Saturday, November 18.

SECOND DIVISION.

MAGISTRATES OF EDINBURGH *v.* LORD ADVOCATE.

Contract—Clause of Relief—Construction—"Rates, Taxes, and Assessments Payable in respect of the said Plant"—Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *Schedules A and B.*

The Minister of Munitions entered into an agreement with a gas company, in terms of which the company undertook to provide the Minister with a site and plant for the manufacture of benzol for the period of the currency of the agreement, and the Minister undertook to pay interest at the rate of 5 per cent. per annum on the agreed-on value of the plant, and on the expiry of the agreement to return it to the company and pay for depreciation. In addition to these stipulations the agreement contained the following clause—"The site so to be provided by the supplier (*i.e.*, the company) shall, if required by the Government (*i.e.*, the Minister), be leased by the Government for the term of this agreement at a nominal rent of £1 per annum, the Government in any event paying or indemnifying the supplier against all rates, taxes, and assessments payable in respect of the said plant." *Held* (*diss.* the Lord Justice-Clerk) that the Minister was not bound to indemnify the company against income tax paid by the company on the interest received by them from the Minister, in respect that (1) the expression "rates, taxes, and assessments" was restricted in its meaning to local rates, and (2) the expression "in respect of the said plant" was inappropriate to income tax, which was a tax upon persons and not upon property.

The Lord Provost, Magistrates, and Council of the City of Edinburgh, *first parties*, and the Right Honourable Charles David Murray, K.C., M.P., His Majesty's Advocate, as representing the Disposal and Liquidation Commission, *second party*, presented a Special Case for the opinion and judgment of the Court as to whether under an agreement between the parties the second party was bound to indemnify the first parties against income tax charged upon certain payments made by the second party to the first parties.

The Case stated—"1. By memorandum of agreement, made the 16th day of May 1916, between His Majesty's Minister of Munitions (in the said agreement and hereinafter referred to as 'the Government') of the one part, and the Edinburgh and Leith Corporations Gas Commissioners, incorporated by and acting under the Edinburgh and Leith Corporation Gas Acts 1888 to 1919 (in said agreement referred to as 'the supplier') of the other part, . . . it was agreed, *inter alia*, as follows:—'(1) Subject as hereinafter mentioned the Government will provide and erect at its own expense on a convenient site to be provided by the supplier a suitable plant, with which will be incorporated any machinery or apparatus belonging to the supplier which may be utilised for the purposes desired (hereafter referred to as "the said plant") for scrubbing the coal gas manufactured by the supplier with a view to recovering therefrom the benzol, toluol, and xylol contents thereof, and for distilling the resultant oils as hereinafter described. The site so to be provided by the supplier shall, if required by the Government, be leased by the supplier to the Government for the term of this agreement at a nominal rent of £1 per annum, the Government in any event paying or indemnifying the supplier against all rates, taxes, and assessments payable in respect of the said plant. (2) The supplier has delivered to the Government and allowed the Government to incorporate as part of the said plant'—[*Here follows a description of buildings and plant and their value*]—'on the following terms:— . . . (*b*) The buildings, machinery, and apparatus handed over shall be taken to be of the values set out above. (c) Until such buildings, machinery, and apparatus are returned to the supplier by the Government as hereinafter mentioned, the Government shall pay to the supplier interest at the rate of 5 per cent. per annum on the said value of the said buildings, machinery, and apparatus, such interest to be calculated from the 30th June 1915, and to be paid half-yearly on the 30th June and 31st December in each year. (*d*) On the expiration of this agreement the said buildings, machinery, and apparatus shall be returned to the supplier, and the same shall then be valued by some valuer to be agreed upon, or failing agreement, to be appointed by the Sheriff of the Lothians and Peebles. The Government shall pay to the supplier a reasonable sum to be agreed, or failing agreement fixed by the said valuer to cover the cost (if any) of reinstating the said buildings, machinery, and apparatus to the use to which they were being put by the supplier prior to the handing of the same over to the Government, and the Government shall also pay the amount (if any) by which the value of the said buildings, machinery, and apparatus so ascertained as aforesaid may be less than the agreed value as above mentioned, the amount so to be paid by the Government to be in full satisfaction of all claims of the supplier for depreciation or damage to the said buildings, machinery, and apparatus.' By articles 4 and 5 of the said agreement the supplier undertook to work the whole plant and to deliver to the Government the benzol, toluol, and other products recovered from the gas scrubbing, and the Government undertook to pay the expense of such recovery, including all additional labour required for the purpose by the supplier, and also to pay for the products so delivered at a price to be fixed as provided in the agreement. In terms of the provisions of the Edinburgh Boundaries Extension and Tramways Act 1920, the Edinburgh and Leith Corporations Gas Commission was dissolved as at 2nd Nov-

ember 1920, and the Lord Provost, Magistrates, and Council of the City of Edinburgh were constituted the authority for carrying on the undertaking formerly conducted by the Edinburgh and Leith Corporations Gas Commissioners, which undertaking was transferred to and vested in the said Lord Provost, Magistrates, and Council. All the obligations, contracts, and agreements of the Edinburgh and Leith Corporations Gas Commissioners were transferred and attached to the Lord Provost, Magistrates, and Council—sections 73, 75, and 77 (2) of the said Act of 1920. The said Lord Provost, Magistrates, and Council, who are the first parties to this case, are therefore now entitled to enforce all claims which were prior to 2nd November 1920 competent to the Edinburgh and Leith Corporations Gas Commissioners under the said memorandum of agreement. The Right Honourable Charles David Murray, K.C., M.P., His Majesty's Advocate, as representing the Disposal and Liquidation Commission, is the second party thereto. 2. In due implement of article 2 (*c*) of the agreement above referred to, the Government has paid to the first parties during each year during the currency of the agreement interest at the stipulated rate of 5 per cent. per annum on the value of the buildings, machinery, and apparatus referred to in that article of the agreement, said interest amounting to £609, 11s. 6d. per annum, together with the nominal rent of £1 per annum referred to in article 1 of said agreement, making together a sum of £610, 11s. 6d., which last-mentioned sum has been yearly included in the first parties' accounts as part of the revenue of their undertaking. 3. Neither local rates nor imperial taxes are levied on any separate valuations of such buildings, machinery, and plant. For the purposes of local taxation the first parties' whole undertaking is valued as a *unum quid* on the basis of net revenue. The Government has paid or indemnified the first parties or their predecessors against burgh, parochial, and other local rates in the proportion which the above-mentioned sum of £609, 11s. 6d. bears to the net revenue of the undertaking, but a dispute has arisen between the parties in regard to Property and Income tax. 4. For the years 1917-18 and 1918-19 the predecessors of the first parties were charged with income tax on their whole undertaking under Schedule A. In later periods the charge of income tax in respect of the said sum of £609, 11s. 6d. has been made upon a separate return in respect of the said sum under Schedule D. 5. The first parties contend that upon a sound construction of the agreement, particularly article 1 thereof, the Government are bound to pay or indemnify the first parties against income tax at the rate current in each respective year upon the said annual interest payment of £609, 11s. 6d., as being tax payable by the first parties in respect of the said plant within the meaning and intent of the said agreement. 6. The second party contends that the obligation in article 1 of the said agreement does not extend to income tax, and that in any case the income tax in respect of said payments of £609, 11s. 6d., which the first parties claim that the Government should pay or indemnify them against, is not a rate, tax, or assessment payable in respect of the plant in question."

The *question of law* was — "Are the Government bound during the currency of the agreement of 16th May 1916 to pay or indemnify the first parties against income tax, whether charged under Schedule A or Schedule D, on the payments of interest made under article 2 (*c*) of the agreement of 16th May 1916?"

Argued for the first parties—Income tax payable on the interest was a tax payable in respect of the plant within the meaning of the indemnity clause, whether charged under Schedule A or under Schedule D of the Income Tax Act 1918 (8 and 9 Geo. V, cap. 40). The interest represented the rent or profit derived from the plant. The income tax in question charged under Schedule A was a tax on profits—First Schedule, rules applicable to Schedule A, No. III, Rule 3—and the income tax in question charged under Schedule D was also a tax on profits—First Schedule, rule applicable to Case I of Schedule D—*Largs and Lundin Links Gas Company, Limited* v. *Inland Revenue*, 1922 S.C. 616, 59 S.L.R. 517, *per* Lord President (Clyde) at 1922 S.C. 619, 59 S.L.R. 518. In construing the language of a contract the Court was not entitled to treat words as redundant, and the word "taxes" in the indemnity clause must be given a meaning, because the indemnity clause formed part of a contract. The case of *Lindsay* v. *Bett*, (1898) 25 R. 1155, 35 S.L.R. 881, was distinguishable. The decision in that case turned on the expression "payable . . . for or furth of the . . . land." There was no such expression in the agreement between the parties to the present case—see also the opinion of Lord Moncreiff, *ibid.*, at 25 R. 1160, 35 S.L.R. 883.

Argued for the second parties — The expression "rates, taxes, and assessments" in the indemnity clause did not cover income tax. It was reasonable that the second parties should relieve the first parties of the rates and taxes which burdened the property taken by the second party, but it was not reasonable that the second party should relieve the first parties of the tax which was payable by the first parties on profits, and income tax was a tax on profits — *London County Council* v. *Attorney-General*, [1901] A.C. 26, *per* Lord Macnaghten at p. 35; *Ashton Gas Company* v. *Attorney-General*, [1906] A.C. 10, *per* Lord Robertson at p. 13. Moreover, it could not properly be said that the income tax in question was "payable in respect of the said plant." Only the local rates and assessments could properly be said to be "payable in respect of the said plant," because unlike income tax they were assessed on the revenue principle on the annual value of the plant — *Edinburgh and Leith Gas Commissioners* v. *Assessor of Edinburgh*, 1909 S.C. 664, 46 S.L.R. 442. *Pole Carew* v. *Craddock*, (1919) 35 T.L.R. 445; *Associated Newspapers Limited* v. *City of London Corporation*, [1916] 2 A.C. 429; *Duke of Argyll* v. *Commissioners of*

Inland Revenue, (1913) 109 L.T. 893; Dowell, Income Tax (8th ed.), p. 273. The indemnity clause must be read in the light of the relations between the parties to the agreement. The expression "rates, taxes, and assessments" was redundant. It was really a composite phrase meaning dues of the nature of rates. The draughtsman had not intended to draw a contrast between rates and taxes.

At advising—

LORD HUNTER—The question in this case arises out of an agreement entered into between the Minister of Munitions on the one hand and the Edinburgh and Leith Corporation Gas Commissioners on the other hand, dated 16th May 1916. At that date the Government was anxious to increase the supplies of benzol, toluol, and xylol available in the United Kingdom. They arranged with the Commissioners to erect a suitable plant on a site to be provided by the latter body, with which was to be incorporated any machinery or plant utilised for the purpose desired. A value was put on the plant so taken over, and the Government agreed to pay interest thereon at the rate of five per cent. per annum in addition to reinstating the buildings on the termination of their period of occupancy and paying for any depreciation. The agreement contains a provision to this effect—"The site so to be provided by the supplier" (*i.e.*, the Commissioners) "shall, if required by the Government, be leased by the supplier to the Government for the term of this agreement at a nominal rent of £1 per annum, the Government in any event paying or indemnifying the supplier against all rates, taxes, and assessments payable in respect of the said plant." The expression "said plant" includes the plant erected by the Government and the plant taken over from the Commissioners and incorporated therewith. The interest paid by the Government amounted to £609, 11s. 6d., and this sum, together with the nominal rent of £1, has been yearly included in the Commissioners' accounts as part of the revenue of their undertaking. The Government regularly paid or indemnified the Commissioners against burgh, parochial, and other local rates on an agreed basis. In 1920 the Edinburgh and Leith Corporations Gas Commission was dissolved and the undertaking transferred to the Lord Provost, Magistrates, and Council of Edinburgh, who are the first parties to this case. For the years 1917-18 and 1918-19 the predecessors of the first parties were charged with income tax on their whole undertaking under Schedule A. In later periods the charge of income tax in respect of the £609, 11s. 6d. has been made upon a separate return in respect of that sum under Schedule D.

It is contended for the first parties "that upon a sound construction of the agreement, particularly article 1 thereof, the Government are bound to pay or indemnify the first parties against income tax at the rate current in each respective year, upon the said annual interest payment of £609, 11s. 6d., as being tax payable by the first parties in respect of the said plant within the meaning and intent of the said agreement." This contention is disputed by the Government, who contend "that the obligation in article 1 of the said agreement does not extend to income tax, and that in any case the income tax in respect of said payments of £609, 11s. 6d., which the first parties claim that the Government should pay or indemnify them against, is not a rate, tax, or assessment payable in respect of the plant in question."

In the argument presented to us by the first parties it was maintained that if the contention of the second party was given effect to the word "taxes" would be disregarded, and that it was the duty of the Court in construing the agreement to give to the word a meaning and significance distinct from the word "rates." This view was founded upon the circumstance that a person who pays assessments levied for imperial purposes is referred to as a taxpayer, while a person who pays assessments levied for local purposes is referred to as a ratepayer, the assessment in the former case being known as taxes and in the latter case as rates. In my opinion the answer to the question put to us is not to be found along so simple lines. There is nothing improper in referring to rates as taxes. In Webster's Dictionary "rate" is defined "a tax or sum assessed by authority on property for public use according to its income or value; especially in England, a local tax, as parish rates, town rates." In Chambers' Etymological English Dictionary "tax" is defined as "a rate imposed on property or persons for the benefit of the state." The words are frequently interchangeable, and there must be many documents in existence where local assessments are referred to as rates and taxes. In *Associated Newspapers, Limited* v. *City of London Corporation* ([1916] 2 A.C. 429), the Court had to construe the meaning of a statutory expression—"free from all taxes and assessments whatsoever." The facts and details of the case need not be considered, but according to the headnote of the case it was held by the House of Lords that the exemption "though limited by the context to local as distinguished from imperial taxes, extended to all local taxes and assessments." And at p. 442 Viscount Haldane said—"I think that from the context and purpose with which it is introduced the expression 'taxes' means local and not imperial taxes, and that the exemption is confined to these."

The words of the clause of relief are "rates, taxes, and assessments payable *in respect of the said plant.*" I think that the answer to the question put must depend upon whether or not it is a proper or natural use of language to refer to income tax on the money received by the first parties from Government as a tax payable in respect of the plant. In my opinion it is not. Taxes are, generally speaking, imposed either upon persons or upon property, and I think that it is only in regard to taxes of the latter description that the clause of relief is intended to apply. In the case of *The London County Council* v. *Attorney-*

General ([1901] A.C. 26) Lord Macnaghten (at p. 35) said—"Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Schedule D and those assessed under Schedule A or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limits. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all. . . . In every case the tax is a tax on income, whatever may be the standard by which the income is measured. It is a tax on 'profits or gains' in the case of duties chargeable under Sched. A and everything coming under that schedule — the annual value of lands capable of actual occupation as well as the earnings of railway companies and other concerns connected with land—just as much as it is in the case of the other schedules of charge."

In *Lindsay* v. *Bett* ((1898) 25 R. 1155) a proprietor feued out land, binding himself and his successors in the superiority "to pay the teind duties, ministers' stipends, schoolmasters' salaries, cess or land tax, and all other burthens, duties, services, and casualties whatsoever, public and parochial, as well as all others of every description now due and payable, and that shall hereafter become due and payable or be imposed by any authority whatever for or furth of the said portion of lands." It was held that this clause did not bind the superior to relieve the vassal of property tax, that being a personal tax on income derived from the land, and not a tax payable "for or furth of" the lands. In the same way I do not think that the intention of the clause in question was to relieve the first parties from a personal tax payable in respect of what they might receive from the second party in so far as that represented gain or profit.

If I am right in the view which I have expressed as to the meaning of the indemnity clause, there is no liability on the second party to relieve the first parties of payments in the nature of income tax, whether charged under Schedule A or Schedule D, on the payments of interest made in respect of the first parties' plant referred to in the agreement. In any event I have difficulty in seeing how the first parties can recover anything from the second party in respect of income tax paid by their predecessors for the years 1917-18 and 1918-19 when they were assessed under Schedule A. During those years no payment of income tax was made on the interest received by the Commissioners on the value of plant. The sum so received was treated as part of their revenue, and they were afterwards taxed upon the profits or return from their undertaking. No information is given us as to the deductions that were made from revenue before the taxable income was arrived at. Apparently the first parties' argument on this part of the case is based on the circumstance that the Government arranged to indemnify their predecessors against local rates in the proportion which the sum of £609, 11s. 6d. bears to the net revenue of the undertaking. This may have been quite a satisfactory method of ascertaining the extent to which the Commissioners should be relieved from payment of local rates where the assessment is made in respect of annual value of the heritage (including therein heritable plant) of the undertaking, and where that annual value is ascertained by taking revenue after certain recognised deductions are made. It does not follow that the same method would be satisfactory where a question of imperial taxation is concerned. The whole plant, as is explained in the Special Case, was worked by the Commissioners, and the relief to which they were entitled as regards local taxation was in respect not only of the plant on the value of which they received interest, but also the plant supplied by the Government. I should have thought that so far as this part of the question was concerned it would in any event be sufficient to say that neither the first parties nor their predecessors were ever taxed under Schedule A on the payments of interest made by the Government.

LORD ANDERSON—The question raised by this Special Case is not free from difficulty. The impression which I formed at the conclusion of the debate was adverse to the second party. On further consideration, however, I am satisfied that the question of law ought to be answered in the negative for the reasons stated by Lord Hunter in his opinion, which I have had the advantage of perusing, and with which I concur.

The point raised in the Special Case is concerned with the construction which is to be put upon the clause of indemnity in article 1 of the agreement of 16th May 1916, and especially with the meaning which is to be attached to the term "taxes" occurring in that clause. It is the duty of the Court, in accordance with a fundamental canon of construction, to give some meaning to that term, and therefore we cannot, as we were invited to do by the first contention advanced by the second party, disregard the term or strike it out of the agreement on the footing that it is mere surplusage. The alternative contention of the second party was that the term, looking to the context, was used as synonymous with the other two terms "rates" and "assessments." These two terms are undoubtedly synonymous, and if the draughtsman has seen fit to use two terms where one would suffice, it may well be that he has unnecessarily added a further synonym. It seems to me that the context shows that this is just what has been done. The primary meaning of the term "taxes" is undoubtedly "imperial imposts." There is a well-recognised distinction, both popular and scientific, between the "taxpayer," whose contributions go to the Exchequer, and the "ratepayer," whose contributions are payable to local bodies. And if there is no qualification in the context, "taxes"

in such a phrase as "rates and taxes" signifies "imperial contributions." But both etymology and law recognise that the word may also be employed to indicate local charges such as rates.

In order to determine what is the signification of the term in the indemnity clause it is necessary to note exactly what is the character of the annual payment of £609, 11s. 6d. which the Government stipulated to pay to the Corporation. This payment, in my opinion, is of the nature of estimated profits earned by the plant supplied by the Corporation for the use of the Government. The amount is nothing more than an estimate, and it is arbitrary, being at the fixed annual rate of five per cent. The Revenue authorities treated the payment as of this nature, as it was assessed to income tax under Schedule D, which applies to profits. I reach the conclusion that the term "taxes" in the indemnity clause was intended to apply only to local burdens on these two grounds—(1) That it is sandwiched between two other terms, each of which obviously refers only to local burdens, and (2) that the term is not used without contextual qualification. The Government are to relieve the Corporation not from "all taxes" but from "all taxes . . . payable in respect of the said plant." If the sum of £609, 11s. 6d. really represents a payment in lieu of profits, then the income tax payable in respect of these profits is to my mind something different from a tax payable in respect of plant. The clause is plainly elliptical, and must necessarily be expanded to square with the rival contentions. In order that the first parties may succeed, the necessary expansion must take this form—"All taxes payable in respect of profits earned by the Corporation's share of said plant." The argument of the second party necessitates this expansion—"All taxes payable in respect of the annual value (calculated on a revenue basis) of the whole of said plant." The language of the clause does not in my opinion justify the former reading; it is apt to support the latter.

I therefore think that the intention of the parties, as expressed in the language used, was to offer and obtain indemnity against local burdens, and that imperial taxes are excluded from its operation.

I am therefore for answering the question of law in the negative.

LORD JUSTICE-CLERK—I regret that I am unable to concur in the opinions which your Lordships have expressed.

The question for decision in this case is whether the first parties, who have succeeded to the rights and liabilities of the Edinburgh and Leith Corporation Gas Commissioners, are entitled to be indemnified by the second party, who represents the Disposal and Liquidation Commission, against certain payments of income tax which they have made. The answer to that question depends upon the construction of the first clause of an agreement entered into on 16th May 1916 between the Gas Commissioners (hereafter termed "the supplier") and the Minister of Munitions (hereafter termed "the Government"). That agreement is embodied in the Special Case. It was entered into because the Government decided to take advantage of the facilities which the supplier possessed for the production of benzol, toluol, xylol. Broadly speaking, the arrangement, so far as relevant to the present question, was that the Government should erect certain plant on a site to be provided by the supplier, and should also incorporate any machinery or apparatus belonging to him which could be utilised for the desired purposes. The Government undertook to pay the supplier five per cent. interest per annum on the value of the plant, and that payment amounted as matter of fact to £609, 11s. 6d. The first clause of the agreement, *inter alia*, provided—"The Government in any event paying and indemnifying the supplier against all rates, taxes, and assessments payable in respect of the said plant." It is maintained by the first parties that under that clause the Government are bound to indemnify them against income tax paid by them on the said sum of £609, 11s. 6d., "being tax in respect of the said plant." The second party maintains two contentions—(1) That the clause does not extend to income tax; and (2) that in any event the income tax payable on the sum of £609, 11s. 6d. is not a rate, tax, or assessment "payable in respect of the plant in question."

As regards the first contention for the second party I have no hesitation in rejecting it. The undertaking by the Government is to pay *all* taxes. Income tax is, I think, manifestly included in that comprehensive description. If income tax is not covered, then I inquire what tax is covered? I know of no other tax falling within the description, and counsel for the second party was unable to suggest any other. The language "all taxes" is simple and clear. It must receive effect. It must have some meaning. And I can figure no other than that which the first parties suggest attaches to it.

But the second party further contends that in any event income tax cannot be regarded as a tax paid "in respect of the said plant." He says that income tax is a personal tax, and that the agreement contemplates a tax on property. Now income tax was paid on a sum which obviously represented the hire or rent of the plant. And the question therefore is whether a tax paid on the rent or hire of the plant is a tax payable in "respect of the said plant." To that question common sense, I think, supplies an affirmative answer. The tax is payable in respect of income derivable from the plant, and that tax may reasonably be regarded as paid "in respect of the plant." If the tax was not paid "in respect of said plant," in respect of what was it paid? There is an undertaking to indemnify the first parties against *rates* payable in respect of said plant, and also against *assessments* payable in respect of the said plant. So much is clear. But if the second party's contention is correct, there are no taxes paid in respect of the said plant,

the language used is meaningless, and the undertaking is futile. I should be slow to reach that result. The second party admits that if he is right the word "taxes" might be deleted from the clause without altering its meaning. They are mere surplusage. For, says he, "rates" and "taxes" are often used as interchangeable terms meaning the same thing, and the presence of the word "taxes" must be attributed to the inveterate and incurable habit of conveyancers to indulge in tautological and pleonastic phraseology. I am unable to accept that view. There is nothing, I think, in the context to suggest it. Even in popular parlance the distinction between the *ratepayer* and the *taxpayer* is well recognised, and the grievance of each is at all times recognised to be essentially different. The one is concerned with local imposts, the other with imperial burdens. Even if popular parlance failed to distinguish between the two words, it would, in my opinion, be an unsafe guide. But this is a formal and solemn contract to which the Government is a party, and I cannot assume that the word "taxes" is used inaccurately and superfluously. Unless you deny any meaning to the word "taxes," the second party must fail. In order that he may succeed "you must," said the learned Vice-Dean, "draw your pen through the word 'taxes.'" I respectfully decline to do so. On the last question referred to by your Lordship I offer no opinion, inasmuch as no argument was presented to us upon it.

The Court answered the question of law in the negative.

Counsel for the First Parties — Graham Robertson, K.C.—Keith. Agent—A. Grierson, S.S.C., Town Clerk.

Counsel for the Second Party — Brown, K.C. — Young. Agent — Campbell Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, November 20.

(Before the Lord Justice-General, Lord Cullen, and Lord Sands.)

[Sheriff Court at Lanark.

TENNANT *v.* GILMOUR.

Justiciary Cases—Statutory Offence—Contravention of Explosives in Coal Mines Order, 1st September 1913, *Rule* 3 (*a*)—*Miner Returning to Shot-Hole within the Hour — Miner Honestly Believing that Fuse had Failed to Ignite.*

The Explosives in Coal Mines Order of 1st September 1913 provides — Par. 3. "If a shot misses fire—(*a*) the person firing the shot shall not approach . . . the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

Two miners working together in a mine each prepared a charge, and after each had applied a light to the fuses attached to their respective shots retired to a place of safety. One of the shots having exploded, they returned to the face within an hour, in contravention of Rule 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913, under the erroneous though honest belief that the endeavour to light the second fuse had been unsuccessful. The second shot thereupon exploded, causing injury to both the miners. In a criminal prosecution against the miner, the explosion of whose shot was delayed, *held* that he was liable to a penalty for contravention of the Order.

John Gilmour and Thomas M'Intosh, miners, *respondents*, were charged in the Sheriff Court at Lanark at the instance of Thomas Tennant, Procurator-Fiscal of Court, *appellant*, upon a summary complaint in the following terms:—"You are charged at the instance of the complainer that on 17th March 1922, at the working-face in the main mine of the Hagshaw Mines, Douglas Parish, Lanarkshire, worked by the Arden Coal Company, Limited, being a mine to which the Coal Mines Act 1911 applies, having prepared and charged two shots and lighted the fuses attached thereto and retired to a safe distance for shelter, and one of the shots having missed fire, you did return towards the face within a short time and less than one hour from the firing of the shots, when the shot went off, and you were both injured about the face and body, and this you did contrary to the Explosives in Coal Mines Order of the 1st September 1913, 3 (*a*), whereby in virtue of section 101 (3) of the said Act you are liable to a penalty not exceeding £5, and in default of payment thereof to imprisonment in terms of section 48 of the Summary Jurisdiction (Scotland) Act 1908."

The respondents pleaded not guilty.

On 4th July 1922, after evidence had been led, the Sheriff-Substitute (HARVEY) found the accused not guilty of the contravention libelled.

On the application of the Procurator-Fiscal a Case was stated for appeal.

The *facts* proved were as follows—"That on 17th March 1922 the respondents M'Intosh and Gilmour and the witness Alexander Gray were driving a stone mine in order to get at the coal seam in the Hagshaw Mines, Douglas, worked by the Arden Coal Company, Limited; that the said mine is one to which the Coal Mines Act 1911 applies, and also the Regulation 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913; that in the course of this work, in the afternoon shift beginning at 3 p.m., two shot-holes were bored, the one by Alexander Gray and the other by the respondent Gilmour, and charged by them with explosives, a detonator, and fuse; that about 5 p.m. the fuse of the shot prepared by Gray was lighted by him by applying a naked light thereto, and that at the same time the respondent Gilmour attempted to light the fuse of his shot by the same method;