

## HOUSE OF LORDS.

Monday, May 6.

(Before the Lord Chancellor (Finlay),  
Viscount Haldane, Lord Dunedin, and  
Lord Shaw.)

## MURRAY v. INLAND REVENUE.

*Inland Revenue—Excess Mineral Rights  
Duty—Basis of Tax—Mode of Computa-  
tion—Liability—Finance (No. 2) Act 1915  
(5 and 6 Geo. V, cap. 89), sec. 43 (1) and (2).*

A proprietor had let to coalmasters his minerals at a rent based on royalties varying with the price of the minerals. He was called upon to pay excess mineral rights duty for the accounting years ending Martinmas 1914 and Martinmas 1915.

*Held* (1) that the excess mineral rights duty was based, not on the excess (if any) of the rent payable for the accounting year over the rent of the pre-war standard year, but on the excess of the royalty in the accounting year over the pre-war standard royalty, and that the sum upon which tax fell to be levied was the difference between the amount of the royalties in the accounting year and the amount to which royalties on the same quantity of minerals at the pre-war standard would have come; (2) that the exemption "where the right to work the minerals" are "part of the assets of any trade or business" referred only to a trade or business of the person in right to receive the rent.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), sec. 43, enacts—"Excess Mineral Rights Duty—(1) Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves (in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business) varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty payable or paid, either directly or by deduction, by reference to the amount of the rent paid in that working year, by that person (in this section referred to as the person liable) an amount equal to fifty per cent. of that excess. (2) The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer, and in cases where the minerals have not been worked or the wayleaves have not been let throughout the three years by reference to which the three last pre-war rent values are to be calculated, or for any other reason there are no proper data for ascertaining the pre-war rent

values, shall be taken to be such amount as may be fixed by the Commissioners of Inland Revenue, having regard to the data afforded by the working and price of minerals in like circumstances, subject nevertheless to the same appeal as that to which the assessment of duty is subject under Part I of the Finance (1909-10) Act 1910. The pre-war rent value shall as respects each of the three years immediately preceding the first accounting year be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year. . . . (7) Expressions to which a special meaning is attached by Part I of the Finance (1909-10) Act 1910 shall have the same meaning in this section."

The Finance Act 1916 (6 and 7 Geo. V, cap. 24), sec. 46 (2), enacts—"It is hereby declared that the words in sub-section (1) of section 43 of the principal Act 'assets of any trade or business' refer only to assets of the trade or business of the person receiving the rents for the right to work the minerals or for the mineral wayleaves."

The Finance Act (1909-10) Act 1910 (10 Edw. VII, cap. 8), section 20 (2), enacts—"The rental value shall be taken to be (a), where the right to work the minerals is the subject of a mining lease, the amount of rent paid by the working lessee in the last working year in respect of that right, and . . . (c) In the case of a mineral wayleave the amount of rent paid by the working lessee in respect of the wayleave. . . ."

Major A. B. Murray of Polmaise, *appellant*, appealed against assessments for excess mineral rights duty issued by the Commissioners of Inland Revenue, *respondents*, for the accounting years to Martinmas 1914 and to Martinmas 1915.

The Special Case stated by the referee set forth—"In this appeal, as questions of law are in dispute, I have been requested to state my award in the form of a Special Case for the opinion of the Valuation Court, which accordingly I hereby do.

"The following facts were admitted:—(1) Major Alexander Bruce Murray of Touchadam and Polmaise (hereinafter referred to as the 'appellant') is proprietor of minerals situated at Cowie, Wester Greenyards, and Polmaise in the county of Stirling. The minerals at Cowie and Wester Greenyards are leased to the Alloa Coal Company, Limited, and the minerals at Polmaise are leased to Archibald Russell, Limited. In both leases the rents or royalties stipulated therein vary according to the price of the minerals when these exceed the fixed rents named in the respective leases. (2) A notice to make returns for the purpose of excess mineral rights duty under the provisions of section 43 of the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), for the first and second accounting years in respect of the said minerals, was served on the appellant on 25th February 1916 by or on behalf of the Commissioners of Inland Revenue (hereinafter referred to as 'the Commissioners'). The accounting years in question ended at

the terms of Martinmas 1914 and Martinmas 1915 respectively. (3) On 19th April 1916 the appellant furnished to the Commissioners the particulars called for in the said notice. (4) The rents payable for or in respect of the first and second accounting years were (1) for the year ended Martinmas 1914, £17,512, 9s. 11d., and (2) for the year ended Martinmas 1915, £21,849, 7s. 2d. (5) The two pre-war rent values selected by the appellant, in terms of section 43 (2) of the Finance (No. 2) Act 1915, of which the average is to be taken for the purposes of said section, are the years ended Martinmas 1912 and Martinmas 1913 respectively. (6) The average rates of royalty for the said two selected years were as follows:—

“(a) *Cowie and Wester Greenyards (Alloa Coal Company, Limited).*

	Coal.	Coke.
“ 1912	8d. per ton	1/4-2301d. per ton
1913	11d. per ton	1/4-3731d. per ton
	19d. per ton	2/8-6032d. per ton
Average	9½d. per ton	1/4-3016d. per ton.

“(b) *Polmaise (Archibald Russell, Limited).*

	Main Coal.	Other Coals.
“ 1912	7d. per ton	4½d. per ton
1913	8½d. per ton	8¾d. per ton
	15½d. per ton	13d. per ton
Average	7¾d. per ton	6½d. per ton.

“(7) The rents received by the appellant in each of the said two selected years were:—

“ For the year to Martinmas 1912 . . . . .	£12,407 12 3
For the year to Martinmas 1913 . . . . .	18,199 14 1
	£30,607 6 4
“ Average	£15,303 13 2

“(8) Following upon the delivery to them of the above-mentioned particulars (see article (3), *supra*) the Commissioners issued to the appellant four notices of computation of liability to excess mineral rights duty in respect of the said accounting years, showing the following amounts of excess of net rent in each year respectively:—

“(a) *For the Accounting Year ended Martinmas 1914.*

“ Cowie and Wester Greenyards (Alloa Coal Company, Limited) . . . . .	£1335 3 10
Polmaise (Archibald Russell, Limited) . . . . .	1313 19 9

“(b) *For the Accounting Year ended Martinmas 1915.*

“ Cowie and Wester Greenyards (Alloa Coal Company, Limited) . . . . .	£2184 11 10
Polmaise (Archibald Russell, Limited) . . . . .	5383 5 9

“(9) By assessments, dated 26th October 1916, the appellant was assessed by the Commissioners to excess mineral rights duty in the following sums:—

“(a) *For the Accounting Year ended Martinmas 1914.*

“ Cowie and Wester Greenyards (Alloa Coal Company, Limited) . . . . .	£667 11 11
Polmaise (Archibald Russell, Limited) . . . . .	656 19 10
	£1324 11 9

“(b) *For the Accounting Year ended Martinmas 1915.*

“ Cowie and Wester Greenyards (Alloa Coal Company, Limited) . . . . .	£1310 15 1
Polmaise (Archibald Russell, Limited) . . . . .	3229 19 5
	£4540 14 6

“(10) Notice of appeal against the said assessments was duly given by the appellant on 20th November 1916.

“III. It was *contended* before me and is now *contended* on behalf of the appellant—  
 (1) That the whole assessment is in the present case excluded by the terms of section 43 (1) of the Finance (No. 2) Act 1915, and particularly by the words ‘(in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business)’ occurring therein, which words exempt from excess mineral rights duty any minerals ‘the right to work’ which is ‘part of the assets of any trade or business.’ The appellant contends that the minerals in question fall within this exemption, in respect (a) that ‘the right to work’ these minerals under the leases granted by the appellant to the said Alloa Coal Company, Limited, and Archibald Russell, Limited, forms part of the assets of the trade or business of the mineral tenants working the same; and (b) that the appellant is only the person who receives rent for ‘the right to work’ the said minerals, which right is accordingly not vested in him but in his mineral tenants under the said leases.

“The appellant further contends under this head that as regards the two accounting years ending at Martinmas 1914 and Martinmas 1915 respectively the exemption of the minerals in question from liability to excess mineral rights duty under the exempting words in section 43 (1) of the Act of 1915 above quoted has not been and cannot be modified or prejudiced by the passing of the Finance Act 1916, the effect of which is not retrospective.

(2) That, in any event, having regard to the terms of section 43, sub-sections (1) and (2) of the Finance (No. 2) Act 1915, the proposed assessment upon the appellant as made by the Commissioners proceeds upon a wrong principle, and is unjust and inequitable in its results.

The appellant, subject to what is contended for under Article III (1) hereof, and in the event of such contention being rejected by the Court (but in that event only), admits liability under the Act for payment of excess mineral rights duty for the accounting years in question to the following extent, viz.—

“(a) 50% of the amount by which the mineral rents actually received by him for the

accounting year ending at Martinmas 1914 exceeds the average amounts of the mineral rents received by him for the two selected pre-war years—which is . . . . . £ 931 10 5

(b) 60% of pre-war years for the accounting year ending at Martinmas 1915, which is. . . . . 3133 17 2  
In all . . . . . £4065 7 7

whereas the Commissioners propose to assess the appellant as shown above in the following sums:—

“(a) For the accounting year 1914 . . . . . £1324 11 9

(b) For the accounting year 1915 . . . . . 4540 14 6

In all . . . . . 5865 6 3

thus showing an over-assessment upon the appellant to the extent of . . . . . £1799 18 8

“The appellant further contends that the words of section 43 (1), and particularly the words ‘amount payable to any person as rent’ contained in line 1, and the words ‘the amount so payable in respect of any working year’ contained in line 6 of said section, necessarily refer to actual sums received and not to hypothetical sums, and further that the excess mineral rights duty thereby imposed being declared to be payable ‘as an addition to any mineral rights duty payable or paid,’ falls to be paid on the same basis as the said mineral rights duty. Such mineral rights duty being payable in terms of the Finance Acts in respect of actual lordships received by the person letting the minerals, it follows, according to the contention of the appellant, that the excess mineral rights duty payable must be ascertained in the same way. Applying this principle the appellant contends that the ‘pre-war standard of rent’ and ‘pre-war rent value’ specified in the Act of 1915 fall to be determined by the average of the sums actually received as rent by the landlord in the two selected pre-war years. The appellant therefore maintains that only the lordships actually received by him in the said two pre-war years fall to be taken into account in determining such ‘pre-war standard of rent’ and ‘pre-war rent value.’ If effect be given to this principle of assessment for the accounting years in question in relation to the pre-war average of lordships received by the appellant, he is only liable in payment of excess mineral rights duty to the extent of the above-mentioned sum of £4065, 7s. 7d.

“Finally, the appellant contended and contends under this head—(a) That no application of a Revenue statute could be made or interpretation of its terms accepted which has the effect of subjecting any proprietor of minerals who has let the same on lease in a liability to account to the Commissioners for excess mineral rights duty in respect of moneys which he has not in point of fact received during the accounting years in question.

“The difference of £1799, 18s. 8d. shown above as arising between the excess mineral rights duty payable, calculated on the basis

of lordships actually received by the appellant, and the hypothetical basis adopted by the Commissioners, is explained by the fact that owing to the war and the shortage of labour thereby occasioned, the appellant's output has been so heavily reduced that this reduction has counteracted in whole or in part the increased price received by the appellant on this reduced output, so that to apply the pre-war rate of lordship to the actual output of the accounting years, and to base the assessment to excess mineral rights duty upon the hypothetical results deduced therefrom is inequitable and unjust to the appellant. (b) That the clause beginning ‘Pre-war rent value shall . . .’ (section 43 (2) Act of 1915) must be read in conjunction with the words of section 43 (1) and the preceding part of section 43 (2), and that taking the whole of the clause together it points to ‘rent’ actually received by the mineral owner as the standard of comparison. There is no authority in the words of the Act for the view that the interpretation to be given to it may, by the adoption of a purely hypothetical basis of calculation, bring out a greater excess than the rent or lordships actually received. On the contrary, the whole provisions of Part III of the Act, which deals with excess profits duty, and includes excess mineral rights duty under this classification, contemplate an assessment to duty in respect of actual and not of hypothetical excess profits.

“(3) That in the calculation of the assessments in question the appellant is entitled to have the deductions for (a) owner's rates, and (b) property or income-tax falling to be allowed by the Commissioners (as in the case of assessment for mineral rights duty) stated at the sums actually paid by him in name of owner's rates and property or income-tax—for the average of the pre-war years and the accounting years in question respectively—on the mineral rents actually received by him in these respective years, and not calculated upon the hypothetical basis proposed by the Commissioners.

“IV. It was contended before me on behalf of the Commissioners—(1) That the assessments were properly made and were not excluded by the terms of section 43 (1) of the Finance (No. 2) Act 1915, and in particular by the words in said section referred to by the appellant. By section 46, subsection 2, of the Finance Act 1916, which was retrospective in effect, the words ‘assets of any trade or business’ in said section 43 (1) of the Finance (No. 2) Act 1915 referred only to assets of the trade or business of the person receiving the rent for the right to work the minerals. In the present case the appellant was the person receiving the said rent. The right to work the minerals formed no part of the assets of a trade or business carried on by him.

“(2) That the assessments were correct and proceeded upon a proper interpretation of the statute—(a) Excess mineral rights duty was imposed by section 43 of the Finance (No. 2) Act 1915, which provided that the duty was chargeable upon the sum by which the rent for the right to work the minerals in any accounting year exceeded

the pre-war standard of that rent. Section 43 (2) defined 'pre-war standard of rent' as the average of any two of the three last pre-war rent values. It also defined 'pre-war rent value' as 'the sum to which the rent for the accounting year would amount if the rent so far as variable according to price were based on the average prices governing the payment of the rent in that year.' (b) The pre-war rent value was not the actual rent paid in each pre-war year as contended for by the appellant, but the sum to which the rent for the accounting year would amount if it were based on the average prices obtained for the minerals in each of the three pre-war years. (c) The object of the statute was thus not to tax any increase of rent payable in the accounting year as compared with the rent paid in the pre-war years, but to levy a tax upon such portion of the rent payable in the accounting year as was due to the increase, if any, in the price of coal as a result of the war. (d) The only factor therefore to be looked at in the pre-war years was the price of the mineral, and the only way to reach the excess of rent contemplated by the statute was to apply to the output of mineral for the accounting year the prices governing the payment of rent in the pre-war years. The pre-war standard of rent was the average of any two of the resulting figures to be selected by the taxpayer. (e) The appellant was not being assessed to excess mineral rights duty upon a hypothetical sum which he had not in point of fact received in the years in question. Excess mineral rights duty was chargeable upon the excess of rent actually received by the appellant in the years of charge, such excess being determined with reference to the pre-war standard which the statute prescribed as a datum line from which to measure such excess. (f) Excess mineral rights duty was not the same duty as excess profits duty, and the statutory provisions relating to the latter had no application. (g) Excess mineral rights duty did not fall to be assessed on the same basis as mineral rights duty. The statutory mode of charging the former was to be found in section 43 of the Finance (No. 2) Act 1915, which was the only statutory provision thereon subject to the amendment contained in section 46 (2) of the Finance Act 1916.

"(3) That the appellant's claim to deduction of (a) owner's rates and (b) property or income-tax on the basis contended for by him ought to be refused. The allowance in these respects already made by the Commissioners was a concession and not in virtue of any right in the appellant to demand same. The statute makes no provision for any deduction other than annual increment value duty.

"V. I am of opinion and decide that the contention of the Commissioners of Inland Revenue is correct, and I accordingly award and decide that the appellant is liable in payment to the Commissioners of the sum of £5865, 6s. 3d.

"VI. If the Court should be of opinion that the contention of the appellant Major A. B.

Murray of Polmaise is correct, then I award and decide that the appellant is liable in payment to the Commissioners of the sum of £4065, 7s. 7d."

On 11th July 1917 the Valuation Appeal Court issued an interlocutor finding the first decision of the referee whereby the appellant was held liable in the sum of £5865, 6s. 3d. to be right and affirming the same, without expenses.

LORD JOHNSTON—By the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), section 43, there was imposed an excess mineral rights duty, intended to be analogous to the more general excess war profits tax already exigible. Though the duty is only imposed in the case of such rents as vary according to the price of minerals, the mode of imposition may quite well be subject to the objection that it is based upon unreal figures, and productive of inequality in its results, and generally of injustice. With that I am afraid we have nothing to do. The question for us is what has the statute said.

And here there is a preliminary matter which must first be disposed of. The section above referred to commences by saying (sub-section (1)) that "where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves (in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business) varies according to the price of the minerals," &c. The words in brackets are, it is to be regretted, without sense and render abortive the whole enactment whatever its intention may have been. I do not think it necessary to say more, because the Legislature has been of the same opinion, and has included in the Finance Act 1916 (6 and 7 Geo. V, cap. 24) a provision (section 46 (2)) which rectifies the mistake by declaring that the words in section 43 (1) of the principal Act, that is to say, the Act of 1915, "assets of any trade or business refer only to assets of the person receiving the rent for the right to work minerals or for the mineral wayleaves." This, though it cannot be said that the emendation is altogether happy, imports I think that it was only intended by the principal Act to except from the incidence of the tax any sub-rents which should be part of the trading receipts of the person or concern receiving them.

This Act of 1916 is not an amending Act, but an interpretative Act so far as this matter is concerned, and the provision is, I think, retrospective, not to the effect of opening up any assessment already levied, but merely of applying to the case of any assessment to be levied subsequent to its date.

Going back to the clause (section 43) of the principal Act, and omitting the words in brackets, what the statute provides as to the excess mineral rights duty is, reading it short, that where the amount payable to any person as rent in respect of the right to work minerals varies according to the price of minerals, and the amount so payable in respect of the accounting year exceeds the

pre-war standard of that rent, there shall be paid as duty by that person an amount equal to fifty per cent. of that excess.

To make this intelligible it has to be ascertained what the Act means by "accounting year" and "pre-war standard of rent."

The "accounting year" means any working year, that is, any financial year, presumably defined by the lease (and in the present case running from Martinmas to Martinmas), which ends on any date after the commencement of the present war, that is, after 4th August 1914.

The meaning of "pre-war standard of rent," however, cannot be ascertained without first of all finding out what the statute means by "pre-war rent value," and it is the meaning given to that term by the statute which has created the difficulty in understanding the scheme of the Act, and probably, not without some reason, has also created a sense of injustice to the mineral owner. "Pre-war rent value" is an entirely artificial thing; it is not real rent at all, but is the amount which would have been received as rent in the pre-war year in question if the output for the accounting year was taken and the royalty on that amount calculated on the average prices of the minerals for the pre-war year in question. Such then being the conception of "pre-war rent value," how is the "pre-war standard of rent" to be ascertained? The first accounting year in the case with which we are dealing was the year current when the war broke out, or the year Martinmas 1913 to Martinmas 1914, and in ascertaining the excess duty for that year we are told to ascertain it by comparison between the rent actually received for that year and the pre-war standard of rent applicable to that year, because the pre-war standard of rent is not a thing fixed for all subsequent years. The three years immediately preceding the year current when war broke out, that is, in this case, preceding Martinmas 1913, are taken, and the taxpayer is given his choice of any two of them. Presumably he will choose the same two in subsequent years, but the process has to be gone through in dealing with each successive year of assessment. The pre-war rent standard for application to the first and any subsequent year to be taxed is the average of the two selected pre-war rent values, these being ascertained for each successive year in question according to the method above explained. The appellant here, Major Murray of Touchadam and Polmaise, selected the two pre-war years ending Martinmas 1912 and Martinmas 1913. And the accounting years with which the Commissioners had to deal were the years ending Martinmas 1914 and Martinmas 1915. The comparison to be made to ascertain the amount of the tax is between the amount actually received as rent for these two working years respectively and the pre-war standard of rent ascertained in terms of the statute, for application to each accounting year respectively in succession. This pre-war standard of rent, though ascertained on the same statutory basis, will not be the same for each of these years, and for each of them it will be a purely artificial amount,

bearing no reference to the actual rents of the pre-war years selected. Major Murray contends for comparison not with the artificial pre-war year rent values and the standard derived therefrom but with the actual pre-war rent received, and this contention is plainly untenable.

If I may endeavour to explain the idea at the bottom of the conception of the impost it is not to tax the difference based either on a comparison of output or of money return purely but the difference based on a comparison of combined output and price. It aims at ascertaining whether there is a dutiable quantum by taking the difference between two sets of prices empirically ascertained and applying it to the actual output of the accounting year. This conception whether as worked out in the statute it leads to a just or to an unjust impost—and I can see that in practice it may lead to most anomalous and unequal results—is at least intelligible and we are bound to give effect to it.

I am therefore of opinion that the determination of the Commissioners is correct.

**LORD SALVESEN**—This appeal is taken from the judgment of a referee appointed under the Finance Act 1915-16, and raises important questions of construction of the sections dealing with excess mineral rights duty. The case has been admirably stated, and two questions only have been raised for our decision.

The first question is whether the assessment is wholly excluded in respect the appellant, who is the owner of minerals worked by tenants who derive their rights from him, has "the right to work" the minerals within the meaning of section 43 (1) of the Finance (No. 2) Act 1915. Had the question depended entirely on the terms of that Act I should have felt constrained to accept the appellant's contention, although by doing so the section would have become virtually inoperative. I am unable to see how the "right to work" minerals can be said to remain vested in the mineral owner when he has let that right to tenants who are actively exercising the same, and where his sole interest during the subsistence of the lease consists in his right to receive rents or royalties. This flaw in the language of the Act has, however, been corrected by the Finance Act 1916, section 46 (2), which declares that the words "assets of any trade or business" refer only to the assets of the trade or business of the person receiving the rent for the right to work the minerals—in other words, that they are intended to deal with a special and not with the general case. The appellant argued that as the claim now made is in respect of royalties which accrued before the passing of the Finance Act 1916 this declaratory enactment being in effect the imposition of a duty not previously existing cannot be treated as retrospective. The contrary was decided in a series of cases of which *Attorney-General v. Theobald*, 24 Q.B.D. 557, is a good illustration. It was there held that the declaratory enactment there considered (although expressed as an amend-

ment of the previous Act), directing how certain expressions in the Act were to be construed, was retrospective in its operation, and this although proceedings had been taken to recover duty before the section of the Act came into force. The case for the appellant here is distinctly less favourable, and I am of opinion that as in a question with this appellant we must read section 43 of the Act of 1915 as if it had been originally expressed with the qualification enacted by section 46 (2) of the Finance Act 1916. This removes all difficulty and renders the appellant liable in the duty imposed by the earlier section of the two Acts.

The second objection arises under the following circumstances:—The effect of the war in the case of the appellant's mineral fields has been twofold. It has raised the value of coal, and in his case (as his royalties vary with the average price of coal) has increased the rates of royalty payable to him. On the other hand as there has been a shortage of labour the output has been reduced to such an extent as to counteract in great part the increased royalties received by the appellant on the output of the collieries. The result of the Crown's method of construing section 43 is thus to bring out a greater sum on which the excess mineral rights duty is imposed than the difference between the average of two years' pre-war rents and the rents actually received during the two years of accounting. At first sight this appears anomalous, because, to take a concrete case, if the rates of royalty had doubled but the output had been reduced to one-half, the appellant would, on the Crown's contention, have had to pay a considerable sum in name of excess mineral rights duty, although in fact he had received no more in the aggregate in the accounting years than in the selected pre-war years. On the other hand, the idea evidently underlying the enactment is that the mineral owner whose output has been reduced will be entitled to receive in future years royalties on the coal not extracted, although it is true that this may not hold in individual cases. On the best consideration, however, that I have been able to give to the complicated clauses to which we were referred, I think the only interpretation we can put upon them is that maintained for the Crown. "Pre-war standard of rent" is defined as the average of any two of the three last pre-war rent values, and "pre-war rent value" is the sum to which the rent for the accounting years would amount if the rent so far as variable according to price were based on the average price governing the payment of rent in that year. If this last definition is construed grammatically it has no effect at all, but it is rather to be presumed that a section of an Act of Parliament has been ill-drawn than that it should be meaningless. If effect is to be given to it at all, then the only meaning which can be put upon the section is that for which the Crown contends. I am therefore for refusing the appeal. I should like to add, if any question of expenses is raised, that I do not think the Crown are entitled to any,

as the whole difficulty has arisen from the obscure way in which these sections of the Act are expressed, and I take it besides that this is a test case for the purpose of determining points of general importance.

LORD CULLEN—I concur with your Lordships in thinking that the referee's decision under appeal is well founded.

As regards the words within brackets in the opening part of section 43 (1) of the Finance Act (No. 2) 1915—"in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business"—I entertain no doubt that in their application to the present case we must give these words the meaning attached to them by the declaratory enactment contained in section 46 (2) of the Finance Act 1916.

As regards the words "in that year," which conclude the last paragraph of section 43 (2) of the said Act of 1915, where the statutory definition of "the pre-war rent value" is given, I am of opinion that the antecedent to which these words relate themselves is to be found in the words "each of the three years immediately preceding the first of the accounting years" which occur in the opening part of the paragraph. The syntax of the paragraph may not be ideal, but on a common sense reading of it its meaning does not seem to me to be open to any serious doubt. The appellant's view seems to be that it should be so read "*ut res magis pereat quam valeat*." The words "that year" at the end of it, according to the appellant, mean the accounting year. The result would be that the pre-war rent value would be the same thing in amount as the rent payable in the accounting year so that there could not be any excess chargeable with duty.

The appellant urges that the war conditions which have raised the prices for coal have also operated to restrict output so that a rent-receiving landlord may on an application of the higher prices to a diminished output in the accounting year "be receiving a rent smaller than any of the rents paid in the years preceding." I do not see the relevancy of this observation. We are not directly concerned with the policy of the Legislature but only with the due construction of the duty-imposing enactments. And on a due construction of them it seems to me clear enough that the liability for duty in such a case as the present is to be ascertained by applying to the output of the accounting year two sets of prices, to wit, (1) the prices of the accounting year itself governing the amount of rent payable in that year, and (2) the average of the prices of the two out of the three preceding years selected by the rent-receiver as regulating the pre-war rent value. If the figure resulting as rent under (1) is greater than the figure brought out under (2) there is an excess chargeable with excess mineral rights duty.

The statutory conditions of the excess mineral rights duty are self-contained, and it seems to me to be irrelevant to refer as

the appellant does to the different provisions regulating mineral rights duty and excess profits duty.

I am accordingly of opinion that the appeal should be refused.

The appellant (Major Murray) appealed to the House of Lords.

LORD CHANCELLOR—The question in this case relates to the construction to be put upon section 43 of the Finance (No. 2) Act 1915 with reference to what is called in the marginal note "Excess mineral rights duty." Two points have been raised with which I shall deal for the purpose of dismissing them before I proceed to the consideration of the section generally. The first was as to the effect of the words which occur in the third, fourth, and fifth lines of section 43, sub-section (1), where it is stated that the enactment shall be "in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business." It was suggested by the appellant that this was to exclude them from the operation of the Act, but reference was made by the respondent's counsel to the 46th section of the Act of 1916 which was passed for the purpose of amending that provision in this way—"It is hereby declared that the words in sub-section (1) of section forty-three of the principal Act, 'assets of any trade or business,' refer only to assets of the trade or business of the person receiving the rent for the right to work the minerals or for the mineral wayleaves." I think there was perhaps room still for further amendment in that provision in order to render it thoroughly intelligible and clear in its terms. The provision in the amending Act of 1916 certainly tends to show that the Legislature intended to make it clear that they meant what I must say for myself I should have read the provision as meaning even if it had never been amended at all. I think it is perfectly plain that these words which I have read "in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business," inasmuch as the section is dealing with taxation on the rent, must refer to the case of the landlord's business and to what is called the right to work being part of the landlord's business. The words are unintelligible in any other view. Of course it must be said that "the right to work the minerals" is not a happy way at all of expressing the landlord's right to receive the rent in respect of the working of the minerals. It is a very slovenly method of expression, but still what was intended is I think plain even without the effect of the amending Act of 1916. I accordingly think that that point fails.

Then Mr Blackburn also referred to the 7th sub-section of the 43rd section of the Act of 1915, which provides that "Expressions to which a special meaning is attached by Part I of the Finance (1909-10) Act 1910 shall have the same meaning in this section"; and he says that in the 1910 Act, section 20, "rent value" was defined. I do not think that these words apply at all.

What is defined there is the expression "rental value," and the definition given in that Act must be confined to the very words defined and occurring in the context to which the definition relates.

Clearing away these two subsidiary points I proceed to the consideration of the enactment. I read section 43, sub-section (1), leaving out what for this purpose is immaterial—"Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves . . . varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war . . . exceeds the pre-war standard of that rent, there shall be paid . . . an amount equal to fifty per cent. of that excess." That prescribes a plain and simple way of arriving at the amount on which the 50 per cent. is to be paid; and then when you go on to the second sub-section the pre-war standard of rent is "to be taken to be the average of any two of the three last pre-war rent values to be selected by the taxpayer." The rest of that sub-section I need not for the present purpose refer to. And the second paragraph of the second sub-section is this—"The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year." That requires in effect that you are to take the amount of coal got in the accounting year and to apply it to the prices in this standard year. I say that for this reason. It appears to me perfectly plain that the words at the end of the paragraph—"the average prices governing the payment of the rent in that year"—must refer back to the words in the first line of the paragraph—"each of the three years immediately preceding the first accounting year." I do not think the words grammatically would bear any other meaning. The other meaning which Mr Blackburn suggested would, as he candidly admitted, make absolute nonsense or rather would deprive it of all meaning. That being so, all you have to do is to compare the pre-war standard with what is got in the particular year in the manner there defined. You have to do a simple sum in subtraction of the one from the other, and then an excess of 50 per cent. is to be paid. Of course it is perfectly true that it may result in what seems a very extraordinary consequence, namely, that a man may in cases where the production in the accounting year has for any reason fallen very low, be charged an excess profits duty when he is actually getting less income than he was getting before the war. That is perfectly possible. It is not very probable, but it is a possible result. Of course we are not concerned with the reasons which led the Legislature to adopt this form of enactment. I think it is clear that it cannot have been accidental. It is not the result of any mere slip, because it

has remained on the statute book during more than one year without alteration. And I think that reasons can be conceived why the Legislature should have desired to impose the tax in this way. Much as the Legislature wanted the tax it was also obvious that it was still more vital for the national needs at this time that there should be an abundant supply of coal and that nothing should be enacted which might have any tendency to check the production of coal. Now of course the profits got from coal differ very much from the profits got from a business. What is not got in one year from a business may never be got at all; but with coal you have got the coal in the bowels of the earth; it is safe there, and may be got in subsequent years. This tax was one which everybody expected would be of a temporary nature, and which probably will be of a temporary nature, because it relates to excess profits in consequence of the war. Well, it might have been to the interest of the parties concerned if the working tenant and the landlord should have arranged it between them that the production should be very much kept down in the accounting year, because the coal would remain there and might be got after a year or two, when the war, and with it the war tax on excess profits, should have ceased. That is a possible reason for the enactment which we have got. At first sight, of course, it is a very startling enactment, because, as the heading of the group of sections shows to which the clause belongs, the tax was to be on excess profits. It is Part III of the Act, the title of which is Excess Profits Duty, and one would *prima facie* have assumed that it would deal with cases and cases only in which there were excess profits. But the wording of section 43 to my mind is so clear as to exclude altogether any argument that might otherwise have been drawn from the heading of the group of sections to which this clause belongs, and, whatever the reasons which led the Legislature to adopt this form of enactment may have been, all that we have to do is to construe the section, and for that reason I think that the decision of the Court below ought to be affirmed. I agree with what was said by counsel for the appellant, that it is not a case in which the costs of the appeal should be given. It was necessary to have the point finally and authoritatively decided, and I therefore suggest to your Lordships that the appeal should be dismissed without costs.

VISCOUNT HALDANE — Part III of the second Finance Act of 1915 provides for a duty upon excess profits. As regards ordinary profits it introduces naturally and necessarily a standard defined as the pre-war standard, but the principle which remains is that substantially the tax is to be levied on the difference between what the person who takes the profits receives in the year of accounting and what he has received in the years before the war, based on an average reached by selecting two years out of the three immediately preceding.

That is simple enough, but into the middle of Part III, and in the fasciculus of sections which contains these provisions, there is introduced section 43, which provides for an excess mineral rights duty. When you turn to the nature of the provisions which relate to that duty you are at once struck by the change which has been introduced. A new element comes in—an artificial definition of what is called “pre-war rent value.”

The scheme of the excess mineral rights duty is this—A man pays on the difference between what he receives in respect of royalties during the year of accounting and what he is taken by the Act to have received in respect of the pre-war standard year. But then by the introduction of the reference to pre-war rent value the matter is put upon an artificial basis. He pays not upon the actual difference between the royalties in one period and the receipts in a later period, but he pays upon a quite different basis ascertained by reference to a royalty varying with price, because it is only in the case of royalties varying with price that the section has any application. He pays, I say, upon the amount which he receives from these royalties in the year of accounting minus so much as is arrived at by taking the same number of tons as had been raised in the year of accounting, and attributing to them a notional royalty corresponding to the figure which represents the pre-war average price.

Now it is quite obvious that this may be a very different thing from the excess profits which he would receive were it an ordinary case of excess profits subject to duty as prescribed elsewhere in Part III. The difference which is here introduced may affect the Crown seriously, for if the number of tons in the year of accounting is greater, as it may happen to be, than it was in the pre-war period, then the Crown will not get so much. It may be that in the pre-war period there were faults or strikes or defective organisation which have been so got over that an enterprising coal lessee who was to pay the royalties has been able to secure a larger output after the war than he did before. Such cases are probably not frequent, but I have no doubt that numerically there is a considerable number of them, having regard to the enhanced price which the war has brought about as regards coal. And if that happens, then the deduction will be of the same number of tons as in the accounting year, which by the hypothesis is larger than the actual amount of tons raised on the average of the pre-war years, and the only factor of difference will be not the tonnage but the difference in price.

It is quite obvious that a man under these circumstances may be putting a great deal more into his pocket in the way of excess mineral royalties due in respect of mineral rights than would have been the case if it had been simply a question of the difference in profit between the two periods. But although that may happen, and although it makes the basis an artificial one as regards the Crown, a much more probable case is a case of real difficulty as regards the royalty



owner. The Crown may get little but it cannot lose. The landowner may not only not get much but he may have to pay. The effect of the language used is that if a man's coal gives out by reason of faults, by reason of the seam coming to an end, by reason of strikes, or of some cause over which he has no control, he will suffer just as much as he would have suffered if he had deliberately not allowed the coal to be worked and withheld it. Under those circumstances the basis of the duty seems from a business point of view a somewhat hazardous one. But the question is not what one may speculate upon as the natural or proper principle to have been adopted, but what the Legislature has said, and when I look at the words of the Legislature I come to the conclusion that section 43, which contains the code, is completely unambiguous. Section 43, by subsection (1), defines the amount on which the duty is to be charged in the case of royalties, which vary according to the price of the minerals as the difference between the amount received in the accounting year and the amount received in the pre-war standard period. Then the pre-war standard period is by the next sub-section defined to be "the average of any two of the three last pre-war rent values," and "pre-war value" is by the words occurring at the end of that sub-section defined in a way that to my mind leaves no ambiguity. Pre-war value is to "be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year." It is quite plain that what is to be taken as the basis of the element of deduction is the actual tonnage in the accounting year, and not as one might have expected the tonnage on the average of the pre-war years, because the Legislature has said so, and as I have often had occasion to observe in this House it is no duty of ours to speculate on the reasons which may have influenced Parliament, largely for the good reason that we do not know them. There may have been difficulties in taking the other course which have weighed with the draftsman. I am quite ready to suppose that this section was framed as it was deliberately. What the reasons may have been I do not know. They may have been good reasons, but we have nothing to do with them here. The words are clear, and therefore, as I have said, I agree that the appeal must fail, and I also agree that as this is a question of far-reaching importance it is not a case in which the House should follow its general rule of giving costs. On the other points I concur with what has been said by the Lord Chancellor.

**LORD DUNEDIN**—In common with all who have had to interpret statutes I have frequently experienced difficulties which more careful draftmanship might have obviated. But I confess that the clauses which in this case your Lordships have to interpret do for blundering English surpass anything I have hitherto seen.

If the taxing clause in the Act of 1915 is

to be operative at all you must read "having the right to work" as meaning "having had the right to give someone else the right to work." This has been clumsily interpreted in the subsequent Statute of 1916, and I have no doubt that the words of 1915 must be read for the purpose of any question still pending in the light of those of 1916. Then in the subsequent clause which deals with the fixing of the pre-war rent value, it is only the necessity to avoid a purely nonsensical result that forces one to strain the ordinary rules of grammar.

If this were all it would not perhaps much matter. It is our duty to make what we can of statutes knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a judge to declare a statute unworkable. But unfortunately the scheme read, as I have no doubt it must be read, really perpetrates what is in my opinion a great hardship. The underlying idea was clear enough. If a mineral owner let his minerals and stipulated for a payment or royalty which varied with the price of coal it was simple enough, and most people would think just enough, to say that if the effect of the war was to enhance the price of minerals the increased profit to the mineral owner should be like other profits subjected to special taxation. If the tax had been calculated on the difference between the income received before and after the war, there would have been nothing to complain of. But the framers of the Act by establishing fictitious pre-war rent value as applied to the after-the-war output omitted to deal with the position where although the rate per ton might rise the output might diminish, and the result is that a proprietor may have under the scheme to pay large excess profits when he actually receives a less sum of money for his minerals than he did before the war. This anomaly has been mitigated by subsequent legislation, which does not affect the present case, but which I confess shakes my faith in the view which seems to have commended itself to your Lordships who have preceded me that this peculiar method was of set purpose. But with hardships we have nothing to do, and I do not think that there is any possible way of construing the Act itself except the one that leads to the result reached by the Court below, and I think the appeal should be dismissed.

**LORD SHAW**—I agree.

Some royalties vary with the prices. In such cases when prices rise royalties rise. The calculation for excess mineral rights duty under the second Finance Act of 1915 is the excess of the royalty now as compared with the average of the pre-war royalty. Once that excess of royalty is ascertained, the rest is a multiple of that into the tonnage won for the accounting year. That is what the statute means; all the Judges who have dealt with this section think it does mean that; and I agree with them. There is excess duty on each ton and on each multiple of tons.

I say no more upon the case except that

I desire respectfully to adopt the judgment pronounced in the Court below by Lord Cullen, every word of which aptly expresses the view which I entertain.

Their Lordships dismissed the appeal but without expenses.

Counsel for the Appellant—Blackburn, K.C.—J. S. Leadbetter. Agents—Russell & Dunlop, W.S., Edinburgh—Kekewich, Smith, & Kaye, London.

Counsel for the Respondents—Sol.-Gen. for Scotland (Morison, K.C.)—R. C. Henderson. Agents—Sir P. J. Hamilton Grierson, Solicitor of Inland Revenue, Edinburgh—H. Bertram Cox, C.B., Solicitor of Inland Revenue, London.

Thursday, May 9.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Dunedin, Lord Shaw, and Lord Parmoor.)

N. G. FERGUSSON & COMPANY,  
LIMITED v. BROWN & TAWSE.

(In the Court of Session, June 12, 1917,  
54 S.L.R. 485, and 1917 S.C. 570.)

*Process—Furthcoming—War—Sist.*

A British firm having arrested in the hands of another British firm a debt due by the latter to an alien enemy, which was not payable until twelve days after the outbreak of war, and an action of furthcoming having been brought against the arrestees, the House of Lords, on the ground that a question of importance was raised on which it was not desirable to express an opinion, *continued a sist* till the end of the war, and *dismissed without expenses* an appeal against an interlocutor sisting the action.

This case is reported *ante ut supra*.

The pursuers, N. G. Fergusson & Company, Limited, appealed to the House of Lords.

After the adjournment, counsel for the respondents being in possession—

LORD CHANCELLOR—Mr Gore Browne, their Lordships have been considering this case, and what they are prepared to do is to continue the sist with no costs of the appeal, the arrestees to find caution to pay the appellants the same sum as may be found to be due, the House to continue the sist until the end of the war merely on the ground of convenience, and expressing no opinion as to any of the grounds given for the sist in the Court of Session.

Mr GORE BROWNE—My Lord, I should assent with great reluctance to that judgment.

LORD CHANCELLOR—I do not ask you to assent to it. That would not be fair. We will hear with pleasure anything you have to say.

The learned counsel is heard to conclude his argument.

LORD CHANCELLOR—A question of great importance has been raised in this appeal, on which I do not think it is desirable that any opinion should at present be expressed. The course I suggest should be taken is this—That the sist should be continued; no costs of this appeal, the arrestees to find caution for payment to the appellants of such sum as may hereafter be found to be due. This House continues the sist till the end of the war merely on the ground of convenience, and expresses no opinion as to any of the grounds given for the sist in the Court of Session.

VISCOUNT HALDANE—I concur.

LORD DUNEDIN—I concur. I have no doubt that although as a rule a person is entitled to have the process of the Court made good to him on his claims there is always in the Scotch Court—and we are sitting as the Supreme Scottish Court—a right to sist a cause for any good reason.

LORD SHAW—I agree.

LORD PARMOOR—I concur.

Their Lordships continued the sist and dismissed the appeal, without expenses.

Counsel for the Appellants—Gore Browne, K.C.—Scott. Agents—Gardiner & Macfie, S.S.C., Edinburgh—Roney & Company, London.

Counsel for the Respondents—Macphail, K.C.—Ingram. Agents—Shield & Kyd, Dundee—J. K. & W. P. Lindsay, W.S., Edinburgh—Beveridge & Company, Westminster.

## COURT OF SESSION.

Saturday, March 16.

### SECOND DIVISION.

[Sheriff Court at Banff.]

M'CONNACHIE v. GEDDES.

*Ship—Sale—Proof—Evidence—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 24 (1).*

The Merchant Shipping Act 1894, section 24 (1), enacts—“A registered ship or a share therein (when disposed of to a person qualified to own a British ship) shall be transferred by bill of sale.”

*Held* that a contract for the sale of shares in a ship need not, notwithstanding the above enactment, be in writing, and could be proved by parole evidence.

*Sale—Trust—Agent and Principal—Mandate—Act 1696, cap. 25.*

The Act 1696, cap. 25, enacts—“... No action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or backbond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intended, or unless the same be referred to the oath of party *simpliciter*.”