

to remove it or to destroy it in the interests of public safety.

It seems to me therefore (1) that the appellant's claim is one which the War Compensation Court is competent and has jurisdiction to entertain, and (2) that the facts averred in support of it cannot be disposed of as irrelevant without inquiry. The case must go back to the War Compensation Court—with a finding that that tribunal has competency and jurisdiction to deal with the claim—for inquiry into the circumstances of the claim before further answer.

We were informed at the last moment by the respondents that the case is a test one, and they asked us to grant leave for appeal. The case is obviously a proper one for appeal, but it seems indispensable that the facts should be definitely ascertained before it is carried to the House of Lords. I think therefore that leave should be refused meantime.

LORD MACKENZIE—I am of opinion that, on the facts as stated, this is a case in which the appellant may be due a payment out of public funds, and that therefore the War Compensation Court has jurisdiction to inquire into the matters alleged. I come to this conclusion on a construction of the Indemnity Act of 1920, particularly section 2 (b) and the Schedule, Part II. There are, to my mind, in the case laid before us averments of "direct loss and damage . . . by reason of direct and particular interference," with the property of the appellant, and that the interference was through the exercise or purported exercise of power under an enactment relating to the defence of the realm.

The case was argued upon the question of the Royal prerogative, but it is not necessary to go into that, because when one turns to Regulation 2 of the Defence of the Realm Regulations it appears that there is there sufficient warrant for what was done by the gunner in the Royal Navy who was charged with the duty of carrying out the operation of exploding the mine. When it was put to counsel for the Admiralty whether they disavowed that action, they of course quite properly said that they had no intention whatever of disavowing what was done by the gunner. It is not only the Competent Naval or Military Authority, as defined in the Defence of the Realm Regulations, who can carry out the operation—it is any person duly authorised by him. From what has been stated at the bar one would be surprised to hear that there was any evidence led to the effect that what was done here was not done by a duly authorised person.

It was admitted by Mr MacRobert, on behalf of the Admiralty, that the operation of exploding the mine was one for the purpose of securing the public safety, that is to say, for securing the safety of the population in the district. It was not contended by him that public safety was to be read only with reference to the safety of the State and as a synonym for the defence of the realm. He admitted that the operation was quite properly carried out and was a necessary operation for the safety of those

in the district. As the result of that operation the appellant suffered direct loss and damage to his property, and that appears to be a case in which, if the facts as stated are proved, the War Compensation Court may consider it proper to make an award.

There was an attempt to maintain that the averments were not relevant because there were statements which would show that there had been negligence on the part of those who carried out the operation. But I do not understand it to be contended that, as an alternative to the argument presented for the appellant, the Admiralty proposed to show that the only remedy to the appellant in this case was to bring a personal action of damages against the gunner who exploded the mine.

LORD SKERRINGTON—If the facts are as stated by the claimant, he has suffered direct injury to his property in consequence of the action of an Admiralty official in entering upon his land and exploding a mine thereon. The action of the official is not disavowed, but, on the contrary, it is stated by the respondents to have been necessary in the circumstances. So far as it is possible to judge from the somewhat rudimentary pleadings and from the explanations of counsel, I think that the claim for compensation was one which, *prima facie* at least, fell within the Indemnity Act 1920, and that the Compensation Court ought not to have refused it without inquiry into the facts. I agree with what your Lordships have said in regard to the construction of the statute and of the Regulations.

LORD CULLEN did not hear the case.

The Court recalled the deliverance of the War Compensation Court and remitted to the Court to proceed as accords.

Counsel for the Claimant and Appellant—Mackay, K.C.—Cooper. Agents—Laing & Motherwell, W.S.

Counsel for the Respondents—MacRobert, K.C.—Black. Agent—Norman M. Macpherson, S.S.C.

Saturday, July 8.

FIRST DIVISION.  
ELLERMAN LINES, LIMITED (S.S.  
"CITY OF NAPLES") v. TRUSTEES  
OF HARBOUR OF DUNDEE.

(See *ante*, p. 119.)

*Expenses—Taxation—Allowances to Witnesses—Seafaring Witnesses Detained in this Country so that they might be Present at the Proof—Wages of Substitute for Witness Detained—C.A.S. 1913, K. IV, 1, App. I, v. 3.*

Pursuers who were successful in an action of damages for injury to a ship had detained in this country the master and certain of the officers for periods up to ninety-six days in order to enable

them to give evidence at the proof. All were witnesses whom it was desirable the judge at the trial should see. Although there had been ample time to apply for a special diet the pursuers had not done so. On objections by the pursuers to the Auditor's report on their account of expenses, held that (1) in the circumstances the Auditor had properly restricted the allowances for detention to fourteen days, and (2) that a claim for the cost of filling the master's place was properly disallowed.

*Clan Line Steamers v. Campania Navigation Sota y' Anzar*, 1918 S.C. 87, 55 S.L.R. 61, followed.

The Ellerman Lines, Limited, London, owners of the s.s. "City of Naples," who had been successful in an action of damages against the Trustees of the Harbour of Dundee arising out of a collision between

s.s. "City of Naples" and a sunken wreck, lodged a note of objections to the report of the Auditor on their account of expenses in respect of his having disallowed to the extent of £319, 1s. 6d. their charges for detaining certain officers of the ship to enable them to give evidence at the proof.

The note stated—"The pursuers object to the Auditor's report on the pursuer's account of expenses in so far as the Auditor has taxed the undernoted witnesses' fees. The pursuers submit that in view of the circumstances of the case neither the allowance per day nor the length of time allowed for the necessary detention of the witnesses are sufficient, and that the period of fourteen days allowed in the case of *Clan Line Steamers v. Campania Navigation Sota y' Anzar* (1918 S.C. 87) does not apply to the present case. The items referred to are as follows:—

Schedule of Witnesses' Fees.

No.	Name and Designation of Witness.	Where from.	No. of days.	Rate per day.	Expenses.	Total.	Taxed off.	Sum allowed.
1.	William Hill, master of the "City of Naples"	Liverpool	96	£1 1 0	£10 10 0			
						<i>Note.</i> —This witness was withdrawn from the "City of Naples" from 22nd January 1920 until 26th April 1920 in order that he might attend the proof on 2nd March. The cost of filling his place for that period is at the rate of £620 per annum, and for 96 days amounts to £162 12 6 96 days at £1, 1s. per day - - - 100 16 0 Travelling expenses 10 10 0 £273 18 6		
2.	B. H. Constable, chief officer of do.	Alexandria	55	£1 1 0	£48 12 8	106 7 8	£248 14 6	£25 4 0
3.	A. G. Blackstock, 2nd officer of do.	Liverpool	29	£1 1 0	£10 10 0	40 19 0	15 15 0	25 4 0
4.	John Hopkins, quartermaster of do.	Liverpool	18	£1 1 0	£10 10 0	29 8 0	4 4 0	25 4 0
						£450 13 2	£319 1 6	£131 11 8"

The Auditor has appended the following note to the account—"The parties are at issue as to the allowances to be made to the seafaring witness whom the pursuers detained in this country in order that they might be present at the proof. The pursuers claim such allowances for the following witnesses, viz.—William Hill, master of the 'City of Naples,' detained 96 days; A. G. Blackstock, second officer of the 'City of Naples,' detained 29 days; John Hopkins, quartermaster of the 'City of Naples,' detained 18 days; F. J. Hiles, North Sea pilot, Yarmouth, detained 50 days. The Auditor begs to report that since the case of *Clan Line Steamers v. Campania Navigation Sota y' Anzar* (1918 S.C. 87) the period for which such allowance is granted against the losing party has been restricted to 14 days, and standing that judgment he does not feel justified in extending that period. That case was initiated and the proof taken in the Sheriff Court, but the learned Judge (Lord Salvesen), whose opinion was concurred in, appears to have held that a fortnight was the limit of time to be allowed for detention of witnesses as against the unsuccessful party, being approximately the equivalent of the expense of a special

diet or a commission to take the evidence of the witness or witnesses detained.

"In the present case the pursuers appear to have had ample time to make application for a special diet, but abstained from doing so. The reasons for this are obvious, but these do not form a ground for penalising the defenders in a larger amount of expenses than might otherwise have been necessary.

"With regard to the particular seafaring witnesses who were necessarily detained, the Auditor's view is that these should be restricted to witnesses whom it was desirable that the Judge trying the case should see in the witness-box. If the above period is adhered to, the need for drawing a strict line may not be very material, but so far as the Auditor can judge, the first three of the above-mentioned witnesses and another witness, who will be afterwards referred to, are in this category.

"The North Sea pilot (Hiles) residing in Yarmouth appears to the Auditor to be in the same position as any ordinary witness resident in the United Kingdom whose attendance at the proof the pursuers could arrange for or compel in usual form. He has accordingly cut down the charges for

this witness to those payable on the footing of his being brought from Yarmouth to give evidence.

“The basis upon which the expenses of detention are to be assessed has also been raised. The pursuers claimed in respect of the master William Hill, not only the witness’s allowance of £1, 1s. per day, but the wages of a substitute, while in respect of the second officer and the quartermaster the allowance claimed is at the rate of £1, 1s. per day. In party and party taxation maintenance and not wages is the appropriate allowance for witnesses. The Auditor accordingly does not consider he is justified, without a ruling by the Court, in departing from the scales of maintenance and travelling expenses allowed to witnesses under the table of fees, and he has taxed these allowances accordingly.

“The chief officer of the vessel, B. H. Constable, was brought by the pursuers to attend the proof from Alexandria, where he was stationed at the time. The Auditor is of opinion that he also was a witness whom it was necessary the Judge should see, and he has allowed the expenses of bringing him from Alexandria (which would include his maintenance on the way), together with the usual witness’s allowance for seven days in this country, during which, either at the proof or at a special diet, his evidence could have been taken.”

Counsel for the pursuers was heard in the Single Bills. Counsel for the defenders was not called upon.

LORD PRESIDENT—The claim made in this note of objections is an extreme one. I think the Auditor did what was perfectly right. He gave the witnesses their travelling expenses and an allowance for every day from the time they started until they returned, including of course the time at the trial. It is a general condition of the right to recover expenses from the other side that the expenses must be necessarily incurred, and that qualification appears in the paragraph of the table of fees which regulates the present charges. Nothing has been stated to us which would lead one to think it possible that the allowances extending over fourteen days, as made by the Auditor, were not ample to cover the expenses incurred. I think the note should be refused.

LORD MACKENZIE, LORD SKERRINGTON, and LORD CULLEN concurred.

The Court repelled the objections.

Counsel for the Pursuers—Normand. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders—Ingraham. Agents—J. K. & W. P. Lindsay, W.S.

Saturday, July 8.

FIRST DIVISION.

[Bill Chamber.]

BAIRD v. BAIRD'S CURATOR

AD LITEM.

*Entail—Disentail—Consents—Date of Entail—Trust with Direction to Entail—Marriage-Contract—Heir Born before Direction to Entail Carried Out—Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), secs. 27 and 28.*

In 1879 the heir of entail in possession of an estate under an entail of old date made an agreement with his only son, who was about to marry, whereby he undertook in contemplation of the marriage to disentail the estate, and after placing certain burdens on the fee-simple to re-entail it on the son and certain heirs. Thereafter on 2nd April 1879 he became a party to the son’s antenuptial marriage contract, under which he bound himself to fulfil the obligations to the son undertaken by him in the agreement, and became a party to the appointment of trustees, who were directed to see that the agreement between himself and his son was carried out. There was no conveyance of the estate to the trustees, the father being at the date of the marriage, which took place on 3rd April 1879, heir of entail in possession under the old entail. The estate was immediately thereafter disentailed, but the re-entail was not carried out until 1889. On the application by a child of the marriage, born before the actual date of the re-entail, who was heir of entail in possession, for authority to record a deed of disentail and to acquire certain entailed moneys arising from the sale of portions of the estate in fee-simple, held that under the marriage contract there was constituted a trust with a direction to entail to which the provisions of sections 27 and 28 of the Entail Amendment Act 1848 applied; (2) that for the purposes of the statute the date of the entail was the date of the marriage; and (3) that the petitioner was entitled to disentail the estate and to acquire the entailed money without the consents of any of the next heirs.

The Entail Amendment Act 1848 (11 and 12 Vict. cap. 36) enacts—Section 1—“That where any estate in Scotland shall be entailed by deed of tailzie dated on or after the 1st day of August one thousand eight hundred and forty-eight, it shall be lawful for any heir of entail born after the date of such tailzie, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate in whole or in part in fee-simple by applying to the Court of Session for authority to execute and executing and recording in the register of tailzies under the authority of the Court an instrument of disentail in the form and manner hereinafter provided. . . .” Section