that she was alone to blame, and that this appeal should be dismissed.

Their Lordships ordered that the interlocutor appealed against be affirmed, and the appeal dismissed with costs.

Counsel for the Appellants—The Dean of Faculty (Sandeman, K.C.)—Bateson, K.C. —W. G. Normand. Agents—J. & J. Ross, W.S., Edinburgh—William A. Crump & Son, Solicitors, London.

Counsel for the Respondents—Macmillan, K.C.—Carmont. Agents—Webster, Will, & Company, W.S., Edinburgh—Godfrey, Warr, & Company, Solicitors, London.

Friday, March 21.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

CONNELL *v.* JAMES NIMMO & COMPANY, LIMITED.

(In the Court of Session, May 25, 1923 S.C. 737, 60 S.L.R. 473.)

Reparation—Negligence—Master and Servant—Mine—Accumulation of Gas Due to Failure to Inspect—Whether Constituting Defect in Condition of Ways and Works—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* (1).

Held (*aff.* the judgment of the First Division, Lords Phillimore and Blanesburgh *diss.*) that an accumulation of inflammable gas in the workings of a "gassy" mine, which the ventilating system had failed to dilute and render harmless, and which had not been detected owing to the negligence of the person entrusted by his employer with the duty of seeing that the works and ways were in a proper condition, constituted a defect in the condition of the ways and works of the mine within the meaning of section 1, sub-section (1) of the Employers' Liability Act 1880.

The case is reported *ante ut supra.*

James Nimmo & Company, Limited, appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—This is an appeal against an interlocutor of the First Division of the Court of Session in Scotland, dated 26th May 1923, pronounced against the appellants upon a case stated. The Case stated was prepared upon a requisition by the appellants to the Sheriff of Lanarkshire on an appeal to the First Division of the Court of Session relative to an interlocutor pronounced by the said Sheriff awarding damages (assessed at £325) under the Employers' Liability Act 1880, and decerning against the appellants for the payment of the above sum with interest from the date of the citation and expenses. The Sheriff sets out the findings at which he arrived. They included—1. That the Auchengeich Colliery belonged to the appellants; that at 4 a.m. on the 1st of June 1920 the respondent, while employed in the appellants' service as a brusher in section No. 3 of Pit 2 of this colliery, was injured by an explosion of gas, and that at the time of the explosion the respondent was working at a place known as the Lye in the intake airway of section 3. 2. That Auchengeich Colliery is ordinarily a gassy mine in which naked lights are not used. 3. That the appellants had prior to the explosion extended an old working by cutting through a whin intrusion, and opening up an area beyond and to the north of the latter. 4. That this opening was effected by making a cutting to the left, a cutting called the left cross cut, and a cutting to the right known as the right cross cut, and by a third cutting in line with the intake airway known as the "heading." 5. That the air which ventilated this section No. 3 passed along the intake airway through the whin intrusion, then along the right cross cut and round the face, returning by a third cutting through the whin intrusion. The lye, where the respondent was working at the time of the explosion, was to the south of this last-mentioned intrusion. 6. That within the fortnight preceding the explosion gas had been discovered in this heading on several occasions—on two of which occasions the gas had been found to be in such quantity that it led to the withdrawal of the men working at the heading. 8. That the mine was worked on double shifts.

The Sheriff then proceeds in this case to deal with the happening of the explosion and its causes.

The 9th of his findings is to the effect that the ignition of the gas was caused by a spark from an electric coal-cutting machine which was being used in this section 10. That this machine was fitted with a switch-box cover intended to prevent sparking and the emission of flame to the outer air from the ignition of the gas in the switch-box, and was effective for that purpose if properly bolted down. 11. That at the time of the explosion the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working-place in the vicinity of the top of the heading fit for working. I quote the following important findings *in extenso*:— "(11) That at the time of the explosion the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working-place in the vicinity of the top of the heading fit for working. (12) That the men operating the coal-cutting machine had negligently failed to screw down the cover properly, having used only one of the eight studs provided for that purpose. (13) That during the shift the machinemen had worked the coal-cutting machine following the direction of the air from the right cross cut round the face to the top of the heading, at which point the explosion occurred. (14) That the fireman employed by the appellants to inspect the section on the respondent's shift negligently and without sufficient excuse failed to inspect the section, as required by the Coal Mines Act, within

five hours of the previous inspection. (15) That it was a reasonable inference that if the fireman had fulfilled his duty in regard to inspection he would have discovered that there was a dangerous accumulation of gas, and could either have taken steps to clear it away or have withdrawn the workmen from the neighbourhood. And (16) That the said fireman was charged with the duties applicable to firemen laid down in the said Coal Mines Act, and the general regulations thereunder."

The Sheriff then states in the words following what were his findings on the questions of law involved:—"I found further on the evidence relative to the respondent's claim at common law that the respondent had failed to prove that his injuries had been caused by fault on the part of the appellants. I found in law, in these circumstances, that the accumulation of gas referred to was a defect in the condition of the ways and works connected with or used in the business of the appellants, that it had not been discovered or remedied owing to the negligence of a person in the service of the appellants entrusted by them with the duty of seeing that the ways and works were in proper condition, and that the respondent's injuries were caused by reason of said defect. I accordingly found that the appellants were liable to the respondent in damages under the Employers' Liability Act 1880, but not at common law, assessed the damages at the above-mentioned sum of £325 with interest and expenses as already stated." He asks for the opinion of the Court on the two following questions:—"(1) Was I entitled, on the respondent's pleadings, to consider whether or not the presence of gas at the working-place constituted a defect in the ways and works connected with or used in the business of the appellants in the sense of sub-section 1 of section 1 of the Employers' Liability Act 1880? (2) In the event of question 1 being answered in the affirmative, was I justified in holding that the presence of gas at the working-place constituted such a defect?"

The vast importance attached by the Legislature to the protection of miners from the dangers they may be exposed to by the presence of inflammable or noxious gases in the ways and workings of a mine is demonstrated by the numerous minute and drastic provisions dealing with the matters contained in the Coal Mines Regulation Act 1911. Section 2 of that statute provides that every mine shall be under a manager who shall be responsible for the control, management, and direction of the mine. Section 14, that in every mine there shall be appointed by the manager one or more competent persons styled firemen, examiners, or deputies, to make such inspection and carry out such other duties relative to the presence of gas, ventilation, the state of roof, sides, and general safety as are by the Act and the regulations made thereunder required. Section 29, sub-section 1, provides that an adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless inflammable gas to such an extent that all shafts, roads, levels, and workings of the mine shall be in a fit state for working and passing therein, and particularly that the intake airways up to 100 yards of the first working-place at which the air enters shall be normally kept free from inflammable gas. Sub-section 2 of the same section enacts that a place shall not be fit for working or passing therein (I emphasise the last two words) if it contains less than 19 per cent. of oxygen or more than ½ per cent. of carbon dioxide, and that an intake airway shall not be normally free from inflammable gas if the average percentage of such gas found in six samples taken by an inspector in the air current at intervals of less than a fortnight exceeds one quarter. Section 63, sub-section 1, enacts that firemen, examiners, and deputies of a mine shall within such time, not exceeding two hours immediately before the commencement of work in a shift as may be fixed by the regulations of the mine, inspect every part of the mine situate beyond the station, or each of the stations in which men work or pass during the shift.

By the 65th section it is provided that in case of a mine worked by a succession of shifts, as the mine in this case was, no place shall remain uninspected for an interval of more than five hours. It was the disregard of this latter provision by the fireman examiner which the Sheriff found was the main cause of the explosion.

The last section I think it necessary to refer to is the 67th, which provides that if at any time it is found by the person for the time being in charge of a mine or of any part thereof that by reason of the prevalence of inflammable or noxious gas or for any cause whatever the mine or any place in it is dangerous, every workman is to be withdrawn from the mine or place found to be dangerous. This statute is no doubt much later in date than the Employers' Liability Act. Its provisions show, however, what are the nature and extent of the duties which the officials of a mine are to discharge, and I think it may safely be said that the framers of the statute of 1911 would be astonished to find that an airway or other way in a mine, in which miners work and through which they pass, has, though it be filled with a deadly poisonous gas like carbon dioxide or a highly dangerous inflammable gas, no defect in its condition though it would have a defect in its condition if to take Mr Justice Stephen's illustration it had mud or water on its floor which would probably soil or wet the miners' boots. The Sheriff in his note deals with the duties and position of Hoey. He was a fireman and shot firer; the workings to which his duties applied were sections 3 and 5 of the mine. On the night of the 31st May he went to section 5, where he had some shots fired. After he had inspected that section, he detected the smell of gas in a cross cut at the wall head. At 12·45 a.m. he fired another shot; he observed that after this shot the reek travelled slowly; he then went down to start the pump at the lye in the 5th section.

On his return at 2 a.m. he fired a second shot, and after that saw the smoke was about. He thought something was wrong. Went to the door of No. 3 at 2·45. He returned at 3·15 to No. 5 and fired another shot in No. 5, and then proceeded to inspect that section before he proceeded to inspect section No. 3. On his way to inspect the latter he heard of the accident.

I quite concur with the Sheriff in thinking that Hoey had not any reasonable excuse for failing to inspect No. 3 before the accident. It was most negligent on his part. He was bound under the Mines Act of 1911 to inspect it within five hours of the previous inspection. It will be seen from the provisions of the Act of 1911 that the danger which inspection is directed to guard against is the accumulation of gas in these sections; and I concur with the Sheriff that on the evidence it may be reasonably inferred that if Hoey had inspected No. 3 at the proper time, as he should have done, the presence of the gas would have been detected. His neglect to do his duty was therefore the main cause of the accident. It was not the only cause. The gross negligence of the men in charge of the machine in continuing to work it without the cover having been fastened down was the other cause. The explosion is the result of those two causes combined. Hoey was entrusted by the appellants, or by the manager who represented them, with the duty of seeing that the ways and works were in proper order. The appellants cannot escape liability by entrusting an unfit man, if he be unfit, with those duties. If, therefore, section 3 and the ways connected with it had, when charged with inflammable gases by reason of Hoey's neglect, a defect in their condition within the meaning of section 1, sub-section (1), of the Employers' Liability Act, in my opinion the appellants are liable and the appeal should be disallowed. Section 3 is part of the workings of the mine. The ways, airways, and intake ways are ways of the mine. Men pass through both and work in both. It would appear to me to be plain that in order to determine whether ways or works, or indeed any other thing, had at a given moment a defect in their condition, one must have regard to the use to which they were intended to be put, and were at the time in fact being put, and this for the sufficient reason that a thing may in a given condition be quite adequate for one particular use and quite inadequate for another and different use. I take as an illustration a case I mentioned at the hearing of this appeal.

Suppose there be in an ordinary dwelling-ing house a long passage leading from the kitchen to a pantry, to which the cook and the kitchen-maids must have access to discharge their household duties, I assume that the passage would in its ordinary state be adequate for the purpose for which it was used, but if owing to leakage from a gaspipe it got so full of gas that if one of these servants attempted to traverse it with a lighted candle in her hand she would almost certainly be blown up and possibly killed, and if she attempted to traverse it even without a lighted candle in her hand she would be half choked, it would appear to me impossible to hold the passage had not, having regard to its normal use, a defect in its condition, though it might be an admirable storehouse for trunks and empty wine cases. Ways in a mine serve many purposes—(1) ventilation, (2) passage of miners to and from their work, (3) work in them, so as to extend them, by drilling through obstacles such as whin intrusions, and lastly, I suppose, work must include the transport along them to the foot of the shaft of coal won in the workings to be carried to the surface. All these things require manual labour to be applied to them. Air is needed to enable the workers to breathe, and also needed to dilute inflammable or noxious gases so as to render them innocuous. I cannot think that ways in which human beings work and which they traverse can, however well made and maintained, be considered to have no defect in their condition though they should be filled with a poisonous gas like carbon dioxide, which would kill in a few moments anyone who breathed it. I think the language of the section 2, sub-section (1), applies. In my view, therefore, as I have said, there is a defect within the meaning of this section 1, sub-section (1), in the condition of ways and works in a mine when from any cause they are in a condition which renders them unfit for the uses to which they were designed and intended to be put, and are in fact being put. One would have expected that in the 43 years which have elapsed since the Employers' Liability Act was passed the meaning of section 1, sub-section (1), would have been definitely and clearly determined. It is not so. Yet the authorities are progressive, and I hope presently to show they on the whole support the contention I have put forward. One gets some help, I think, from the judgment of Lord Watson delivered in *Smith* v. *Baker & Son*, [1891] A.C., as reported at p. 351-2 of the report. There a crane which travelled on rails was used to raise stones from a quarry and load them on trucks. In performing this work the suspended stones were swung by the crane over the heads of men, amongst whom was the plaintiff, who were engaged in the quarry drilling holes for blasting.

The plaintiff up to the month of February 1888 had been one of the men using the crane for this particular work. He therefore knew all about the working of it. While a suspended stone was being swung to a lorry it fell upon plaintiff and injured him. As the plaintiff was well acquainted with the manner in which the crane was worked, the principal, if not the only, defence relied upon was that the maxim *volenti non fit injuria* applied, but three questions had by the County Court Judge been left to the jury. First, was the machinery for lifting the stone from the cutting *taken as a whole* reasonably fit for the purpose for which it was applied? (2) Was the omission to supply special means of warning when the stones were being lifted a defect in the ways, works, machinery,

and plant? (3) If so, were the employers or some person engaged by them to look after the condition of works, &c., guilty of negligence? The jury answered the first question in the negative and each of the two others in the affirmative. Lord Watson criticised these questions and came to the conclusion that the jury by their answers to them did not mean to find that there was any specific flaw in the crane itself or its tackle, but that the system of using the crane was not reasonably fit for its purpose, inasmuch as it exposed workmen engaged in another department to unnecessary danger, and second, that the use of the crane without warning to the workman over whose heads its load was jibbed constituted *a defect in the works*. As the action was instituted under the Employers' Liability Act, if this last statement means, as it apparently does mean, that the improper or careless use of a machine, sound and flawless in itself, may amount to a "defect" in the works within the meaning of section 1, sub-section (1), of the Employers' Liability Act, then it does help in the construction of that sub-section very considerably, inasmuch as it amounts to an expression of an opinion that the improper or incautious use of a machine, perfect in itself, may constitute a defect in its condition within the meaning of this section, and, moreover, it gets rid of the notion that a defect is not a defect within the meaning of this sub-section in the ways, works, plant, &c., unless it amounts to a physical or material defect. If this be the result of Lord Watson's judgment, I heartily concur in it. Lord Watson continued—"But as I understand the law it was held by this House long before the passing of the Employers' Liability Act that a master is no less responsible to his workman for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself." And he refers in support of this latter proposition to the case of *Sword* v. *Cameron*, 1 D. 493. He also refers to the judgment of Lord Wensleydale in *Weems* v. *Mathieson* (4 Macq. 266-73), in which that most learned Lord expressed the opinion that a master is responsible in point of law not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

Willetts v. *Watt & Company* ([1892] 2 Q.B.D. 92) is a rather peculiar case. The plaintiff was employed to work in a large workshop in which part of the business of the factory was carried on. There was a catch pit in the floor which was generally covered by a lid. This lid had been removed for a temporary purpose. The plaintiff, when passing from one side of the workshop to the other, fell into this pit, of the existence of which he was ignorant. It was held that the floor of the shop was a "way," but that the hole was not a defect in it within the meaning of section 1, subsection (1), of the Employers' Liability Act. The grounds upon which this judgment of the Court of Appeal seems to have been based arerather peculiar. Esher, M.R., said—"No defect in the way was shown, but only a negligent use of it." I presume by that it is meant that the appellant by falling into the pit was using negligently the way over the floor. But I confess I fail to see how, if a way has an open pit in it, it has not a defect in its condition. Fry, L.J., said the defect must be of a chronic character to come within the section and not arise from negligent user. He refers to *Walsh* v. *Whitely* (21 Q.B.D. 371), where this distinction is dealt with. He says the way, *i.e.*, the floor of the shop, was properly adapted to serve a double purpose. The catch pit might be used when required or the place might be used for general purposes, including the right of way. The negligence consisted in the plaintiff's falling into the pit. Lopes, L.J., says there was no defect in the original construction of the way (*i.e.*, the floor) nor in the subsequent condition of the way. It was not out of repair, but was still as it had always been intended to be—a way with a well in it covered by the lid, and there was nothing wrong with the lid.

The true mode of stating the facts of the case, he said, is that there was no defect in the condition of the way, but a negligent use of it. That does not seem to me to be a very satisfactory decision. In *Walsh* v. *Whitely*, Lord Lindley, in considering this section 1, sub-section (1), and section 2, subsection (1), together at page 379 of the report, said—"It must be a defect in the condition of the machine, having regard to the use to which it is to be applied and to the mode in which it is to be used." He previously had said—"The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to compensation." And then he gives a definition of a defect to satisfy both of these sections, thus—"It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purpose to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer."

The judgment of Lord Lindley supports completely my contention that it is the use to which a thing is intended to be put and is being put which must be considered when the question whether or not there is a defect in its condition has to be determined. The case of *M'Giffin* v. *Palmer Shipbuilding Company* (10 Q.B.D. 5) seems to me to be opposed to my contention. There Stephen, J., in giving judgment said—"A defect in the condition of the way, or works, or machinery, or plant means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' applies are for the time being altered in such a way as to interfere with their use." So far that seems to support my contention, but then he proceeds to say—"For instance, if the way is made muddy by water, or if it is made slippery by ice, in either of these cases I should say that the way itself was not defective, but the condition of the way, by reason of the water which is incorporated

with it, or from its being in a freezing state, is affected."

According to this judgment a way so muddy that a miner going to his work would soil his boots in passing along it would have a defect in its condition, but a way unaltered materially or physically, yet so full of poisonous gas that if a miner walked along it in the usual fashion he would be killed by the gas, would have no defect in its condition. With all respect I think that judgment, if it means this, is entirely unsound, and its unsoundness consists in this, that it treats the word defect as referring solely to a material defect in the structure or substance of the way. In *Tate* v. *Latham* (1897, 1 Q.B.D. 502) a circular saw was used. It required to be guarded and was in fact guarded. The sawyer in charge for his own convenience removed the guard while the machine was in motion, and it was left unguarded. The plaintiff fell against it and was injured. It was held by the Court of Appeal that the absence of the guard was a defect in the condition of the machine. This case supports the view I have put forward, and I am therefore of opinion that the First Division was right in answering in the affirmative as they have done the first question addressed to them.

I was under the impression that during the argument the Dean of Faculty abandoned the point raised as to the sufficiency of pleading, and that therefore it was not necessary that the second question put by the Sheriff should be answered.

If I am right in this I think the appeal fails, and should be dismissed with costs.

LORD SHAW—I am so satisfied with the careful analysis and, as it seems to me, the conclusive reasoning of my noble and learned friend Lord Atkinson in this appeal, that I find it to be unnecessary for me to do anything by way of supplement except to note the following three points:—1. In the citation of authorities in a case of this character I confess that the judgment of this House in *Black* v. *The Fife Coal Company, Limited* (1912 S.C. (H.L.), p. 33) appears to me to be one of the most leading helpfulness. I do not refer to the opinion delivered by myself, but to the most elaborate and deeply considered judgment of Lord Kinnear. The application of the doctrines of responsibility in reference to the safety of mines was there discussed with such precision that I express no surprise at the repeated reference to it in the judgment of the learned Sheriff of Lanarkshire. 2. For myself, I am very well content to accept these sentences from the Sheriff's opinion, which I here repeat, as clearly covering the situation of affairs in the present case:—"The next question is whether the defenders are responsible for Hoey's negligence under the Employers' Liability Act, and this question, I think, must be answered in the affirmative. In my opinion the accumulation of gas in the workings was a defect in the condition of the ways and works of the mine within the meaning of sub-section (1) of section 1 of the Act—*Black* v. *The Fife Coal Company*, 1909 S.C. 152, especially *per* Lord Justice-Clerk Kingsburgh at p. 162, 1919 S.C. (H.L.), *per* Lord Kinnear at p. 40. I think also that the condition imposed by sub-section (1) of section 2 of the Act is satisfied in respect that the defect was not discovered or remedied owing to the negligence of the fireman Hoey, who was the person entrusted with the duty of seeing that the ways and works were in proper condition. It is argued that the accumulation of gas was not a defect of so permanent a character as to be a defect in the condition of the ways and works within the meaning of sub-section (1) of section 1. I am unable to accept that view. The presence of gas in the ways or works of a mine does not resemble a casual obstruction affecting the safety of ways, or a chance of escape of gas causing danger in a factory, for in the case of a mine, or at all events a gassy mine, gas is one of the dangers which requires to be provided against by special precautions, and I think it impossible to hold that the presence of gas in the ways or works is not a defect in the condition of the ways and works. I also refer to *Black's* case as an authority supporting my view."

In a previous passage of this valuable opinion the following sentence also occurs to which I respectfully give my adhesion:—"The next question is whether, if Hoey had inspected No. 3 section in accordance with his duty, the accident would have been prevented. The answer is that this can only be matter of inference, but in considering the question it must be kept in mind that one of the main reasons for requiring the regular inspection of mines by firemen is to provide a safeguard for the men employed against the danger of gas accumulating in dangerous quantities. And if a precaution provided against a particular danger has not been taken, and an accident results by reason of that danger, it is not enough for the person responsible for taking the precaution to say that it is not proved that, had he done his duty, the danger would have been averted. The burden is on him to prove the contrary, and in the present case it cannot be said to be proved that if Hoey had performed his duty in the matter of inspecting No. 3 section the presence of gas in the heading would not have been detected, and the accident prevented by steps being taken either to clear the gas away or to withdraw the men working at the coal cutter. On the contrary, I think it may be reasonably inferred that, had Hoey made the inspection which he should have made, the presence of gas would have been detected and the necessary steps taken to prevent untoward consequences." I take the liberty of adopting these admirable sentences as expressing exactly the opinion which after full reflection I have formed in this case. 3. Numerous cases were referred to as to what constitutes a defect in ways and works. I think that the present case is *a fortiori* of them all, for in my opinion an accumulation of gas in a pit not inspected according to the provisions of the statute constitutes a defect in the ways of the mine. To work in those ways or to traverse them

could only be accomplished with the result or at the peril of injury or of death. I cannot hold that ways which could not be wrought in or traversed except with such result or at such peril were not defective. To say that they were not defective appears to me to be a travesty of language. Nor does it appear to me to matter that such result was caused by explosion rather than by inhalation. In my view that cannot affect the legal responsibility in issue.

I conclude by repeating my agreement with the judgment of my noble and learned friend Lord Atkinson.

LORD PHILLIMORE—At the close of the argument delivered on behalf of the appellants at your Lordships' bar it was, I think, plain to you that all preliminary questions must be disposed of in favour of the respondent Connell, and that the only question worthy of consideration was whether, coupling the eleventh finding of fact by the Court of Session with the fourteenth, there was sufficient to entitle Connell to recover his damages under the Employers' Liability Act 1880.

The eleventh finding is as follows—"That at the time of the explosion the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working-place in the vicinity of the top of the heading fit for working."

If the state of things thus found amounts to "a defect in the condition of the ways or works connected with or used in the business of the employer," and thus brings the employers under section 1, sub-section (1), of the Act, I think all your Lordships were agreed that the workman had proved sufficient to bring himself also under the enabling condition of sub-section (1) of section 2 as found by the fourteenth finding. I address myself therefore to the question whether the gassy condition of the mine, which was one of the causes of the accident to the workman, can be deemed a defect in the condition of the ways or works of the mine.

The Employers' Liability Act was passed, as far as I can see, either to give a right or to take away a defence to a claim of right (it would be pedantry at this time of day to discuss the reason of the earlier jurisprudence) broadly in two cases—(1) where the fellow-servant of the injured man had been put by the employer into a position of superiority and control over the injured man, and (2) where the injury was due to the failure of the employer to supply a safe and proper place and surroundings in which to work and safe and proper materials and tools to handle. Your Lordships have to do with the second of these heads, in respect of which I conceive that the Legislature has imposed an initial duty, as I may call it, upon the employer. During the argument I kept in my mind likening the condition to that imposed upon shipowners to provide a seaworthy ship. It is, as I think Lord Sands rightly expressed it, "a static condition" of the ways and works, or indeed if it were in question in this case of the plant and machinery, which is required of the employer.

The delicacy of the distinction upon which the respondent relies may be illustrated by taking the case of two pumps, one for water and one for air. The water pump will raise and deliver hot water. It is properly arranged and guarded, but it happens that a mine-worker puts himself in the way of the stream as it is delivered from the pump and the pump man does not notice him and negligently continues to pump so that he is scalded. This will be negligence by a fellow-workman and will give no right of action. The air pump delivers fresh air into the mine and so dilutes the noxious gases. The pump man negligently discontinues pumping and the mine-workers suffer. This again is negligence of a fellow-servant, and as such gives no right of action. But it is suggested that the Court can transcend this consideration and look at the state produced by the negligence and say that there is a defect in the condition of the works, however caused, and that for this the employer is liable. As far as I can ascertain, counsel brought before your Lordships all the decided cases which could give you assistance, and there are but four. I take them in chronological order.

M'Giffin v. *Palmer Shipbuilding and Iron Company, Limited* (10 Q.B.D. 5) was decided in 1882. In that case a tap, temporarily left by a workman, projected into the way along which another workman was wheeling a ball of red-hot iron and upset the wheelbarrow, causing the ball to fall on the man and kill him. The Divisional Court (Field and Stephen, J.J.) held that this was not a defect in the condition of the way and rejected the claim.

After a second perusal of their judgments I conclude that both Judges relied upon the fact that the obstruction was not something which grew out of the structure of the way but was something adventitious—something which, as Stephen, J., expressed himself, "cannot be said to be incorporated with it." Both Judges gave an illustration which would help the workman in the present case, for they speak of the condition of being slippery with ice as one which would make a defect in the condition of the way. But with all deference to them, if they intended to decide the case merely on the ground that the obstruction was adventitious or foreign it was an unsafe ground. If a cart travelling along a highway be negligently allowed to let some stones (part of its burden) fall on the road and the carter negligently leave them behind, the driver of a following vehicle is just as likely to suffer injury from their presence as if they were stones sticking up from a badly broken-up part of the road. But I think no one would say that the upsetting of these stones constituted an immediate obstruction for the presence of which the highway authority would be liable—*aliter*, if the highway authority allowed the obstruction to remain for days. It is not the source of the danger but its duration that seems to be pointed at, and Mr Justice Field seems in the end to take this view when he closes his judgment by saying that the "defect must be something in the permanent or quasi-permanent condition."

Walsh v. *Whiteley* (21 Q.B.D. 371, decided in 1888) does not seem to have much bearing on this case. Perhaps its principal value lies in the various observations made by Lord Esher, Master of the Rolls, in the Court of Appeal, and on the whole assented to by the Lords Justices, that a liberal construction in favour of the workman should be given to the statute. The tenor of mind of the Master of the Rolls is not without importance when your Lordships come to consider the next case.

Willetts v. *Watt & Company* (1892, 2 Q.B.D. 92) is the authority nearest this case. In the floor of the workshop there was a catchpit covered by a lid. The shop was a place of passage through which workmen travelled, having to a certain extent to pick their way between a number of heavy articles which were on the floor. The lid had been removed for some not improper purpose, and a workman passing across the floor did not observe this, fell into the catchpit and was injured. The Divisional Court held that there was no regular way across the shop, and therefore that the absence of the lid did not cause a defect in the way. But the Court of Appeal took a different view and said that the passage across the floor was a way, and this led the Court to determine whether the absence of the lid was a defect in the way.

All the members of the Court thought that it was not a defect within the meaning of the statute. Lord Esher said—"There was nothing wrong with the construction. . . . The lid was there for the purpose of being taken off if occasion required, and on this occasion it was taken off and left this hole." It followed that it was a case of negligent user. Fry, L.J., said that "the language of sub-section (1) points to a defect of a chronic character." Lopes, L.J., said "there was no defect in the original construction nor in the subsequent condition of the way. It was not out of repair but was still as it always had been intended to be—a way with a well in it covered by a lid, and there was nothing wrong with the lid. . . ."

In *Tate* v. *Latham & Son* (1897, 1 Q.B.D. 502) a saw worked by machinery had a guard to it, which the man in charge of the saw removed in the course of an afternoon because he thought that it hindered its working. He left the guard off when he left off work, and it was still off at eight o'clock next morning after steam power had been applied and the saw was turning, but apparently before the workman came back to it, and a cleaner tripped and fell upon the saw and got injured. The case was tried before a County Court Judge and a jury, and the Judge withdrew the case from the jury, thinking upon the evidence that no case was made out. This decision was reversed by the Divisional Court (Wright and Bruce, J.J.) and a new trial was ordered, which was affirmed by the Court of Appeal. Both Judges in the Divisional Court felt some difficulty in dealing with the authority of *Willetts* v. *Watt & Company*. Wright, J., disposed of it by saying that "there the lid of the catchpit was properly removed in the ordinary and proper course of business." He added that the negligence complained of did not consist in removing the lid but in not giving proper warning, and he proceeded to comment on the very obvious defect in the saw bench while the guard was away. Bruce, J., I think, took the same view of *Willetts* v. *Watt & Company*, though he is not quite so express as Wright, J. He added that if the guard had been out of its place for a month it could not be doubted that the saw bench was incomplete and therefore in a defective condition. He said that it was "immaterial to consider (apart from the question of negligence) how long the defect had existed." In the Court of Appeal Lord Esher said that a machine could not "rightly be said to be in a proper condition merely because there was a guard provided if that guard was not so fitted whilst it was in motion." Chitty, L.J., concurred.

It so happens that I was long a colleague of Bruce, J., and I have a high respect for the soundness of his judgment. But I would pause for a moment upon his assumption that it was immaterial to consider how long the defect had existed. Let me trouble your Lordships with two more illustrations. Probably all of you have been in a cotton-spinning factory and have seen how the men work in the spinning room in the thinnest and most reduced garments, and I think bare feet. If upon one of these men, without giving him time to retire or put on a wrap, a large window was opened by the negligence of a fellow-servant on a cold day, the sudden lowering of temperature thereby produced would create an atmosphere unsafe for him (perhaps quite as unsafe as a gassy atmosphere), as it might lead to pneumonia and death. Would it be the proper way of looking at that case to consider it as one where there was a defect in the condition of the works and throw the responsibility on to the employer, or would it not be right to say the cause of the accident was the negligence of a fellow-servant?

Then I would take the case of machinery or plant. A firm keeps a motor bicycle for its messengers. A fellow-servant cleans the bicycle and pumps it up but in a hurry, and hands it over to the messenger with the little cap off the tube by which the tyre is inflated or possibly with the cap imperfectly fixed. As soon as the messenger starts the tyre becomes deflated and the messenger is thrown upon his head. Is it reasonable to look upon this as a defect in the condition of the cycle, or should it be considered as a simple act of negligence by a fellow-servant? I think we must all avoid the temptation of glossing the case over by saying that in all these illustrations the way or machinery was in a defective condition. The word condition so used has not the same shade of meaning as the words "condition of" in the statute.

I come back after consideration to the "quasi-permanent condition" of Field, J., and "the chronic character," or as one report of his judgment says, I think, the "quasi-chronic character" of Fry, L.J., and the "static condition of danger" of Lord

Sands. I think this is the real test. It must be a standing and not an accidental and quite temporary defect.

This leaves one to consider whether the gassy condition of the mine at the moment of explosion should be deemed to be of a standing or of a temporary character. For this purpose in order to comply with the provisions of section 2, sub-section (1), it must be a gassy condition which but for negligence should have been discovered, and the only negligence is that the fireman did not come round within the five hours. Therefore what we should know is how long after the five hours the explosion occurred. As to this there is no finding in the Case stated by the Sheriff. All he says is that the fireman negligently failed to inspect within five hours of the previous inspection. If I refer to the pleadings I find in the 6th condescendence "the place in which the pursuer was then working had not been inspected for an interval of more than five hours," and the answer—"Explained further that John Hoey, the fireman who was in formal charge of section 3 and section 5, was delayed in section 5, and it was somewhat later than the normal hour before he arrived at section 3." I have looked at the note of the Sheriff-Substitute, but I cannot trace the point of time there. If, as I think, it is important to show duration, it is for the pursuer to do it and he has failed in proof. If your Lordships should think the point of importance, and that it would be fair to the pursuer to give him still a chance of proving it, it is probably a matter which could easily be ascertained, perhaps admitted. Speaking for myself, I should have no objection to this course, but if the case is left as it is my judgment would be in favour of the appellants.

LORD BLANESBURGH—The question under the Employers' Liability Act 1880 which now alone remains to be considered by your Lordships—for I treat the point of pleading as having been in effect disposed of at the hearing of the appeal—cannot, to my mind, be answered with any certainty, unless it be constantly borne in mind that this pit of the Auchengeich Colliery, the scene of the disastrous explosion on the morning of the 1st June 1920, is what is called in mining parlance a "gassy mine" of a particular type.

The characteristics in this respect of the Auchengeich pit are in the papers before the House referred to in varying forms of description, any one of which I might select as sufficiently apt for my present purpose. The Sheriff describes the pit as one in which naked lights are not used. The appellants in their printed case speak of it as one which has gas—that is to say, inflammable gas in it under normal working conditions. The learned Sheriff-Substitute, most aptly perhaps of all, says of it that the presence of gas in the mine—by which he too means inflammable gas—was its normal condition controlled but not removed by ventilation. I pause to observe—the circumstance being to my mind vital—that throughout this case we are in relation to this mine dealing with inflammable gas only as distinct from noxious or poisonous gas.

Now work in such a mine is not prohibited. It is allowed and even encouraged under conditions prescribed by Act of Parliament, the statute in force dealing with the subject being the Coal Mines Act 1911.

And incidentally I may here observe that the Sheriff has in this case found that the obligations imposed on the appellants by that statute, as at common law generally, were all in relation to this mine complied with by them. In the opinion of the Sheriff, as the Lord President puts it, the employers have acquitted themselves of their responsibility under that statute, and the case before your Lordships so far proceeds, as it did in the Inner House, on the assumption that the Sheriff rightly so held.

Here, therefore, we have a mine in which the presence of inflammable gas was a normal condition and with reference to which the appellants are found to have discharged all their obligations in respect of ventilation, organisation, equipment, and conduct, as prescribed at common law in that behalf. It is in regard to such a mine that the Sheriff propounds the question which the House is now required to answer, whether the presence of such gas at the working constituted a defect in the ways and works connected with or used in the business of the appellants in the sense of section 1 (1) of that general statute, the Employers' Liability Act 1880.

Stated in the unqualified terms in which it is phrased by the Sheriff the question would appear to admit only of one, and that a negative answer. The presence of inflammable gas in this mine, at least to some extent, so far from being a defect, is a permitted attribute of the mine. Its presence, it is true, for extrinsic reasons to which I shall later allude, may make the mine more hazardous to work in than one from which gas is absent. But the mere presence of inflammable gas in such a mine cannot, to my mind, of itself constitute in any proper sense of that word a defect in its ways or works. To say that it does would be equivalent to saying that every gassy mine is in this connection a mine with a defect in it. But the contrary is, I think, very clearly the true view. Gassy mines are a well-known class of mine. So soon as a mine is recognised to be gassy special precautions for the safety of the workers become imperative. Particular care must be taken with regard to ventilation, open lights must not be used, safety lamps must be supplied, and the introduction of lucifer matches and the like must be absolutely banned. With all these safeguards duly provided and observed a gassy mine is no more defective than is a non-gassy mine where they are not necessary. So safeguarded the presence of inflammable gas need not be either harmful or dangerous to the health of the men employed in the mine who, indeed, as apparently was the case here, may remain quite unconscious even that it is there. The difference between a gassy mine

so equipped and organised and another mine is really this, that in a gassy mine there is always the risk of mischance due to the fallibility of human nature or to the carelessness or neglect or wickedness of man, as a result of which the safeguards provided may be misused or the regulations made be broken or disobeyed. But the existence of such a risk cannot, in my judgment, be properly described as a defect in the condition either of the mine or its ways or works in the sense in which that word is used in the statute. Unless you can say of inflammable gas in a mine *so safeguarded* that its mere presence from its first moment constitutes a defect in way or works you cannot, to my mind, describe it as of itself a defect within the meaning of the Act, and so much I think you cannot say. To the question, therefore, in its absolute form the answer must, in my opinion, be in the negative.

But although the question is put by the Sheriff in a form absolute it should, I do not doubt, be read in connection with the accompanying case, and in particular with paragraph 11 thereof, in which the Sheriff states his finding to be that at the time of the explosion in the mine the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working place in the vicinity of the top of the heading fit for working.

Now, before it can be ascertained whether the presence of gas in the mine to the extent here indicated by the Sheriff constituted a defect within the meaning of the statute, it is necessary to discover, if one can do so, from the Stated Case and the Sheriff's interlocutor what were the actual conditions which these words are used to describe. It is, I think, unfortunate that they were chosen to describe anything. They are the words of section 29 of the Coal Mines Act of 1911, selected apparently upon the view that the state of things which under that Act persons in the position of the appellants are only under a qualified obligation to prevent may, without more, be regarded as a defect within the meaning of a general Act passed over thirty years before and in respect of which their liability is unqualified. I am not prepared in general terms to subscribe to that view, and if paragraph 11 of the case is in any way based upon it, it becomes, I think, all the more necessary to get, if it be possible, at the actual conditions which the words of that paragraph 11 are selected to describe. And fortunately a reference to the case and the interlocutor of the Sheriff makes it, I think, quite clear what the actual conditions as found by him were.

As to gas, his finding was that in the mine at the place and time of explosion inflammable gas had accumulated in such density that when brought into contact with a naked light it exploded. But when he finds that the inflammable gas was not diluted to such an extent as to make the working-place in the vicinity of the top of the heading fit for working, does he mean that the gas remained so undiluted that not only did it explode but that its presence was, albeit in a lesser degree, harmful or injurious to the health of the workers in the heading as in the case of *Black* v. *Fife Coal Company*, 1912 A.C. 149? If such be his meaning, the view I would take of this question would be different from that which I am now expressing. But that that is not his meaning is, I think, quite plainly shown by his interlocutor.

There it appears that in the Sheriff's opinion the fact that gas was present was unknown to the respondent. Had the Sheriff thought otherwise on that point, he could not, I think, have refused to the appellants, as he did, the opportunity of showing that such knowledge on the part of the respondent was or might be under section 2 (3) a complete answer to any claim by him under section 1 (1) of the Act; nor could he have omitted to consider the effect on the respondent's claim in that event of section 67 (4) of the Act of 1911. But further, the statement of the Sheriff in paragraph 15 of the case, that it was a reasonable inference that if the fireman had fulfilled his duty in regard to inspection he would have discovered that there was a dangerous accumulation of gas, imports, I think clearly enough, that in the Sheriff's view the presence of gas prior to the explosion was neither known to, nor appreciated, nor felt by anyone concerned.

The finding, therefore, stated in clause 11 of the case amounts in my view to no more than this, that there was present in this gassy mine at the time of the explosion an accumulation of gas which, although not otherwise deleterious or harmful to health, did ignite when brought into contact with an open light. The real question accordingly, as I see it, is whether the presence of inflammable gas to that extent in a gassy mine where an open light is prohibited and unnecessary is a defect within the meaning of the statute.

Here again the answer must, I think, be in the negative. A gassy mine, gassed to that extent may, in the way I have described and as this case shows, be more dangerous than another in which there is no gas. But it is not, I think, for that reason alone defective any more than would a ship be defective merely because through the negligent opening of her port holes she is under risk of being sunk by the inrush of the sea.

And so far as the Sheriff himself is concerned I doubt whether he would have decided that the presence of this gas here was such a defect had he not, as I very respectfully conceive, misapprehended the true effect of *Black* v. *Fife Coal Company* (*cit. supra*), which apparently suggested this conclusion to him, and which he intimated to the parties was in the Court of Session a decision that might justify the view he ultimately took.

With reference to that case, it has first to be observed that the decision on the Employers' Liability Act was based *not on* section 1 (1) but on section 1 (2). No one seems to have thought that section 1 (1) covered even so fatal a state of things as was there disclosed. Speaking, however, for myself I should be of opinion that section 1 (1) was also there applicable, and that

the ways and works of the mine then in question were clearly defective within the meaning of that sub-section.

But the distinction between *Black's* case and the present is, I suggest, fundamental. The ways and works in *Black* were pervaded not by inflammable gas, against the potential dangers of which precautions had been effectively taken and safeguards provided. They were pervaded by noxious gases, against which no such safeguards were either existent or indeed possible. The gas was carbon monoxide, so poisonous, as described by Lord Kinnear in this House, that the presence of a very small quantity of it in the atmosphere would cause death; difficult, moreover, to detect except by its effect upon the system since it has neither colour, taste, nor smell. It was an escape of poisonous gas of such a description into the workings of the mine that caused the death of the pursuer's husband.

Now, as I have already indicated, I should not myself hesitate to say that the presence of such a gas as that in the ways and works of a mine was a defect in their condition in the strictest sense; it was a defect so great as to make them death traps for human beings.

But the whole point is missed, as it seems to me, if it is sought to apply the decision in *Black* to a case like this where the gas present, otherwise innocuous, is inflammable only when exposed to a naked light, the introduction of which into the mine is prohibited and unauthorised and unnecessary—where too the explosion, as the Sheriff-Substitute phrases it, was brought about by the application to the gas of flame from a coal cutter which in turn escaped owing to the carelessness of the men in charge of the machine, for whose carelessness as between the respondent and the appellants the appellants are in these proceedings not responsible. To such a state of things the case of *Black* has I think no application, and no other authority nearer to the present in this aspect of it has been cited.

I am of opinion, accordingly, as I have said, that the answer to the second question in the Stated Case should be in the negative.

Having reached that conclusion on the grounds I have given, I find it unnecessary to consider the case from the point of view from which it has been approached by my noble and learned friend opposite (Lord Phillimore). I should wish, however, very respectfully to say that I concur with him as to the principle he extracts from the authorities to which he refers.

One word further. I should have been sorry if the conclusion at which I have arrived had carried with it the consequence that the respondent was entitled to no compensation in respect of this accident. But that would not have been so. This case is one of several pending actions arising out of this explosion. It has been selected as the leading case, and by arrangement the others have been sisted pending its determination. To this fact is probably due the extreme elaboration both of evidence and argument with which it has been sought to establish liability against the appellants both at common law and under the Employers' Liability Act. Because liability under the Workmen's Compensation Act has always been admitted by the appellants and the modified damages awarded by the Sheriff under the Employers' Liability Act hardly seem adequate to the trouble taken to obtain them. To allow this appeal would in no way preclude the respondent, if so minded, from raising before the Sheriff other points on the Employers' Liability Act with which in the view he took of the case the Sheriff has not hitherto considered it necessary to deal; nor would it preclude him from applying to the Court of Session to review the decision of the Sheriff against him as to the liability of the appellants at common law; nor would it deprive him of his right in the last resort to compensation under the Workmen's Compensation Act, the amount of which is in most cases sufficiently adequate when compared with the damages recoverable under the Employers' Liability Act to make actions under that Act now practically non-existent.

This appeal deals only with one ground of alleged liability under that statute.

I am for allowing it.

LORD DUNEDIN—I have had the advantage of perusing the opinions which have been delivered by my noble and learned friends Lords Atkinson and Shaw, and as they entirely cover all that I should for myself have wished to say I was prepared merely to express my concurrence, but as there has been a difference of opinion I feel I ought to add a few words.

Now first it seems to me that a "way" cannot be taken to be the ground on which you tread, or the walls between which you pass, or the roof which in an underground way is above your head. It includes the whole space which you use as a way, and therefore agreeing with Lord Atkinson I look upon the dictum of Mr Justice Stephen in *M'Giffin* v. *The Palmer Shipbuilding Company* as wrong, I also agree specially with his (Lord Atkinson's) criticism of *Willetts* v. *Watt & Company*, which I think he shows is not really borne out by Lord Lindley's judgment in *Walsh* v. *Whiteley*. Further, I agree with Lord Shaw in thinking that the opinion in *Black* v. *Fife Coal Company* rules the question in this case.

With great deference to the noble and learned Lord who has just preceded me I cannot myself draw any distinction between a poisonous gas such as carbon monoxide and an inflammable gas allowed to remain in such quantities as to become explosive if a light is applied to it. It is true that the carbon monoxide is fatal at once while the inflammable gas needs the further step of a light being applied. But light may be applied by accident or carelessness, and the fault in the condition of the way to my thinking is that the gas had been allowed to accumulate to such an extent that explosion could result. This accumulation was due to the negligence of the fireman. For that negligence the owner would not have

been responsible at common law, but inasmuch as that negligence resulted in effectuating a dangerous condition in a "way" he became liable under the precise provision of the section.

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

Counsel for the Appellants—Dean of Faculty (Sandeman, K.C.) — Carmont. Agents—W. B. Rankin & Nimmo, W.S., Edinburgh—Beveridge & Company, London.

Counsel for the Respondents—Morton, K.C.—Keith. Agents—Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

Monday, March 31.

(Before Viscount Cave, Viscount Finlay, Lord Dunedin, Lord Shaw, and Lord Sumner.)

LORD INVERCLYDE'S TRUSTEES *v.* INLAND REVENUE.

(In the Court of Session, October 27, 1923, 1924 S.C. 14, 61 S.L.R. 29.)

Revenue—Income Tax—Deduction—Whether Interest Paid on Outstanding Estate Duty a Legitimate Deduction—Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *Schedule D, Case iii.*

The income of a trust estate for a certain year included a sum of £72,231 untaxed interest on certain Government securities. *Held* (*aff.* the judgment of the Second Division) that in computing their income for the purpose of assessment under Schedule D of the Income Tax Act 1918 the trustees were not entitled to deduct from the said sum of £72,231 a sum of £21,847 which they had paid during the year as interest on estate duty.

The case is reported *ante ut supra.*

Lord Inverclyde's Trustees appealed to the House of Lords.

At delivering judgment—

VISCOUNT CAVE—This is an appeal by the trustees of the late Lord Inverclyde from a decision of the Second Division of the Court of Session upon a Case stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of Glasgow. During the tax year ending on 5th April 1921 the appellants received interest on Government securities to the amount of £72,231, without deduction of tax, and under the provisions of the Income Tax Act 1918, Schedule D, and particularly under Rules 1 (*f*) and 2 of the Rules applicable to Case iii under that Schedule, they became liable to be assessed to tax in respect of that sum in the following tax year, namely, the year 1921-22. In the latter year the appellants paid in respect of interest on unpaid estate duty a sum of £21,847, that sum being paid in accordance with the provisions of section 18, sub-section (1) of the Finance Act 1896, without deduction for income tax. In making their return for income tax for the tax year 1921-22 they deducted that sum of £21,847 from the £72,231 received for interest on Government securities, and returned the balance only, namely, £50,384, as liable to assessment for income tax. Tax was duly assessed and paid on this sum of £50,384, but an additional assessment was made on the appellants for tax on the sum of £21,847 which had been deducted in the return. Against that additional assessment the appellants appealed to the Commissioners, who rejected the appeal and confirmed the additional assessment, but on the application of the appellants stated a Case for the opinion of the Court of Session as the Exchequer Court.

The question of law which was submitted for the opinion of the Court of Session was formulated by the Commissioners as follows:—"The question of law for the opinion of the Court is whether for the purpose of assessment under Schedule D (Case iii) of the Income Tax Act 1918 the appellants are entitled to deduct from the £72,231, being interest received for the year ending 5th April 1921, the sum of £21,847 of interest paid on estate duty for the same period." The Court of Session unanimously affirmed the decision of the Commissioners, and thereupon the present appeal was brought.

Upon the argument of the appeal before your Lordships counsel for the appellants did not insist upon the view that the appellants had a right, for the purposes of income tax, to "deduct" (in the strict sense of the word) the £21,847 from the income which they had received, and indeed such a contention would be plainly untenable. The case does not fall within any of the categories under which deduction (in the strict sense) is allowed by the Act. The trustees of course did not carry on any business. The payment of interest on estate duty was not an outgoing necessary for obtaining the income from the investments. The interest on estate duty was not legally charged upon or payable out of the sum received for dividends, but was payable out of any moneys in the hands of the appellants as trustees. It did not fall within the deductions allowed by section 36 or any other section of the Act of 1918, and section 209 of the Act expressly provides that "in arriving at the amount of profits and gains for the purpose of income tax (*a*) no other deduction shall be made than such as are expressly enumerated in this Act." Deduction therefore, in the ordinary sense, is out of the question.

But your Lordships have not held the appellants strictly to the question as formulated by the Commissioners, and Mr Moncrieff, in an ingenious argument, put his case in two other and alternative ways. First he said that the sum of £21,847 paid for interest on estate duty included income tax on that amount, and that although the appellants were prohibited by section 18 of the Finance Act 1896, from deducting tax from the interest paid, they were entitled, in bringing into computation for the purposes of income tax their untaxed interest