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)

general directions. The letter of instructions given to M'Creath on 25th February 1857, when he received his appointment, and an excerpt from which he produced, entirely corroborates this parol testimony. It bears, 'Your duty will be to take the chief superintendence of all our coal and ironstone pits that supply Carnbroe Iron Works, including the Woodhall, *Haughhead*, and North Motherwell sale collieries, or any others we may acquire in the same locality. In doing this, you will have to make *frequent visits to and inspections of the pits* and workings, to consult with and advise the resident managers of the pits as to the best mode of carrying on the mining operations, so as to secure as far as possible economy in the output of the minerals and the safety of the workmen, and to report to us from time to time either verbally or in writing, as we may desire. You will have to see to the *sufficiency of the ventilation*, the state of the drawing roads, and the conducting of the underground workings generally, the winding and pumping machinery, the railways above ground, and the sinking of new pits, &c. In the face of this evidence it is impossible to hold that Jack, though he may be the principal business manager for the other defenders, is, in the sense of the Act, the 'principal agent or viewer' of their Haughhead pit. He has not, in the words of the interpretation clause, 'the care or direction thereof.' The duty devolves primarily on M'Creath, and secondarily on Nish. The complaint therefore miscarries as regards Jack on this preliminary ground. The next and still more important inquiry is, was there a contravention of the Act by the other defenders, who are admittedly the owners? The statutory rule which they are bound to observe is expressed as follows:—'An adequate amount of ventilation shall be constantly produced in all coal-mines or collieries and ironstone mines, to dilute and render harmless noxious gases to such an extent that the working places of the pit, levels, and workings of any such colliery and mine, and the travelling roads to and from such working places, shall, under ordinary circumstances, be in a fit state for working and passing therein. By section 22 the penalty now concluded for is imposed on every owner by whom the said rule shall be 'neglected or wilfully violated.' It is necessary, therefore, to consider, in the first place, what the obligation is which the rule naturally imposes, and it seems to be simply this, that every owner is bound to see that such a system of ventilation is established in his pit as will, under ordinary circumstances, make it fit or safe to work in. Was the Haughead pit in such a state or not? The evidence goes to show that it was. The plan produced has been proved to exhibit a correct view of the workings, and these were by pillar, or stoop and room. M'Creath, the head mining engineer, depones, 'I continued that mode of working as I found it suitable. I have been often in the pit. I found ventilation sufficient. . . . . Nothing has gone wrong in the ordinary working.' John Nish, the manager, who has been engaged in collieries for thirty years, explains that in stoop and room working 'the air course goes along the lower end of the stoop, until the upper end is cut through, when the air course is changed;' and after stating the average length of a room before the end is cut through, he adds, 'This is a common mode of working in pits of which I have charge. I find it the most efficient course of ventilating; under ordinary circumstances, no accident has ever occurred from want of ventilation.' There is no evidence whatever to contradict these statements, viz., that the mode of ventilation was such as is usually adopted in pits, and has been found in all ordinary circumstances to be sufficient. An explosion of fire-damp did, nevertheless, take place on the last of the three days libelled, by which two men were injured, but the proof at the same time instructs that it did not take place 'in ordinary circumstances.' In working in one of the rooms, which they had done quite safely with the established ventilation, the men came upon a blot at the place marked A on the plan, consisting of a quantity of stones or other foreign material, known by the name of a hitch; to remove this obstruction it is usual to resort to some blasting operation, and the place in consequence stood idle for a little. But on Monday the 25th May last the working was resumed, and the usual steps taken for the removal of the hitch. No fire-damp was observed on Monday, but there was a little on Tuesday, This was not unexpected, for it is amply proved that on opening up a hitch there is always much greater risk of fire-damp than in ordinary cutting. On this point it is only necessary to quote the words of Mr Ralph Moore, the government inspector of mines, who depones, 'The place had been standing on account of the hitch. The cutting of a hitch is more likely to cause fire-damp than if there had been no hitch.' On the Wednesday morning the men began to get alarmed, but on asking William Dougall, the underground manager below Nish, if all was right, they were told it was, but on their going in to work the explosion took place. Nish states that, being aware of the probability of fire-damp coming out from the hitch, he had instructed Dougall on the Friday before to put in bratticing, which would have created an additional amount of ventilation, and in all probability prevented the explosion; but Dougall neglected the order, and was thus greatly in fault, as Nish was also to a lesser degree in not seeing personally that the necessary precaution was taken. But all this was a *causas improvisis*. A hitch is only occasionally met with; and if there had been no hitch, there would have been no more need for bratticing in that particular room than there had been in any of the others. In compliance with the general rule, the ventilation had been found 'adequate' under 'ordinary circumstances.' Owners are also responsible, in terms of the provisions of section 11 of the Act, for the establishment of special rules; and the defenders accordingly established the special rules, of which the production No. 4 is a copy. By the 21st of these rules the following is declared to be a part of the duty of the fireman:—'In case fire-damp or other impure air shall be discovered in any working place, road, or level, the fireman shall, in the first instance, thoroughly clear the same of such impurity, if it can be done easily, and shall thereupon report to the colliers that the working places are apparently safe; but if the impurity cannot be readily or at once cleared out, the colliers shall not be permitted to enter any such working places, roads, or levels, until the impure air shall have been by further appliances entirely dispelled.' Again, by the 32d special rule, the following provisions are made:—'The whole operative details of the colliery shall be under the care and charge of the underground manager, and he shall see that the workmen in their several departments discharge their duties; he shall receive and attend to all reports as to the state of repair of

the mid-wall, trap-doors, roads, shaft, cube, coal-faces, and other works, and also as to the state of ventilation and the machinery; he shall cause remedies to be provided where needed, and every workman in the colliery shall be at his command in effecting such repairs, or applying such remedies as shall be urgent and important for the safety of the men and works.' The Act imposes no penalty on owners should these special rules be neglected or violated by the parties selected and employed to enforce them; and it would evidently have been unjust to make owners penally liable, whatever the civil consequences might be, for the faults of others who were specially appointed and paid to perform duties which it was impossible the owners themselves could perform. In the case of *M'Donald*, Jan. 20. 1862, where the owner of a coal pit was convicted in this court of a contravention of the same general rule as is here libelled, the *species facti* was altogether different. The complaint bore, that the owner had incurred the penalty provided by the 22nd section of the Act, 'In so far as, on 22nd June 1861, or about that time, the Bargeddie coal pit or mine being then worked, the said John Young senior, as one of the owners thereof, did neglect, or wilfully fail and omit, to constantly produce an adequate amount of ventilation in the main coal workings thereof, and, in particular, in or near the working place there of David Kelly, a collier, to dilute and render harmless noxious gases therein to such an extent that the working places of said coal pit or mine, and the travelling roads to and from said working places, would, *under ordinary circumstances*, be in a fit state for working and passing therein.' All this was found proved, so that there was a direct contravention of the rule. But the very reverse is the case here. There was no neglect of a general and adequate system of ventilation, 'under ordinary circumstances' the noxious gases were sufficiently diluted and rendered harmless, and the travelling roads to and from the working places were in a fit state for passing therein. It is not pretended that because hitches are sometimes met with in the workings the roads should therefore be always bratticed. The extraordinary circumstances which a hitch occasions are to be dealt with by the fireman and underground managers when they arise. The proper officers for doing so, and the necessary means and appliances, were provided by the owners, and where, therefore, was their 'neglect' or 'wilful violation' of the general rule? It appears to the sheriff that none such, in the meaning of the Act, has been brought home to the defenders."

The complainer appealed.

The SOLICITOR-GENERAL and DEAS for him.

SHAND and MACLEAN in answer.

The competency of the appeal was objected to, on the ground that the penalties were exigible from the respondents severally, and that the cause must be dealt with as if it had been one complaint against the owners for a penalty of £20, and another against the manager for a like sum, and that in these circumstances the cause was not of the value of £25.

The Court sustained the competency; and parties having been heard on the procedure which had taken place, the Court held that by the course which had been followed in regard to the notes of evidence the cause had been taken out of the ordinary course of judicial procedure; that the notes were not a judicial document which they were entitled to look at; and that the Sheriff-Principal had practically been dealt with by the parties as an arbiter in the cause, whose judgment must be final. Opinions were intimated to the effect that the Sheriff should have taken evidence for himself *de novo*. Lords Benholme and Neaves also expressed an opinion to the effect that, under the 10th and 22d sections of the Mines Inspection Act, the Legislature contemplated that there must be fault on the part of the persons from whom the penalties were to be exacted. The Court dismissed the appeal.

Agent for Appellant—Charles Morton, W.S.

Agents for Respondents—J. & R. D. Ross, W.S.

Friday, March 5.

THE MINISTER OF MORVEN *v.* THE HERITORS.

(Before Seven Judges.)

Teinds — Sub-Valuation — Approbation — Positive Prescription. Held (Lord Benholme dissenting) that the positive prescription does not protect a valuation of teinds, supported by a decree of approbation, against a claim for augmentation of stipend by the minister, the allegation of the minister being that certain lands were not included in the decree of valuation and others were unwarrantably included.

This was a question between the minister of Morven and the heritors. The heritors maintained that there was no free teind for an augmentation, because all the teinds of the parish had been valued by a sub-valuation in 1629, on which approbation followed in 1785-86. The minister condescended on certain lands, some of which were not included either in the Sub-Commissioners' report or the approbation, and others which, the minister argued, were unwarrantably included in the latter. The Lord Ordinary held that the minister's claims were cut off by the negative prescription. In the Inner-House the positive prescription was also pleaded by the heritors, and a hearing ordered before the Second Division, with three judges of the First, on the question whether that plea applied to the case.

CLARK and CRAUFORD for minister.

GORDON, Q.C., MILLAR, Q.C., WEBSTER, BALFOUR, and SELLAR for heritors.

At advising—

LORD NEAVES—The question which we have now to determine is one of much interest and importance. Though not unfrequently raised, it has never, I think, been deliberately considered or substantially decided.

This question is, whether a valuation of teinds, which *ex hypothesi* may be liable to latent objections not excluded by the negative prescription, can be validated by the positive prescription? The nature of the question may be well illustrated by stating a case similar to one sought to be made in this process.

A valuation of teinds is produced bearing to refer to the lands of A, and is founded on as protecting the whole lands of the heritor producing it. The minister objects that the valuation, when obtained, did not refer to the whole lands now held by the heritor, but had reference only to a certain portion of those lands, and that the heritor's other lands, to which he seeks to extend it, did not then belong to him, but can be shown by the titles to have belonged to another party. This objection, it is clear,