obtained information as to locality of which they might have availed themselves if they attributed importance to construction, but that they never did so. And further, looking at Hamilton's evidence in the record and Maxwell's evidence, it is plain that it was not Maxwell, the secretary of the assured, who introduced into the proposal the words "above address." Indeed Maxwell did not know they were there, and would not have signed if he had known. It was Hamilton, the broker of the insurers, who was seeking to obtain the contract, who wrote the words "above address," and by the words "supposing he did" (*i.e.*, supposing Maxwell said something to the effect "We garage our own cars") it is plain, I think, that Hamilton was not prepared to say, and could not truthfully say, that Maxwell made the representation upon which all the edifice of an alleged statement that the car would be garaged in a stone or brick building and not in a wooden building is founded.

In my opinion the resistance of the insuring office who have taken the premium to satisfy the claim of the assured upon his policy is neither creditable nor capable of being sustained. I think the assured is entitled to succeed on this appeal.

Their Lordships ordered that the interlocutor appealed from be varied by omitting the first finding [that the answer to the fourth question contained a misstatement material to assessing the premium], and restoring the second finding of the Lord Ordinary [that the policy was void because of the untrue answer to the fourth question], and with this variation affirmed the interlocutor with costs against the appellants.

Counsel for Pursuers and Appellants — Mackay, K.C. — Gentles, K.C. — Patrick. Agents — Manson & Turner Macfarlane, W.S., Edinburgh — Simmons & Simmons, Solicitors, London.

Counsel for Defenders and Respondents —Christie, K.C.—Ingram. Agents—Allan, Lowson, & Hood, Edinburgh—Carpenters, Solicitors, London.

COURT OF SESSION.

Saturday, June 24.

FIRST DIVISION.

[Exchequer Cause.

LARGO AND LUNDIN LINKS GAS COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue — Income Tax — Lands and Heritages — "Mills, Factories, and Similar Premises" — Annual Value — Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *Nos. I and III of Schedule A — Finance Act* 1919 (9 *and* 10 *Geo. V, cap.* 32), *sec.* 18 (2) *and* (3).

Rule 3 of No. III of the rules applicable to Schedule A of the Income Tax Act 1918 provides as follows:—"In the case of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments, or heritages, the annual value shall be understood to be the profits of the preceding year." Section 18, subsections (2) and (3) of the Finance Act 1919 (9 and 10 Geo. V, cap. 32), provides, *inter alia*—"(2) In estimating the profits for any year of any of the concerns enumerated in Rules 1, 2, and 3 of No. III of the rules applicable to Schedule A, there shall be allowed to be deducted as expenses incurred in any year, on account of any mills, factories, or similar premises owned by the person carrying on the concern and occupied by him for the purposes of such concern, a deduction equal to one-sixth of the annual value of those premises. (3) Annual value for the purposes of this section shall be estimated according to the principles governing the estimation of the annual value for the purposes of Schedule A of mills, factories, and similar premises in the United Kingdom."

Opinions per curiam that the annual value mentioned in the above section is to be estimated according to the principles which apply to ordinary lands or heritages occupied as a mill or a factory under No. I of Schedule A, *i.e.*, the estimation is based on the rent, actual or valued, and not on the principles which govern the estimation of the annual value of the special and peculiar concerns enumerated in Rules 1, 2, and 3 of No. III of Schedule A.

Opinion reserved per Lord Cullen as to the method of valuation where the whole concern as distinguished from a part fell to be regarded as embracing nothing but mills or factories or similar premises.

The Income Tax Act 1918 (8 and 9 Geo. V, cap. 40) enacts—"First Schedule. Schedule A. No. I.—*General Rule for estimating the annual value of lands, tenements, hereditaments or heritages.*—In the case of all lands, tenements, hereditaments, or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II and No. III of this Schedule), the annual value shall be understood to be—(1) The amount of the rent by the year at which they are let, if they are let at rack-rent and the amount of that rent has been fixed by agreement commencing within the period of seven years preceding the fifth day of April next before the time of making the assessment; or (2) If they are not let at a rack-rent so fixed, then the rack-rent at which they are worth to be let by the year. . . . No. III.—*Rules for estimating the annual value of certain other lands, tene-*

ments, hereditaments, or heritages which are not to be charged according to the preceding General Rule.—(1) In the case of quarries of stone, slate, limestone, or chalk, the annual value shall be understood to be the profits of the preceding year. (2) In the case of mines of coal . . . and other mines, the annual value shall be understood to be the average amount for one year of the profits of the five preceding years: Provided that— . . . (3) [*Quoted supra*]."

The Finance Act 1919 (9 and 10 Geo. V, cap. 32), sec. 18 (2) and (3) is quoted *supra*.

The Largo and Lundin Links Gas Company, Limited, *appellants*, being dissatisfied with a decision of the Commissioners for the General Purposes of the Income Tax Acts for the St Andrews Division of the County of Fife confirming an assessment to income tax made upon them on the sum of £435 under Schedule A of the Income Tax Acts for the year ending 5th April 1920, appealed by way of Stated Case. F. G. H. Smith, Inspector of Taxes, Cupar, was *respondent*.

The Case set forth, *inter alia*—"1. The following *facts* were admitted or proved:—(1) The appellants, the Largo and Lundin Links Gas Company, Limited, are a private limited liability company and were incorporated on 23rd October 1919. They have their registered office at Harbour Brae, Largo. (2) They carry on the manufacture of gas and as such are one of the concerns enumerated in Rule 3 of No. III of the rules applicable to Schedule A of the Income Tax Act 1918 (8 and 9 Geo. V, cap. 40). (3) They own property consisting of land, buildings, plant, machinery, pipes, &c., situated at Harbour Brae and elsewhere in Largo and Lundin Links, which they occupy and use for the purposes of and in connection with their gas works undertaking and on which they are assessed under Rule 3 of No. III of the rules applicable to Schedule A aforesaid. (4) Rule 3 of No. III of the rules applicable to Schedule A of the Income Tax Act 1918 reads as follows:—[*Quoted supra*]. (5) In terms of that rule above quoted the annual value of the concern was adjusted subject to the deduction which is under dispute at - - - - - - £435 0 0

Less adjustment of allowances for depreciation - 219 0 0

leaving - £216 0 0

(6) Section 18, sub-sections (2) and (3), of the Finance Act 1919 (9 and 10 Geo. V, cap. 32) reads as follows:—[*Quoted supra*]. (7) The appellants fall within sub-section (2) of section 18 of the Finance Act 1919 as a concern enumerated in Rule 3 of No. III of the rules applicable to Schedule A. 2. *Mr J. Miller Thomson, W.S.*, Edinburgh, on behalf of the appellants contended—(1) That by virtue of the foregoing provisions of the Finance Act 1919 the appellants were entitled to a deduction from the assessment of one-sixth of the profits of the preceding year, which for the purposes of the present case the appellants claim to be one-sixth of £435, *i.e.*, £72, 10s.; (2) that the whole heritable subjects occupied by the appellants as a gas works constituted one factory, each and every part of which was indispensable to the manufacture of gas and inseparable from the others; (3) That there is no principle to be found in the statute for ascertaining the annual value of a part of such a factory artificially separated from the parts which are in practice necessarily conjoined with it; and (4) that the only 'principle governing the estimation of the annual value' referred to in section 18 (3) of the Finance Act 1919 is that found in Rule 3 of No. III of the rules applicable to Schedule A of the Income Tax Act 1918. 3. The Inspector of Taxes (Mr F. G. H. Smith) on behalf of the Crown contended—(1) That the allowance granted by section 18 (2) of the Finance Act 1919 on account of 'mills, factories, or similar premises' did not extend to the appellants' whole concern but was limited to those buildings which were similar in character to mills or factories, *e.g.*, buildings containing moving plant and machinery and buildings ancillary thereto, but excluding services, mains, stores, &c., and also the gasholder which was purely plant, and which had already been the subject of wear and tear allowance; (2) that in terms of section 18 (3) of the Finance Act 1919 the annual value fell to be estimated according to the General Rule No. 1 of Schedule A and not according to Rule 3 of No. III of the rules applicable to Schedule A of the Income Tax Act 1918; and (3) that the appellants had furnished no information on which the allowance claimed might be accurately computed but from information derived from past accounts of the concern the annual value of the buildings might be taken at £120 (based on a cost of about £2000), and on these figures the allowance to which the appellants were entitled was £20."

The *questions* for the opinion of the Court were—"(1) Whether the deduction allowed by section 18 (2) of the Finance Act 1919 falls to be calculated on the annual value of the whole concern of the appellants, or only on the annual value of such part of the premises as can be shown to be similar in character to mills or factories; and (2) Whether the annual value for the purposes of section 18 (2) of the Finance Act 1919, falls to be ascertained according to the General Rule No. 1 of Schedule A, or according to Rule 3 of No. III of the rules applicable to Schedule A of the Income Tax Act 1918."

At advising—

LORD PRESIDENT—The appellant company own a gaswork. As such they have been assessed to income tax under Schedule A of the Income Tax Act 1918, the rules for estimating the annual value of their lands or heritages being those contained in No. III of that schedule. It is a peculiarity of the scheduled classification of the various kinds of profits and gains brought into charge by the Income Tax Act that the appellant company, although it carries on a business or trade in the lands or heritages which it owns, is assessable to tax only under Schedule A on the annual value of such lands or heritages, and not also and separately under Schedule D on the annual amount of the profits accruing from the business carried on by it there. The reason

may not inaccurately be said to be that by Rule 3 of No. III of Schedule A the profits made by the manufacture, distribution, and sale of gas are slumped with those strictly arising from the lands or heritages as such. The whole gains arising from the property and its use as a gaswork are treated as the profits of one concern, and are classed as profits arising out of lands or heritages. The rule goes on to provide that the annual value of the concern "shall be understood to be the profits of the preceding year," and by Rule 8 these profits are directed to be assessed in accordance with the rules of Schedule D, except in so far as those rules may be inconsistent with the rules of No. III of Schedule A. The only inconsistency which need be noticed for the purposes of the present case is one which inevitably arises from the slumping together of the profits accruing from the business and those properly arising from the lands or heritages as such, and is the direct result of the provisions of Rule 5 of No. III of Schedule A—that is to say, no deduction is allowed to be made from the produce of the concern in respect of the annual value or rent of the lands or heritages in which the business is carried on. If the assessment were one of profits properly belonging to Schedule D, such a deduction would be appropriate and allowable.

By section 18 (2) of the Finance Act 1919 a further deduction with regard to the assessment of "the profits for any year of any of the concerns enumerated in Rules 1, 2, and 3 of No. III of Schedule A" is given. In the present case we are dealing particularly with a concern enumerated in Rule 3, but it is important to have regard to the nature of the concerns enumerated in all three rules. The direction is that in assessing those profits "there shall be allowed as expenses incurred in any year, on account of any mills, factories, or similar premises owned by the person carrying on the concern, and occupied by him for the purposes of such concern, a deduction equal to one-sixth of the annual value of those premises." Before the Commissioners the Inspector of Taxes offered to concede the deduction of a figure representing one-sixth of the estimated annual value of certain parts of the appellant company's premises which he was willing to admit fell under the description of "mills, factories, or similar premises." These parts he valued for the purposes of this proffered concession in the same way as ordinary mills, factories, or similar premises are valued for the purposes of Schedule A—that is, at their estimated rental. But the appellant company rejected this offer as being contrary to the Act, and contended that they were entitled to a deduction of one-sixth part of the assessed profits of the whole concern. This contention raises two points—(1) Are the appellant company's whole premises those of a mill or factory, or similar to the premises of a mill or factory, within the meaning of the Act of 1919? and (2) If so, is the annual value of their "premises" measured by the annual value of the profits of their "concern"? It is on these two points that the first and second questions put to us in the case substantially turn.

It is clear that the first point cannot be determined in this appeal. There are no materials in the case on which a determination of it can proceed; for it is in the first instance a question of fact, and no facts are found proved with regard to it. It is probably safe to say this much, that the property of any of the concerns enumerated in Rules 1, 2, and 3 of No. III of Schedule A may include a mill or a factory or premises *ejusdem generis* therewith—though it is unlikely as regards some of them; and further, that the property of some of them may conceivably consist wholly of premises of that character. But it is impossible to conclude from the bare circumstances that the appellant company's lands or heritages are of the kind ordinarily known as a gaswork, that they consist either wholly or partly of such premises. If in fact it consists only in part of such premises, the Act does not warrant an extension of the deduction beyond the annual value of that part.

The second point thus becomes really hypothetical. But as it was the subject of much argument I think I may express an opinion upon it. Assuming that the portions of the lands or heritages which the inspector was willing to admit fell under the description of mills, factories or similar premises had been proved to be of that character, the question is, on what principle the annual value of those portions should be estimated. Section 18 (3) of the Act of 1919 expressly provides that the annual value of such portion of the premises as consists of mill, factory, or something *ejusdem generis*, is to be "estimated according to the principles governing the estimation of the annual value for the purposes of Schedule A of mills, factories, and similar premises in the United Kingdom." What are those principles? Plainly in my opinion they are not those which govern the estimation of the annual value of the special and peculiar concerns enumerated in Rules 1, 2, and 3 of No. III of Schedule A, but those which apply to ordinary lands or heritages occupied as a mill or a factory under No. I of Schedule A—in other words, the estimation is based on the rent, actual or valued.

In the circumstances of the case we cannot formally answer either of the questions put to us, and the appeal must be dismissed.

LORD SKERRINGTON—The case does not set forth the facts which are necessary in order to enable us to answer either of the questions. As, however, we heard a full argument as to the construction of the Income Tax Act of 1918 and the Finance Act 1919, there is no reason why we should not state our opinion as to the construction of these statutes for the guidance of the parties. I have had the advantage of studying the opinion which has just been delivered and I entirely agree with it.

LORD CULLEN—I am of the same opinion. It is, I think, too clear for argument that under section 18, sub-section (2), of the Act of 1919 the mills or factories or similar

premises owned by the person carrying on the concern, assessable under Rules 1, 2, or 3 of No. III of the rules applicable to Schedule A, are not necessarily identical with the whole heritable subjects embraced in the concern. The appellants, however, argued that in the case of a concern called a gas-works there must in fact be this identity. I am unable to see how we can affirm that general proposition. Nor do I see how we can, on the case as stated, affirm the particular proposition that the appellant's concern is wholly made up of mills or factories or similar premises. All we are told about it by the case is that it consists of "lands, buildings, plant, machinery, pipes, &c." The first question in the Case as stated is hypothetical, because we are not in a position to decide or know whether there is in fact room for distinguishing a part or parts of the concern from the remainder.

The second question is also hypothetical. As at present advised I am inclined to think that if the appellants' concern consists in part and in part only of a mill or factory, the annual value of that part for the purpose of the allowable deduction would fall to be estimated according to the general rule of Schedule A. I desire, however, to express no view as to the method of valuation on the alternative footing of the whole concern falling to be regarded as embracing nothing but mills or factories or similar premises.

LORD MACKENZIE did not hear the case.

The Court found that on the Case as stated they were unable to answer the two questions of law therein, and dismissed the appeal.

Counsel for Appellants—Wark, K.C.—Keith. Agents—J. Miller Thomson & Company, W.S.

Counsel for Respondent—The Solicitor-General (Constable, K.C.)—Skelton. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Thursday, July 20.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CANTIERE SAN ROCCO, S.A. (SHIPBUILDING COMPANY) *v.* CLYDE SHIPBUILDING AND ENGINEERING COMPANY.

Contract — Impossibility of Performance — Restitution — Executory Contract Abrogated by War—Payment of Instalment on Signature—Right to Repetition.

A shipbuilding company in Scotland entered into a contract to make and deliver to a foreign shipbuilding company certain marine engines. By the terms of the contract the price was to be paid in instalments, the first instalment being due on the signing of the contract and the remaining ones as the work progressed, and it was stipulated that the whole of the work which from time to time might be in hand should become the absolute property of the foreign company. The contract was signed and the first instalment paid shortly before the outbreak of war in 1914. The foreign company became on the outbreak of war an alien enemy. *Held* (*rev.* judgment of Lord Hunter, *diss.* Lord Mackenzie) that while the outbreak of war had discharged the parties from further performance of the obligations it did not affect rights which had already accrued, and that the foreign firm were not entitled to repayment of the instalment.

The Cantiere San Rocco, S.A. (Shipbuilding Company) at Trieste, and E. Radonicich, shipowner, Glasgow, their mandatory, *pursuers*, brought an action against the Clyde Shipbuilding and Engineering Company, Limited, *defenders*, in which the conclusions were for declarator that a contract entered into between the parties, dated 4th May 1914, was abrogated and avoided and dissolved by the existence of a state of war between Great Britain and Austria on 12th August 1914, that the pursuers were entitled to payment of the sum of £2310 paid by the pursuers to the defenders under the said contract, and for decree for payment of the said sum.

The following narrative of the *facts* of the case is taken from the opinion of Lord Hunter (Ordinary)—"The pursuers in this action are a shipbuilding company carrying on business at Trieste, formerly in Austria, now in Italy. The defenders are a company carrying on the business of shipbuilders and engineers at Port-Glasgow. [*His Lordship then narrated the conclusions of the action.*] By a contract embodied in an agreement and specification, dated 4th May 1914, entered into between the defenders of the one part and the pursuers the Cantiere San Rocco, S.A., of the other part, the defenders agreed to supply and deliver f.o.b. Port-Glasgow, and the said pursuers agreed to purchase, one set of triple expansion surface condensing screw marine engines with cylinders 26 in., 42 in., and 70 in. diameter by 48 in. stroke. In terms of the said contract (article 9) the price payable by the pursuers the Cantiere San Rocco, S.A., to the defenders for the said engines was £11,550, and was to be paid as follows:—20 per cent. thereof in London on the signing of the contract, 20 per cent. when the cylinders were cast and the boiler plates were in the defenders' premises, 20 per cent. when the boilers were tested and the engines assembled, 30 per cent. net cash in London in exchange for signed bills of lading and policies to cover insurance, and the balance of 10 per cent. after the reception of the engine and boilers and satisfactory trials. The engines were to be completed and delivered at Port-Glasgow by 4th May 1915. By article 7 of the contract it was provided that the whole of the work which from time to time might be in hand under the contract should become the absolute property of the pursuers, subject only to the lien which the defenders might have upon it for unpaid money. On 20th