At advising—

Lord Deas—I have no doubt that the Lord Ordinary is right. These two missives are holograph of the respective parties. The one missive is addressed to a third party, said to be the agent of Bate, but that makes no difference. They are both holograph documents, as probative as if they had been regularly tested. The whole question is whether, on the face of them, there is a concluded bargain? Now a bargain may be final and concluded, although on a condition,—and I cannot doubt that there was here a concluded bargain on the condition in the letter, whatever that may be. It is not unusual either for the purchaser or seller to make the first offer, and it is no difference which makes it. Here it is the proprietor, who says—"I agree to accept an offer of £12,600 from Mr John Bate." If you stop there, Is that not an offer to accept £12,600 as the price of the property? That was subject, no doubt, to a condition, where the writer goes on to say that in "the event of a better offer than his being made before he has gone to any expense in improving the property, he will divide equally with me the sum offered or accepted in excess of £12,600." That contemplates that, before it shall be determined whether there is a surplus sum to either, Bate shall be in possession, and making improvements. Can that be anything but under the missives of sale? It is he alone who was spoken to. He is supposed to be in possession as the purchaser, no matter to whom the offer was made. If there was a *bone fide* offer within a certain time, the meaning was that the advantage was to be divided between them. The holograph letter of Bate could not be better expressed if his object was to tie down Corstorphine to this as a final purchase. In place of explaining the condition, Bate took the far safer plan of saying, "I accept your offer of the property, subject to the condition named in your letter." There is no doubt that that is the legal construction, and I am glad that it is not inequitable. I think we should adhere, but that we should also go farther, by deciding that the pursuer gets the property on condition of paying the £225.

Lord Ardmillan—I am of the same opinion. It cannot be denied that there may be a good sale, with a condition inherent in the contract. The true question here is, what is the condition within this contract? Now, I don't think a second sale was necessary,—an offer without a sale was contemplated. It was enough that there was an offer, and if there was a *bona fide* higher offer, then Bate was bound to pay half of the difference between that offer and the price he gave.

Lord Kinloch—I think there is no serious difficulty in this case. It appears just to stand here. Corstorphine had a property which he wanted to sell, and which Bate wanted to buy. Corstorphine thought that Bate was willing to give £12,600, but surmised that he might get a better offer, but, as he says, he had no opportunity of ascertaining the amount. So he writes a letter which, I think, is simply an offer of the property to Bate at £12,600, coupling his offer with the condition already stated. The meaning of this transaction is to me perfectly clear. Directly, and in the first instance, it contemplates Bate coming into possession of the property as proprietor, and stipulates that if Bate gets a better offer for it than the price he had himself paid, he shall give one-half of the surplus to the original seller. The words "offered or accepted" are used in the letter, because it was not on acceptance of any higher offer, but simply on such being made, that Bate was to pay half of the difference. But whilst this was the case directly in view, the principle of the transaction applies equally where a higher offer was made to Corstorphine before Bate had finally concluded his arrangement. Such an offer was in fact made. Bate is quite willing to pay one-half of the surplus to Corstorphine, so as to give him £225 more than he expected to get. I think that this is all which at the utmost was implied in the condition. And, as Bate accepted the condition, and is willing to fulfil it, I think the sale must stand and be enforced.

The Lord President was absent.

This interlocutor was pronounced,—"Adhere to the interlocutor in so far as it finds that there was a concluded contract of sale between the parties; *Quoad ultra* recal that interlocutor: Find that both parties admit at the bar that if, as has now been decided, there was such a concluded contract, the price to be paid by the pursuer is £12,600 with the addition of £225 in respect of the offer subsequently made by Mr Jardine: and Find that, upon payment of these sums with interest from and after Martinmas 1868, the defender will be bound, *simul et semel* to grant a disposition *habili modo* in favour of the pursuer; and to this extent and effect decern in terms of the conclusions of the summons: Find the pursuer entitled to expenses, and remit the account thereof when lodged to the auditor to tax the same and to report."

Agent for Pursuer—W. S. Stuart, S.S.C.

Agents for Defender—Adamson & Gulland, W. S

Wednesday, March 3.

M'ISAAC *v.* MACKENZIE.

Assessment—Poor-rates—Militia Act, 17 *and* 18 *Vict. c.* 106. *Held* (Lord Kinloch dis.) that, under the 36th section of the Militia Act, premises rented and used by the Commissioners of Supply for Militia purposes are exempt from poor-rates as regards the proprietor of the premises as well as in respect to the Commissioners.

Certain premises in Campbeltown, belonging to a trust estate on which the defender is judicial factor, are let to the Commissioners of Supply for Argyleshire, as a place for the keeping of the arms, accoutrements, clothing and other stores, belonging to the Argyle and Bute Militia Regiment, and as buildings or premises appurtenant thereto, part being occupied as quarters for the permanent staff of militia, part as a hospital for the militia regiment when it is called out for training and exercise, and thereafter by the permanent staff, and the remainder of said premises consists of a yard or place wherein the men are mustered for the issue and return of their arms, accoutrements, clothing, and other stores, and of a building in which these are kept. The gross rent of the premises is £163.

The pursuer, inspector of poor for the parish of Campbeltown, levied an assessment for poors' rates on these premises on account of the rents paid or payable to the defender, but the defender refused to pay them, on the ground that the same are not liable to be valued and assessed for poors' rates, or county, or burgh or local rates, in respect of the terms of the 36th section of the 17th and

18th Vict., cap. 106, the Militia Act, which *inter alia* declares, "and no place provided for the keeping of militia stores under this or any former Act, nor any buildings or premises appurtenant thereto, shall be liable to be valued or assessed to any county, burgh, parochial, or other local assessments."

The pursuer brought this action to enforce his right.

The Lord Ordinary (BARCAPLE) assoilzied the defender, adding this note:—"The Lord Ordinary has no difficulty in holding that the exemption from assessment in the Militia Act applies to poors' rates. The case of *Hunter* v. *Chalmers*, 20 D. 1311, and the authorities there referred to, are conclusive on that point. The question chiefly argued at the debate was, Whether the defender, as landlord of the premises, is entitled to the benefit of the exemption? The Lord Ordinary has not found this point to be free from difficulty. It is not to be easily inferred that an exemption of premises from assessment conferred for the benefit of the public, is to be available to any private party. Accordingly, if the words of the clause appeared to him to admit of construction on this point, the Lord Ordinary would have thought there was a strong presumption in favour of the more limited meaning contended for by the pursuer. But the provision is so unqualified in its terms, enacting absolutely that 'no place provided for the keeping of militia stores, under this or any former Act, or any buildings or premises appurtenant thereto, shall be liable to be valued or assessed,' that he does not think it admits of any limited application. It occurs in the same section that requires the Commissioners of Supply to provide a place for keeping militia arms and stores, and which enacts that for that purpose they may either purchase or hire suitable premises. There is therefore no doubt that the exemption applies equally to rented as to purchased premises. Whether rented or purchased, they are not to be liable to assessment. On the other hand, it is only by the subjects being assessed for poors' rates that the defender can be made liable for the landlord's share of the assessment. The Lord Ordinary thinks that would be a proceeding contrary to the express enactment of the Statute. It is not to be lost sight of that, where the premises are hired, the public may derive benefit from an exemption from taxation in favour of the landlord, as in these circumstances there will probably be a corresponding abatement of rent. If the Commissioners of Supply had purchased the premises they would have been permanently withdrawn from assessment, and it is therefore the less remarkable that, by their temporarily acquiring the use of them for payment of rent, they should be placed in the same position during the currency of the lease.

"The pursuer's third plea, that certain of the premises being used for other than militia stores, and premises appurtenant thereto, they are not within the exemption, was not made the subject of argument at the debate. The Lord Ordinary has however considered the point, and has come to the conclusion that the plea is not well founded. The phraseology of the clause, as regards this point, is not very clear. Its leading enactment is compulsory on the Commissioners of Supply, requiring them to provide premises for the custody of militia stores. It goes on to enact that the place so provided shall contain an orderly and guard room, and a magazine and mustering yard. Immediately in connection with this enactment, the clause proceeds to provide that it shall be lawful at any time for the Commissioners of Supply 'to provide such quarters for the permanent staff as may appear to them desirable, together with cells and such convenient premises as may be necessary for the safe custody of the stores;' and then there immediately follows the provision that no place provided for the keeping of militia stores, nor any building or premises appurtenant thereto shall be liable to assessment. It appears to the Lord Ordinary that the permissive provision as to providing additional accommodation is so mixed up with the main enactment of the clause, and so connected with the exemption from assessment, that the additional accommodation so provided must be held to be included in the exemption, as being appurtenant to the place for keeping militia stores."

The pursuer reclaimed.

FRASER and LANCASTER for reclaimer.

MILLAR and MACKENZIE for respondent.

At advising—

LORD DEAS—The question raised in this case is, whether the premises occupied for the purposes of the militia are exempt from the local rates mentioned in this section, both in respect of occupation and of property? It is not contended that the occupants are liable to pay these rates, but it is said that the exemption does not extend to the proprietor of the premises so occupied. The Lord Ordinary has found that the exemption is applicable to both cases; and I am humbly of opinion that in that judgment the Lord Ordinary is right.

It is not disputed that the premises in question are in the predicament to which the 36th section of the statute applies, that is, it is not disputed that they are premises which have been provided by the Commissioners of Supply. The Commissioners have provided them by becoming tenants of them. The words in the section are—(*quotes*). It cannot be contended that if you take these words in their literal meaning they do not comprehend the landlord equally with the tenant. It may be that poor-rates are of the nature of personal taxes, but they are so in respect of real property, and if that were not so, the result would be that under that clause neither the tenant nor the proprietor would be exempted. It is only by reading the clause as providing that no one shall be assessed in respect of any premises that you get the tenants comprehended in the exemption, and the exemption of the landlord arises in just the same way. If the argument of the reclaimer were given effect to, it is clear that occupants would not be exempted any more than landlords. The only construction of the words as they stand is, that no one shall be liable in respect of any building used for this purpose, and no such are to be valued, that is, if valued for the purpose of these assessments. If there is a distinction between owners and tenants it must be found somewhere else than there.

There are just two grounds on which it may be said there is such a distinction. The first would be, that in section 36 it is said that the Commissioners may, in their discretion, from time to time resolve either to purchase or hire any suitable buildings or premises, &c., and it may be said that it is only in the former case that there is to be any exemption. There is nothing in the clause to make that a sound construction. The Commissioners may either purchase or take on lease. If it were meant that the Commissioners are not to

be liable, that would have been stated; but instead of that, after saying that the Commissioners may buy or lease, the clause goes on to say that no *place*, &c., shall be liable, and there is no more settled rule than that when the words of an Act are clear, you must follow them, for you must suppose that the Legislature used words which properly expressed their meaning.

But, in the second place, it may be said that the reason of the thing applies to the Commissioners, but not to the landlords. That is not a safe ground. The reason of the enactment is not set forth, and is at best only conjectural. Besides, it is far from clear that the reason does not apply equally to proprietors as to commissioners or occupants. It is very plain that the Legislature contemplated that proprietors would not be very much disposed to let their premises for such purposes. The place to be so hired, purchased, or built, is to contain a guard and orderly room, and a magazine. The place is to be inhabited much like barracks, and proprietors would naturally not be very anxious to let their premises for these purposes, particularly if they retained any part of them in their own possession; and it is not wonderful, therefore, that the Legislature held out this inducement that the proprietors would not be liable in these taxes. Besides, that would enable him to take a smaller rent. I admit that the question is one of some delicacy, but I think the Lord Ordinary is right.

Lord Ardmillan—We have to consider the present case with this point certain, and to be assumed in our judgment, that the exemption in the Militia Act is applicable to the case of poor-rates. Farther, it is certain that, whether valued or not for other purposes, these premises are not valued and cannot be valued under this statute. Then there arises the question, whether the landlord is exempted under these circumstances which exempt the tenant? I am of opinion with your Lordship and the Lord Ordinary, that the exemption extends to the landlord, and that, the tenant not being liable, the landlord is not liable.

But Mr Lancaster ingeniously contended that the tax is a personal tax, and therefore that we must separate the two persons of the owner and occupant, and deal with their interests separately, so that the owner may be liable while the tenant is not. Now I think it is quite true that the tax, at its basis, is a personal tax, but it is so in respect of heritable subjects. It occupies logically the same position which the franchise occupies. The franchise is a personal franchise, but it is in respect of property or tenancy or occupancy. It is the man and not the land or the house that is represented, but it is in respect of the land or the house. And so it is not the house or the land that is liable for poor-rates, it is the man, but it is the man in respect of the house who is taxed. Therefore, whether a man is in the position of tenant or owner, it is in respect of the subject sthat in either character this tax touches him. The incidence of the tax, though different as regards the position of the man, is always in respect of the subjects. In all such taxes there is at bottom a heritable subject, which, though not the thing taxed, is uniformly the measure of the taxation, the man being taxed in respect of the subject. Applying this to the case before us, we find the clause of exemption reads thus—(*reads*). It is clear that no one can be liable to pay for rates in respect of premises unless they are liable to be assessed, and no premises are liable to be assessed unless they can be legitimately valued under the statute imposing the assessment. It may be that the premises may be got for a more moderate rent for the public, in consequence of their exemption from taxation; but, at any rate, it is clear that the statute does not make any distinction between the right of owners and tenants. It simply declares that the subjects shall not be valued, and if they cannot be valued for the purpose of the assessment, there can be no taxation.

Lord Kinloch—I have had considerable doubts of the soundness of the Lord Ordinary's interlocutor; and these doubts are not yet removed.

The state of the question is this. The respondent is, as judicial factor, proprietor of certain house property in Campbeltown. He has let this property to the Commissioners of Supply for Argyllshire, for behoof of the Argyll and Bute Militia, drawing, it is said, a rent of £163 per annum. It is admitted that no assessment for the poor is chargeable in respect of this occupancy against the militia or any one representing them. But the defender maintains that not only are the occupants free from poor-rates, but, in respect of this occupancy by the militia, he, the proprietor, is exempt also from owner's assessment. He rests this conclusion on the 36th section of the Militia Act, 17 and 18 Vict. c. 106, which provides that, "no place provided for the keeping of militia stores, under this or any former Act, nor any buildings or premises appurtenant thereto, shall be liable to be valued or assessed to any county, burgh, parochial, or other local rates or assessments."

The words of the statute are unquestionably very broad and unqualified. But I think the Act must be interpreted reasonably, and with reference to the fairly presumable intention of the Legislature. I am the more disposed to adopt this mode of interpretation that the passage relied on is expressed in very loose and inaccurate terms. In strict legal construction, more especially with reference to poor-rates, there is no assessment on the property itself,—the assessment is on the owner or occupant respectively, in respect of the property. The assessment leviable is "one-half imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands and heritages." The 36th section of the Militia Act, after providing that, in certain specified circumstances, the Commissioners of Supply shall furnish accommodation for the militia, declares that they may do so either by purchasing or renting premises,—that is, either by becoming proprietors and occupants, or occupants simply. When the clause, after making this provision, goes on to declare that the premises shall not be valued or assessed for local or parochial rates, I think its true intendment is that it shall not be valued or assessed against the parties so purchasing or renting. I conceive that, with reference to the proper legal character of the assessment, this is the true reading of the statute. The exemption will, in this way, be limited to the proper object of legislative favour, the militia, or those acting on their behalf. When the Commissioners of Supply purchase the property, and it is occupied by the militia, they will be free from assessment, whether as owners or occupants. When they merely rent the premises, they will be free from the occupant's assessment. But the owner of whom

the property is held will be liable to the owner's assessment just as before. The prohibition of the assessment in the Militia Act will be limited to the case of the party purchasing or renting the property for militia purposes, according as that party purchases or rents, but will not extend further.

I do not think that this construction does any violence to the language of the statute. It does nothing more than restrain the exemption to those who had been previously referred to as owners or occupants of the premises. At the same time, it avoids what I cannot but think a great anomaly, viz., that the fact of the militia being occupants of the premises should not only relieve the militia from the occupant's assessment, but, by a reflected privilege, very unusual in the annals of taxation, should relieve the owner from the owner's assessment as well. I can perceive no adequate or sufficient reason for the privilege being so extended. I cannot bring my mind to the conclusion that the object of the Legislature was not only exemption to the militia, but exemption also to any proprietor to whom the militia might be paying rent. I think that this conclusion may be avoided by an interpretation of the Militia Act which is both reasonable and admissible.

Agents for Pursuer—Murray, Beith, & Murray, W.S.

Agents for Defender—J. W. & J. Mackenzie, W.S.

Thursday, March 4.

SECOND DIVISION.

DYKES *v.* MERRY & CUNNINGHAM.

Appeal—Competency—Summary Procedure Act—Notes of Evidence—Sheriff—Arbiter—Mines Inspection Act. (1) Held that a complaint praying for a penalty against each of two respondents of £20 was appealable notwithstanding of the provision excluding the review of the Court of Session in cases under £25. (2) A complaint was brought under the Summary Procedure Act, and a few notes of the evidence were taken by the Sheriff-substitute for his own use. The Sheriff, on appeal, ordered these notes to be put into process, whereupon the parties agreed by a minute to hold them as a record of the evidence in the cause. *Held* that these notes did not form a judicial document at which the Court could look, and that the parties, having practically dealt with the Sheriff as an arbiter, his judgment was final. *Opinion* by Lords Benholme and Neaves on the Mines Inspection Act.

The Procurator-fiscal of Hamilton brought a complaint against Merry and Cunningham, owners of the coal-mine known as Haughead Colliery, and the manager thereof, for a contravention of the Act 23 and 24 Vict. c. 151, secs. 10 and 22, in respect they had not provided adequate ventilation for the pit. The complaint asked a penalty of £20 against each of the respondents. The Sheriff-substitute (VEITCH) held the complaint proved, and adjudged the owner to pay a penalty of £10 and the manager a penalty of £10, and granted a warrant to poind on failure to pay. The respondents appealed; and it being stated to the Sheriff that, although the proceedings had been taken under the Summary Procedure Act the Sheriff-substitute had taken notes of the evidence, he ordered the Sheriff-substitute to lodge the notes, which was done. The parties thereupon signed the following minute:—"The parties agree to hold the copy notes, No. 5 of process, as being in all respects full and complete notes of the evidence adduced at the trial in this case." On appeal, the Sheriff dismissed the complaint, adding the following note:—

"The Sheriff considers this a case of considerable importance, as affecting the interpretation of the Mines Regulation and Inspection Act; and he has had the less difficulty in recalling the Sheriff-substitute's interlocutor, as it was apparently pronounced by default in absence of the defenders. The first matter to be determined is, whether the party William Jack is in a position which renders him amenable to the provisions of the Act 23 and 24 Vict. cap. 151. By section 10 it is provided, that certain general rules therein embodied 'shall be observed in every colliery or coal-mine and ironstone mine by the owner and agent thereof.' No penalty is imposed by this section on the non-observance of said rule, but by section 22 it is enacted that, if 'any of such general rules, provision of which ought to be observed by the owner and principal agent or viewer of such coal-mine, be neglected or wilfully violated by any such owner, agent, or viewer, such person shall he liable to a penalty of not exceeding £20. There is thus an awkward discrepancy in the provisions of the Act, for section 2 lays the onus of observing the rules on the 'owner and agent,' while section 22 imposes the penalty for non-observance on the 'owner and principal agent or viewer.' Whatever other consequence this discrepancy may give rise to, one thing is clear, that unless Jack has been shown to be the 'principal agent or viewer' of the Haughhead Colliery, no penalty is exigible for him. In the interpretation of terms contained in section 7, no interpretation is given of the words 'principal agent or viewer,' but it is declared that the term 'agent of a coal-mine or colliery, or ironstone mine, shall mean any person having, on behalf of the owner, the care or direction thereof.' Now, under the proof Jack himself has deponed, when examined as a witness for the complainer, that he is the 'principal manager' for the firm of Merry & Cunningham, and that as such he has eight or nine different collieries under him, and has a general superintendence of the business. But Jack farther depones, that John Nish is manager at Haughhead Colliery, that he takes the entire management underground, and has an underground manager below him, and that he (Jack) has not been more than twice in the pit altogether, and had not been in it for a year preceding October last, and that for some time before said date, George M'Creath, mining engineer, had been 'employed to take a general superintendence.' George M'Creath was the first witness for the defence, and he depones that he was employed some time ago to take the superintendence of Merry & Cunningham's coal-pits, that Nish is manager at Haughhead, and has the entire charge under him (M'Creath), that he has been often in the pit, and superintended and authorised the mode of working in it, and, in particular, looked after the ventilation, and finally, that Jack was 'business manager,' and that he did not consider that Jack had any right to give him (M'Creath) directions. John Nish confirms this. He depones that he has had the management of the Haughhead mine since the commencement, that he ordered everything to be done in it, that Jack does not go down the pit, but that M'Creath does, and gives him (Nish)