*f*), did not apply. The gunner was not acting as the competent naval authority and his act was not for the defence of the realm. But if the act did come within the Regulations they were of general application in the meaning of Part II of the schedule. There was, further, no direct loss or damage caused by direct and particular interference with the claimant's property. The mine was not his property. The interference which had caused the damage was the accidental result of an act which had nothing to do with the property damaged. It might have been direct interference if there had been an order to destroy the steading. Any damage that had been done must be held as due simply and solely to the existence of a state of war for which there could be no claim—schedule, Part II. The decision of the War Compensation Court should therefore be sustained.

LORD PRESIDENT—It appears from the adjudication upon this claim by the War Compensation Court that that tribunal either held the appellant's claim to be one which lay beyond their competency or jurisdiction, or that it was irrelevant to justify an award in his favour under the Indemnity Act 1920. So much appears to follow from the declaration that the appellant had suffered no loss in respect of which any compensation "can be awarded." The representations of the parties with regard to matters of fact are to be found in paragraphs 1 and 3 of the note of appeal taken from the particulars of claim lodged by the appellant with the tribunal, and from a memorandum similarly lodged by the respondents, supplemented (in the case of the latter) by a statement by the respondents' counsel that the mine was a British one, and that when it was exploded it was above high water-mark.

The first question is whether the appellant's claim is one which it is within the competency or jurisdiction of the War Compensation Court to entertain? And the second is whether the averments or submissions of fact presented by the parties to that Court — assuming them to be well founded—are relevant to support the claim? The two questions may conveniently be disposed of together.

In order to form proper matter for adjudication under the jurisdiction of the War Compensation Court the loss or damage incurred or sustained must be "direct loss or damage by reason of interference with [the appellant's] property . . . through the exercise, or purported exercise, during the war of any prerogative right of His Majesty, or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder." These are the words of section 2 (1) (*b*) of the Indemnity Act. Further, the compensation claimed must be "only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property . . ., and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality," or to certain other matters which have no relation to the facts of the present case. These are the provisions contained in Part II of the schedule to the Indemnity Act.

The mine belonged to the respondents. It had accidentally found its way to dry land on (as I understand the averments to represent) the appellant's property. It was destroyed by officials of the respondents, who went on to the appellant's land for the purpose and exploded it there. The house and steading, also the property of the appellant, were situated some little distance away, but to the knowledge of the officials in question they were within the ambit of interference by the explosion. Whether it would make any difference that the mine was destroyed not actually on the appellant's property but so near to it as to expose his buildings to the impact of the explosion, it is unnecessary at this stage of the case to determine. I do not wish in any way to anticipate the results of inquiry into the actual facts, but it is impossible to hold that the averments made are irrelevant to support a case of direct interference with the appellant's property. It is clear that the loss was not due merely to the existence of a state of war. Even if the arrival of the mine at the appellant's seaboard could be ascribed to that cause, the deliberate destruction of the mine on his property could not. Nor was the appellant's loss due to general conditions prevailing in the locality. It was, *prima facie* at anyrate, direct and particular in relation to the appellant's property.

The next question is whether the destruction of the mine on the appellant's property, and so near the house and steading as to injure them, is relevantly averred as an act done in the exercise or purported exercise either of prerogative right or of some power under the Regulations for the Defence of the Realm? So far as the averments go, I think it is not doubtful that it was at least a purported exercise of power under the last branch of Regulation II. I express no opinion as to whether the act as averred might or might not be attributed to the exercise of power under the royal prerogative. It is enough for the present purpose that it may be attributed to the powers of interference with private property under the Regulations.

Some argument was presented on the question whether the purpose of the Regulations — that, namely, of "securing the public safety and the defence of the realm" —was wide enough to cover an act such as this. It was said that the purpose of the Regulations did not extend beyond acts which had in view the prosecution of hostilities or defence against hostile attack, while the destruction of this mine was an operation directed merely to the removal of a danger to the neighbourhood. The words in question come from the Defence of the Realm Act 1914, which authorised His Majesty to make the Regulations. The phrase is not exactly the same as that which was used in the older Defence of the Realm Acts, for instance in the Act of 1842. If reference is made to the Regulations made under the Act of 1914 it is easy to discover examples which make it clear that "the public safety" covers a wider ambit than "the defence of the realm." Things which might be prejudicial to the public safety, and against which the Regulations provide, include precisely such dangers as those arising, for example, from the presence and handling of explosives, or from conduct calculated to create trouble and dissension, not merely among the forces but among the public at large.

Again, it was argued that any interference with the appellant's property involved in exploding the mine on his land and near his house and steading was truly attributable to the enforcement of the Regulations, and of regulation II in particular, in the interests of public safety. The argument was based on the terms of the schedule. But I think it is fallacious, for the loss occurred in consequence of the exercise of a power, not in consequence of the enforcement of any order of local or general application.

A further point was submitted for the respondents. It was said that the act was not one which could be attributed to a competent naval or military authority as defined by Regulation 62, but was in the nature of a voluntary service rendered by the officials concerned, and not in pursuance of any duty or authority committed or delegated to them by their superiors as competent naval authorities. Without in any way anticipating the result of inquiry into the facts, it is impossible to accept this defence at the stage of relevancy. The mine belonged to the respondents, and I did not understand the respondents to contend that it was not in the course of their duty either

to remove it or to destroy it in the interests of public safety.

It seems to me therefore (1) that the appellant's claim is one which the War Compensation Court is competent and has jurisdiction to entertain, and (2) that the facts averred in support of it cannot be disposed of as irrelevant without inquiry. The case must go back to the War Compensation Court—with a finding that that tribunal has competency and jurisdiction to deal with the claim—for inquiry into the circumstances of the claim before further answer.

We were informed at the last moment by the respondents that the case is a test one, and they asked us to grant leave for appeal. The case is obviously a proper one for appeal, but it seems indispensable that the facts should be definitely ascertained before it is carried to the House of Lords. I think therefore that leave should be refused meantime.

LORD MACKENZIE—I am of opinion that, on the facts as stated, this is a case in which the appellant may be due a payment out of public funds, and that therefore the War Compensation Court has jurisdiction to inquire into the matters alleged. I come to this conclusion on a construction of the Indemnity Act of 1920, particularly section 2 (*b*) and the Schedule, Part II. There are, to my mind, in the case laid before us averments of "direct loss and damage . . . by reason of direct and particular interference" with the property of the appellant, and that the interference was through the exercise or purported exercise of power under an enactment relating to the defence of the realm.

The case was argued upon the question of the Royal prerogative, but it is not necessary to go into that, because when one turns to Regulation 2 of the Defence of the Realm Regulations it appears that there is there sufficient warrant for what was done by the gunner in the Royal Navy who was charged with the duty of carrying out the operation of exploding the mine. When it was put to counsel for the Admiralty whether they disavowed that action, they of course quite properly said that they had no intention whatever of disavowing what was done by the gunner. It is not only the Competent Naval or Military Authority, as defined in the Defence of the Realm Regulations, who can carry out the operation—it is any person duly authorised by him. From what has been stated at the bar one would be surprised to hear that there was any evidence led to the effect that what was done here was not done by a duly authorised person.

It was admitted by Mr MacRobert, on behalf of the Admiralty, that the operation of exploding the mine was one for the purpose of securing the public safety, that is to say, for securing the safety of the population in the district. It was not contended by him that public safety was to be read only with reference to the safety of the State and as a synonym for the defence of the realm. He admitted that the operation was quite properly carried out and was a necessary operation for the safety of those in the district. As the result of that operation the appellant suffered direct loss and damage to his property, and that appears to be a case in which, if the facts as stated are proved, the War Compensation Court may consider it proper to make an award.

There was an attempt to maintain that the averments were not relevant because there were statements which would show that there had been negligence on the part of those who carried out the operation. But I do not understand it to be contended that, as an alternative to the argument presented for the appellant, the Admiralty proposed to show that the only remedy to the appellant in this case was to bring a personal action of damages against the gunner who exploded the mine.

LORD SKERRINGTON—If the facts are as stated by the claimant, he has suffered direct injury to his property in consequence of the action of an Admiralty official in entering upon his land and exploding a mine thereon. The action of the official is not disavowed, but, on the contrary, it is stated by the respondents to have been necessary in the circumstances. So far as it is possible to judge from the somewhat rudimentary pleadings and from the explanations of counsel, I think that the claim for compensation was one which, *prima facie* at least, fell within the Indemnity Act 1920, and that the Compensation Court ought not to have refused it without inquiry into the facts. I agree with what your Lordships have said in regard to the construction of the statute and of the Regulations.

LORD CULLEN did not hear the case.

The Court recalled the deliverance of the War Compensation Court and remitted to the Court to proceed as accords.

Counsel for the Claimant and Appellant—Mackay, K.C.—Cooper. Agents—Laing & Motherwell, W.S.

Counsel for the Respondents—MacRobert, K.C.—Black. Agent—Norman M. Macpherson, S.S.C.

Saturday, July 8.

FIRST DIVISION.

ELLERMAN LINES, LIMITED (S.S. "CITY OF NAPLES") *v.* TRUSTEES OF HARBOUR OF DUNDEE.

(See *ante*, p. 119.)

Expenses—Taxation—Allowances to Witnesses—Seafaring Witnesses Detained in this Country so that they might be Present at the Proof—Wages of Substitute for Witness Detained—C.A.S. 1913, *K. IV*, 1, *App. I, v*, 3.

Pursuers who were successful in an action of damages for injury to a ship had detained in this country the master and certain of the officers for periods up to ninety-six days in order to enable