that there was nobody in charge of the boys, but it was made clear that this only means that there was nobody actually in the room at the moment. It does not mean that there was nobody on the premises responsible for the boys, aware that they were playing in this room, and available in case of any disturbance. The case would have presented a different aspect if the accident had been one which might have been foreseen as not unlikely to occur—if, for example, blind boys had been left to romp by themselves in a room where there was an unguarded fire and one of them had run into it and been burned. Pursuer's case is much short of that. It seems to require that in order to guard against any such unusual misadventure as here occurred there must be some adult in the room with attention concentrated upon the romping children. A lady sitting there sewing or knitting or reading a book would hardly have sufficed to safeguard against such a mishap. It appears to me that this is too exacting a requirement, and that a jury could not reasonably hold that the defenders were guilty of negligence in not making such provision. The children were not in my view exposed to any danger other than such as is inevitable if children are to be allowed to play together. It is not said that the children were unruly or quarrelsome. I do not think a reasonable parent would have had any anxiety in leaving them playing together, and I do not think that any higher standard of precaution is incumbent upon the defenders than would be observed by a reasonable parent. I am accordingly of opinion that the reclaiming note ought to be refused.

The Court adhered.

Counsel for Reclaimer (Pursuer)—Watt, K.C. — Crawford. Agents — Manson & Turner Macfarlane, W.S.

Counsel for Respondents (Defenders) — D. P. Fleming, K.C. — Berry. Agents — Laing & Motherwell, W.S.

Thursday, February 16.

SECOND DIVISION.

[Sheriff Court at Stranraer.

PIRRIE AND ANOTHER *v.* M'NEIL.

Process—Sheriff—Joint Motion for Proof—Remit to Court of Session for Jury Trial—Competency—Bar—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

In an action of damages for personal injuries brought in the Sheriff Court the Sheriff-Substitute "on the motion of parties' procurators" allowed a proof. The pursuers subsequently required the cause to be remitted to the Court of Session for jury trial. A question having been raised by the Clerk of Court as to the competency of the remit in view of the joint motion for proof in the Sheriff Court, the Court *allowed* an issue.

Archibald Gillies Pirrie and Mrs Elizabeth Reynolds or Pirrie, his wife, *pursuers*, brought an action of damages for personal injuries in the Sheriff Court at Stranraer against John M'Neil, farmer, Kirkcolm, Wigtown, *defender*.

On 19th January 1922 the Sheriff-Substitute (WATSON) pronounced the following interlocutor — "On the motion of parties' procurators, allows to the parties a proof of their respective averments."

The pursuers thereafter required the cause to be remitted to the Court of Session for jury trial. On the case appearing in the Single Bills counsel for the pursuers moved the Court to approve of an issue for the trial of the cause. The Clerk of Court called their Lordships' attention to the terms of the interlocutor of 19th January 1922 as inferring a joint agreement to refer the cause to proof, and therefore barring the pursuers from applying to the Court of Session for jury trial.

Counsel for the defenders intimated that he did not oppose the motion for an issue, and referred to the following authorities:—*Paterson* v. *Kidd's Trustee*, 1896, 23 R. 737, 33 S.L.R. 568; *Fleming* v. *Eadie*, 1897, 25 R. 3, 35 S.L.R. 1; Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30.

The Court (LORD JUSTICE-CLERK, LORD SALVESEN, and LORD ORMIDALE) allowed an issue.

Counsel for Pursuers and Appellants — Grainger Stewart. Agents — Simpson & Marwick, W.S.

Counsel for Defender and Respondent—Patrick. Agents—Armstrong & Hay, S.S.C.

HOUSE OF LORDS.

Thursday, February 23.

(Before Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Wrenbury, and Lord Carson.)

GLENBOIG UNION FIRECLAY COMPANY *v.* INLAND REVENUE.

(In the Court of Session, February 5, 1921, S.C. 400, 58 S.L.R. 376.)

Revenue—Excess Profits Duty—Profits of Trade—Capital or Income—Compensation Paid by Railway Company in respect of Minerals Left Unworked—Finance (*No.* 2) *Act* 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 40 (1) (2), *and Schedule IV, Part I, par.* 1, *Part II, par.* 1.

In 1913, one of the two pre-war trade years, payment was made to the Glenboig Union Fireclay Company of £15,316, 11s. 4d. by a railway company as compensation in terms of the Railways Clauses Act 1845 for minerals left unworked for support of their line. The sum was entered in the revenue account of the Glenboig Company for the year in which it was paid, and on it the company paid income tax. A question

having arisen as to whether this sum fell to be included in computing the "amount of the profits arising from the trade or business" of the company in the pre-war year 1913, *held* (*aff.* judgment of the Court of Session) that the sum in question was not profits within the meaning of the Finance (No. 2) Act 1915, it not being of the nature of an annual profit arising from trade, but money paid in respect of an asset of the company which had to that extent been sterilised and destroyed, and that accordingly it could not be included as profit in the company's balance-sheet for the year 1913.

The case is reported *ante ut supra.*

The Glenboig Company appealed to the House of Lords.

At delivering judgment—

LORD BUCKMASTER—The Finance Act of 1915 imposed a duty known as excess profits duty, to be levied and paid upon profits arising from trade or business. The method provided for assessment was by comparing the profit in the particular business for the period known as the accounting period with the average pre-war standard of profit determined by taking the average of any two of the three last pre-war trade years, the difference between the two being liable to duty, which was imposed at the rate of fifty per cent.

The appellant company here, the Glenboig Union Fireclay Company, Limited, in making their return for the purpose of this statute included as one of the two pre-war years the year that ended the 31st August 1913, and into the accounts of that year they brought as items of profit a sum of £15,316 received from the Caledonian Railway Company on the 9th April 1913, and a further sum of £4500 received from the same company on the 29th August 1913. The question that is raised upon this appeal is whether or no the Company is entitled to increase the amount of their pre-war profits by these two sums, and thereby reduce the amount of the excess profits duty payable under the statute. There is no question whatever about the *bona fides* of the appellants in this case. Both these sums had been included in their balance-sheet as profit for the year 1913, and upon them they had paid income tax without demur.

The circumstances in which these moneys were paid may be shortly stated. The appellants the Glenboig Union Fireclay Company carry on business as manufacturers of fireclay goods and as merchants of raw fireclay. Part of their property consisted of mining rights over certain beds of fireclay at Gartverrie, Glenboig, and in the course of working these fields they were at the end of 1907 approaching the line of the Caledonian Railway, and due notice was given on the 25th January 1908 to the Railway Company of the intended extension of their working. The Railway Company being apprehensive as to the result, required the Fireclay Company to desist from working. A dispute arose as to whether or no the fireclay in question was a mineral, and litigation ensued during which the Railway Company were able to obtain against the Fireclay Company interdicts which operated for two periods—one from the 29th February 1908 to the 15th April 1910, and the second from the 12th November 1910 to the 28th April 1911, when the interdict was finally recalled. Upon the recall of the interdict the Railway Company accordingly became liable to pay the Fireclay Company the damages that had been caused to them by the order, and the sum of £4500 to which I have made reference was the sum that was paid under that head. The Railway Company now proceeded to treat with the Fireclay Company for the purpose of preventing any further working of this fireclay adjacent to their railway, and arbitration proceedings ensued for the purpose of determining what sum the Railway Company were bound to pay for this privilege, and ultimately the sum of £15,316 was fixed as the sum payable by the Railway Company, and this was accordingly paid on the 9th April 1913.

These two sums require some different consideration for the purposes of this appeal, but your Lordships are relieved with regard to the second sum of £4500, because the parties to this appeal have very wisely made an arrangement upon the point with the terms of which it is unnecessary to trouble your Lordships. The sum of £4500 is therefore removed from your consideration.

It therefore only remains to consider whether the sum of £15,316 was properly included as a profit in the appellants' balance-sheet for the year ending 31st August 1913. The argument in support of its inclusion can only be well founded if the sum be regarded as profits or a sum in the nature of profits earned in the course of their trade or business. I am quite unable to see that the sum represents anything of the kind. It is said, and it is not disputed, that the amount in fact was assessed by considering that the fireclay to which it related could only be worked for some two and a-half years before it would be exhausted, and it is consequently urged that the amount therefore represents nothing but the actual profit for two and a-half years received in one lump sum. I regard that argument as fallacious. In truth the sum of money is the sum paid to prevent the Fireclay Company obtaining the full benefit of the capital value of that part of the mines which they were prevented from working by the Railway Company. It appears to me to make no difference whether it be regarded as a sale of the asset out and out or whether it be treated merely as a means of preventing the acquisition of profit that would otherwise be gained. In either case the capital asset of the company to that extent has been sterilised and destroyed, and it is in respect of that action that the sum of £15,316 was paid. It is unsound to consider the fact that the measure adopted for the purpose of seeing what the total amount should be was based on considering what are the profits that would have been earned. That

no doubt is a perfectly exact and accurate way of determining the compensation, for it is now well settled that the compensation payable in such circumstances is the full value of the minerals that are to be left unworked less the cost of working, and that is of course the profit that would be obtained were they in fact worked. But there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test. I am unable to regard this sum of money as anything but capital money, and I think therefore it was erroneously entered in the balance-sheet ending 31st August 1913 as a profit on the part of the Fireclay Company.

It has been stated before your Lordships that the income tax which was paid upon that sum will be returned by the Crown with interest, but that consideration forms no part of the matter that is now before this House, and I have only to ask your Lordships to dismiss this appeal with costs.

LORD ATKINSON—I concur.

LORD SUMNER—I concur.

LORD WRENBURY—The mining leases which the appellant company held of some 1835 acres of fireclay fields in or near Glenboig were capital assets of the company. The company's objects were to acquire profit by working the mines under and by virtue of the title and rights which they held under the leases. By acts done by the Caledonian Railway Company the appellant's were, as to part for a time and as to part altogether, precluded from working the mines and acquiring profit in so doing, and this in two ways—First, the Railway Company obtained from the Court of Session an interdict which precluded the appellants from working for some two or three years. Ultimately this interdict was by judgment of your Lordships' House recalled and was held to have been wrongful, or as this is a Scotch case I ought to say wrongous, from the first. The appellants recovered from the Railway Company £5400 as damages in respect of the operation of the interdict. Secondly, the Railway Company, after the interdict was recalled, gave the appellants notice under section 71 of the Railways Clauses Consolidation (Scotland) Act 1845 not to work a certain area of one and a-half acres, and compensation in respect of this was assessed by arbitration at £15,316. These two sums of £4500 and £15,316 were paid in April and August 1913. The appellants included them as income in their return for the purposes of income tax and paid income tax upon them. The Inland Revenue received and retained the income tax so paid.

The question now is as to excess profits duty. The year 1913 is one of the two years upon the average of which the pre-war standard of profits is to be ascertained. It is to the interest of the appellants to contend that the profits in the pre-war years were large, for the excess profits would be to that extent less. They therefore contend that these sums were profits of the year 1913 and that they rightly paid income tax upon them. The Inland Revenue, however, finding that it is to their interest so to do, contend that these sums were not profit although they have accepted and retained income tax upon them on the footing that they were. The question to be determined is whether they or either of them were in the whole or in part profits of the appellants' business.

In the case stated by the Commissioners for Special Purposes it appears that the appellant company contended before them that the Inland Revenue by accepting income tax upon the sums in question were barred from now maintaining that they were not revenue under income tax principles. It is unnecessary for your Lordships to express any opinion whether as a matter of honest administration by the Inland Revenue Authorities or as a matter of law the Inland Revenue could have maintained the contention that they could take and retain income tax and then claim excess profits duty on the ground that the sum was not income. For in the course of the proceedings the appellants abandoned this plea upon the Commissioners of Inland Revenue giving an undertaking that in the event of their recovering from the appellants excess profits duty on the basis that these sums were not profits the income tax should be repaid with interest at five per cent. The only question before your Lordships is therefore, as before stated, whether those sums or either of them were in whole or in part profits of the year in which they were received.

First as to the £15,316, this was compensation for being precluded from working part of the demised area which otherwise the appellants might have worked and thereby made profit. Was that compensation profit? The answer may be supplied, I think, by the answer to the following question—Is a sum profit which is paid to an owner of property on the terms that he shall not use his property so as to make a profit? The answer must be in the negative. The whole point is that he is not to make a profit and is paid for abstaining from seeking to make a profit. The matter may be regarded from another point of view—The right to work the area in which the working was to be abandoned was part of the capital asset consisting of the right to work the whole area demised. Had the abandonment extended to the whole area all subsequent profit by working would of course have been impossible, but it would be impossible to contend that the compensation would be other than capital. It was the price paid for sterilising the asset from which otherwise profit might have been obtained. What is true of the whole must be equally true of part. Again, a further point of view is this—Had the working not been interfered with the profit by the working would have extended over, say, three years. It would have been an annual sum. The payment may be regarded as a redemption of that annuity. Is the redemption of an annuity itself an annuity? If the currency of the annuity had been,

say, ten years, and the beneficiaries were A for three years and B for seven years, could A have claimed all the compensation money on the ground that it was income of the first year? Clearly not.

In my opinion it has been rightly held that the £15,316 was not, nor was any part of it, income of 1913 or of any other year. The income tax was wrongly assessed and paid and received, and must be repaid as agreed with interest, and the pre-war standard must be calculated upon the footing that the sum was not profit.

As regards the £4500, it is unnecessary for me to state the opinion which I had formed. The parties have come to an agreement as regards that sum—an agreement which very fairly gives effect, I think, to the rights of the parties.

LORD CARSON—I concur.

Their Lordships ordered that the judgment appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Hon. Sir William Finlay, K.C. — Morrice Mackay, K.C. — Edmunds. Agents — Craig & Henderson, Glasgow—R. S. Miller, W.S., Edinburgh—John Bransbury, London.

Counsel for Respondents — Attorney-General (Sir Gordon Hewart, K.C.)—Lord Advocate (Morison, K.C.)—Hills—Skelton. Agents—Stair A. Gillon (Solicitor of Inland Revenue for Scotland)—H. Bertram Cox, C.B. (Solicitor of Inland Revenue for England).

COURT OF SESSION.

Friday, December 9.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

JOHN GRAHAM *v.* STIRLING AND ANOTHER

ROBERT GRAHAM *v.* STIRLING AND ANOTHER.

Process—Decree of Removing—Reduction—Competency—Court of Session Act (Judicature Act) 1825 (6 Geo. IV, cap. 120) sec. 44.

The Court of Session Act (Judicature Act) 1825, sec. 44, enacts—"When any judgment shall be pronounced by an inferior court ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply as above by bill of advocation to be passed at once, but only by means of suspension as hereinafter regulated."

Held, in an action of reduction of a decree of removing, that the process of review by way of reduction was not excluded by the section, and action sustained as competent.

Landlord and Tenant—Joint Lease—Termination of Tenancy—Notice—Validity—Notice by One of Joint Tenants—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII*, *cap.* 64), *sec.* 18 (1) *and* (2).

The Agricultural Holdings (Scotland) Act 1908, sec. 18, enacts—"(1) Notwithstanding the expiration of the stipulated endurance of any lease the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end. . . . (2) Failing such notice by either party the lease shall be held to be renewed by tacit relocation for another year and thereafter from year to year."

A farmer who had become sole tenant of a farm assigned the lease which had several years to run to himself and his brother. Shortly afterwards the brothers entered into an agreement to carry on "a joint trade or partnership" as farmers of the farm and became joint owners of the stock. The management of the partnership was left wholly to the farmer, who carried on the farm as if he were sole tenant, all the transactions in connection with it and all matters relating to the tenancy and lease being carried through by him in his own name. After the lease expired the tenancy was continued under tacit relocation for several years. The brother who managed the farm then gave notice to terminate the tenancy, the notice being in his own name and containing no reference to his brother. At the time the notice was given the brothers had forgotten that there was a joint tenancy and the proprietor's factor was unaware of it. Circumstances in which *held* that the notice was given with the authority of the other tenant and was sufficient under the Agricultural Holdings (Scotland) Act 1908, sec. 18 (1).

Opinions reserved as to whether one of two or more joint tenants can at his own hand give notice which will be effectual under the statute to prevent tacit relocation, or whether such notice must be given by or on behalf of all the joint tenants.

John Graham, farmer, Gatehouse, *pursuer*, brought an action against James Stirling, Lauriston Hall, Balmaghie, stewartry of Kirkcudbright, *defender*, and also against Robert Graham, farmer, Twynholm, for his interest, concluding for reduction of "a pretended decree dated 18th May 1920, and extracted 11th June 1920, pronounced by the Sheriff-Substitute of the Sheriffdom of Dumfries and Galloway at Kirkcudbright in an action of removing at the instance of the defender against the pursuer and the said Robert Graham," or alternatively for reduction of the decree "so far as it ordains the removal of the pursuer from the farm of Bargatton, and finds him liable to the defender in the expenses of the said action." There was also a conclusion for payment of a random sum as the expenses incurred by the pursuer as defender in the action of removing.

Robert Graham, *pursuer*, also brought an action against James Stirling, *defender*