the effect that they were under a belief that there had been a waiver by the pursuers of their contract rights, on which the defenders relied. But the admitted facts do not in any way verify that the defenders were under such belief or so relied, even if there had been any justification for this, which I do not think there was.

I accordingly concur with the majority of your Lordships in the view that the pursuers are entitled to the decree concluded for.

The Court recalled the interlocutor of the Lord Ordinary and decerned against the defenders in terms of the conclusions of the summons.

Counsel for the Pursuers (Reclaimers)—Brown, K.C.—A. M. Mackay. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender (Respondent), Maclaine — Chree, K.C. — Dykes. Agents —Martin, Milligan, & Macdonald, W.S.

Counsel for the Defenders (Respondents), the Lochbuie Trustees — Wilson, K.C. — D. P. Fleming. Agents—Hope, Todd, & Kirk, W.S.

HOUSE OF LORDS.

Monday, March 15.

(Before the Lord Chancellor (Birkenhead), Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin.)

PENNEY *v.* CLYDE SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

(In the Court of Session, February 20, 1919, 56 S.L.R. 258, and 1919 S.C. 363.)

War—Contract—Ship—Sale—Payment by Instalments—Passing of Property in Ship under Construction on Payment of Instalments—Right to Instalments—Counter-Claims.

On the outbreak of war, a ship, being built to the order of an enemy firm, was in the builders' yard nearing completion. The contract provided that "the steamer as she is constructed . . . shall immediately as the work proceeds become the property of the purchasers," and the price was payable by instalments. On the ship being requisitioned and paid for by the Admiralty, *held* that the builders were bound to account to the Custodian of Enemy Property for Scotland under the Trading with the Enemy Amendment Acts 1914 and 1916 for the instalments paid, subject to any counter-claims arising out of the occupation of the berth beyond the period required for building.

This case is reported *ante ut supra.*

The defenders, the Clyde Shipbuilding and Engineering Company, Limited, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The question raised in this appeal is whether the respondent, the Custodian of Enemy Property for Scotland under the Trading with the Enemy Acts 1914 and 1916, was entitled to a decree against the appellants for the sum of £79,732, 16s. 4d., which sum was the total of certain instalments paid by an Austrian firm for the building of a ship by the appellants, which was nearing completion at the date when war broke out.

The course which the debate has taken and the arrangement which has been come to between the parties make it unnecessary for me to examine at length the contentions which were pursued in the Courts below and upon which those Courts pronounced.

It was contended by the appellants throughout that after the sale by them of the vessel which had been built for the Austrian company to the Admiralty, and after payment in full to them by the Admiralty of the agreed purchase money, they were none the less entitled to retain as their own property a sum of money which had been paid to the appellants from time to time as the vessel was in course of construction under the terms of the contract. The main controversy in the Courts below, as abundantly appears from the judgments which were given by the learned Judges, was concerned with this topic. When one reads the judgments given below one cannot but observe how much greater was the attention and how much more considerable was the time bestowed upon this question than upon any other. In fact a perfunctory paragraph is all the attention that is given to the secondary question in those judgments. I have no doubt that the course taken by the Bench reflected the attitude of the advocates.

Sir John Simon says with perfect accuracy that he had not fully developed his argument upon the main question which was before your Lordships. That claim is well founded, but it had at anyrate been sufficiently delivered for me at least, and I think for the rest of your Lordships, who were prepared to listen very attentively to any further argument Sir John might have afforded us, to feel the gravest doubt whether the impression then formed upon the merits was in the least likely to be disturbed. The position to-day is therefore under these circumstances that the principal contention urged throughout on behalf of the appellants is not persisted in by them, but their counsel in the course of argument called attention very cogently to a real grievance under which they would labour if the whole of the sum of money which has been paid to them by the Austrian company were handed over to the Custodian without any conditional arrangement in their favour. That grievance arises in these circumstances—They have a claim which they desire at the proper time to make against the Austrian company. Had official authority not intervened in this country — had, in other words, the vessel not been purchased from them under requisition by the Admiralty—they would at any moment when they were required to account, if they were required to account, for the moneys they received from the Austrian company, have been in a position to say, "We must account

as trustees—that is agreed—but at the same time you, the Austrian company, owe us a sum of money which we estimate at £9000 to compensate us for the period during which your ship occupied our dock." To the extent of such part of that claim as they succeeded in establishing they would be completely protected if they were in a position to retain this money. They will not be in a position so to protect themselves if this money is unreservedly handed over to the Custodian, and all your Lordships are, I think, of opinion that this degree of protection ought to be accorded to them.

When the impression thus formed by your Lordships was made clear to the learned counsel for the respondent, they, representing a public authority, took a reasonable view, and have acquiesced in an arrangement which recommends itself to your Lordships, which I think may take the following form, and I shall move formally—To reverse the interlocutors: To remit the cause to the Court of Session with a declaration that the defenders be allowed proof of their averments in statement 4 of their statement of facts: That the pursuer be allowed a conjunct probation, and that thereafter decree be pronounced in favour of the pursuer for the sum of £79,732, 16s. 4d., with interest from the interlocutor of February 20th, and deduction of the sum, if any, found due in respect of the averments of the defenders in statement 4 aforesaid.

It is proper that I should add an observation upon the subject of costs. Their Lordships have given very careful consideration to the points which are here involved, and they have reached the conclusion that it would be wrong to ignore the circumstance that the main and principal contention in fact of the appellants related to the whole sum, and not merely to the comparatively small question of the protection of their claim against the Austrian company. Having regard to the time which must have been consumed in each of the stages in the subordinate Courts in dealing with this main contention which has been withdrawn, and which I say plainly I am satisfied if it had been persisted in would have completely failed, their Lordships have reached the conclusion that neither here nor below should there be any costs, and I move your Lordships accordingly.

VISCOUNT HALDANE—I agree.

VISCOUNT FINLAY—I agree.

VISCOUNT CAVE—I also agree.

LORD DUNEDIN—I concur.

Their Lordships, without expenses to either party, reversed the interlocutors appealed, and remitted the cause to the Court of Session with the declaration given in the Lord Chancellor's opinion.

Counsel for the Pursuer (Respondent)—Lord Advocate (J. A. Clyde, K.C.)—Austen Cartmell, K.C.—Hunter. Agents—Thomas Carmichael, S.S.C., Edinburgh — Solicitor to the Treasury, Law Courts Branch.

Counsel for the Defenders (Appellants)—Sir John Simon, K.C.—Condie Sandeman, K.C.—Sir Hugh Fraser. Agents—Wright, Johnston, & Mackenzie, Glasgow—Webster, Will, & Company, W.S., Edinburgh—J. D. Langton & Passmore, London.

Monday, March 22.

(Before Viscount Finlay, Viscount Cave, and Lords Dunedin, Atkinson, and Moulton.)

WOODIELEE COAL AND COKE COMPANY, LIMITED *v.* ROBERTSON.

(In the Court of Session, June 20, 1919, 56 S.L.R. 498.)

Master and Servant—Workmen's Compensation—Arising out of and in the Course of Employment — Serious and Wilful Misconduct — Added Peril — Breach of Statutory Rule—Coal Mines Regulation Act 1911 (1 *and* 2 *Geo. IV, cap.* 50), *secs.* 32 *and* 35—*Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *secs.* 1 (1) *and* (2) (c).

In a fiery mine, a miner, at the customary knock-off in the middle of the shift, struck a match to light a pipe. An explosion occurred and he received injuries from which he died. It was, as he knew, an offence under the Coal Mines Regulation Act 1911 to light or to be in possession of a match. *Held* that the miner's injuries were not "arising out of" the employment but out of an added peril, and consequently that his dependants could not recover compensation.

This case is reported *ante ut supra.*

The respondent, Mrs Annie Campbell or Robertson, appealed to the House of Lords.

At the conclusion of the argument on behalf of the appellant, counsel for the respondents being present but not being called upon, their Lordships delivered judgment as follows:—

VISCOUNT FINLAY—I believe that all your Lordships are agreed that it is not necessary in this case to call upon the respondents; every possible point has been put and very fully argued. The facts of the case lie in a very small compass indeed; they are stated in the appellant's case in the Stated Case in which the points were raised for the opinion of the Court—"Kenneth Robertson was a miner in the employment of the Woodilee Coal and Coke Company, Limited. On Friday, 27th September 1918, while on the back (afternoon) shift in the Meiklehill Colliery of the said company he was personally injured by an explosion which occurred about 6 o'clock. The said explosion occurred on his striking a match to light his pipe, after finishing his piece at the customary knock-off in the middle of the shift. To have matches in the said pit was an offence under section 35 of the Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), and the lighting of a match an offence under section 32 of the said Act, which was posted