Brown, K.C.—Black. Agents—Smith & Watt, W.S.

Counsel for the Claimants John Taggart, Mrs Langmuir, and Miss Margaret M'Naught and Others—M. P. Fraser, K.C.—J. G. Jameson. Agents—T. S. Paterson & Davidson, W.S.

Counsel for the Claimant Miss Elizabeth Adam—J. M. Hunter. Agents—Forbes, Dallas, & Company, W.S.

Counsel for the Claimants Miss Grace B. S. Adam and Another—Christie, K.C.—Gibson. Agents—Balfour & Manson, S.S.C.

Tuesday, November 30.

FIRST DIVISION.

[Exchequer Cause.

TRANENT CO-OPERATIVE SOCIETY, LIMITED *v.* INLAND REVENUE.

Revenue—Income Tax—Occupation of Land for the Purpose of Husbandry only—Election to be Assessed under Schedule D—Co-operative Society—Customs and Inland Revenue Act 1887 (50 *and* 51 *Vict. cap.* 15), *sec.* 18—*Industrial and Provident Societies Act* 1893 (56 *and* 57 *Vict. cap.* 39), *sec.* 24—*Income Tax Act* 1918 (8 *and* 9 *Geo. V, cap.* 40), *sec.* 39 (4), *and Schedule B, Rule* 5 (1).

A co-operative society registered under the Industrial and Provident Societies Act 1893 occupied land for the purposes of husbandry only. They elected by statutory notice to be assessed, in respect of profits from the land, for the periods 1918-19 and 1919-20, under Schedule D of the Income Tax Acts applicable to the periods. They were assessed under Schedule B. *Held* that the election was competent and that the assessments were bad.

Revenue—Income Tax—Exemption from Tax under Schedule D—Co-operative Society—Occupation of Land for Purposes of Husbandry only—Customs and Inland Revenue Act 1887 (50 *and* 51 *Vict. cap.* 15), *sec.* 18—*Industrial and Provident Societies Act* 1893 (56 *and* 57 *Vict. cap.* 39), *sec.* 24—*Income Tax Act* 1918 (8 *and* 9 *Geo. V, cap.* 40), *sec.* 39 (4), *and Schedule B, Rule* 5 (1) (2).

A co-operative society registered under the Industrial and Provident Societies Act 1893, which provides that such societies shall not be chargeable under Schedule D of the Income Tax Acts unless in certain specified circumstances, elected to be assessed under Schedule D for the profits from land occupied for the purposes of husbandry only. *Held* that the effect of their election was not to procure their exemption from income tax, but to make them assessable as under Schedule D in respect of their profits and gains as occupants of the lands in the same way as other occupants electing to be assessed under that schedule.

The Customs and Inland Revenue Act 1887 (50 and 51 Vict. cap. 15), sec. 18, enacts—"It shall be lawful for any person occupying lands for the purposes of husbandry only to elect to be assessed to the duties of income tax chargeable under Schedule D and in accordance with the rules of that schedule in lieu of assessment to the duties under Schedule B. The election of such person shall be signified by notice," . . . "and from and after the receipt of such notice the charge upon him to the duties of income tax for such year shall be under Schedule D, and the profits or gains arising to him from the occupation of the lands shall for all purposes be deemed to be profits or gains of a trade chargeable under that schedule."

The Industrial and Provident Societies Act 1893 (56 and 57 Vict. cap. 39), sec. 24, enacts—"A registered society shall not be chargeable under Schedules C and D of the Income Tax Acts unless it sells to persons not members thereof, and the number of shares of the society is limited either by its rules or by its practice. But no member of or person employed by the society shall be exempt from any assessment to the said duties to which he would be otherwise liable."

The Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), sec. 39 (4), enacts—"(4) A society registered under the Industrial and Provident Societies Act 1893 shall be entitled to exemption from tax under Schedules C and D unless it sells to persons not members thereof, and the number of its shares is limited by its rules or practice, but no member of or person employed by the society shall be exempt from charge to the tax to which he would be otherwise liable."

Schedule B, Rule 5 (1) (2), of the Income Tax Act 1918 contains provisions similar to those of the Customs and Inland Revenue Act 1887, section 18, with the difference that the person may elect "to be assessed and charged under Schedule D."

The Tranent Co-operative Society, Limited, *appellants*, being dissatisfied with the determination of the Commissioners for the General Purposes of the Income Tax Acts confirming assessments for the years ending 5th April 1919 and 5th April 1920 made on double the annual value of lands occupied by the appellants for the purposes of husbandry only, obtained a case in which H. G. C. Brown, Inspector of Taxes, was respondent.

The assessments were made as regards (1) the year ending 5th April 1919, under the Acts 5 and 6 Vict. cap. 35, sec. 63, Schedule B; 16 and 17 Vict. cap. 34, sec. 2; 59 and 60 Vict. cap. 28, secs. 26 and 27; and 8 and 9 Geo. V, cap. 15, secs. 17 and 21; and as regards (2) the year ending 5th April 1920, under the Act 8 and 9 Geo. V, cap. 40, and the rules applicable to Schedule B, and 9 and 10 Geo. V, cap. 32, sec. 14.

The Case stated—"The following *facts* were proved or admitted—1. The appellants are a society registered under the Industrial and Provident Societies Act 1893 (56 and 57 Vict. cap. 39). To a very small and immaterial extent they sell to persons not members of the Society, but the number of shares of the Society is not limited either

by its rules or practice. The Acts 56 and 57 Vict. cap. 39, sec. 24, and 8 and 9 Geo. V, cap. 40, sec. 39 (4), apply to the appellants, and in terms thereof they are exempt from taxation under Schedules C and D. 2. The appellants are occupiers of lands as owners in the parish of Tranent, and as tenants in the parish of Pencaitland, county of Haddington, to which the assessments appealed against relate. The appellants occupy those lands for the purposes of husbandry only. The double of the annual value of said lands is—(1) For the year ending 5th April 1919, £2106, 15s., and (2) for the year ending 5th April 1920, £2103. (3) The whole produce of the lands occupied is used for the benefit of the members of the Society. There are no sales with the exception occasionally of such sales as of a horse which has become too old for work and which it is necessary to replace with a younger animal. (4) The appellants, in terms of section 18 of the Customs and Inland Revenue Act of 1887, and of the Income Tax Act 1918, Schedule B, Rule 5, signified by notice in writing, delivered personally or sent by post in a registered letter to the Surveyor of Taxes for the district within two calendar months after the commencement of the respective years of assessment, that they elected to be assessed to the duties of income tax chargeable under Schedule D, and in accordance with the rules of that schedule, in place of assessment to the duties under Schedule B. (5) On 5th June 1918 the appellants' manager Mr James Cochrane wrote to the Surveyor of Taxes in the following terms:—'With reference to the Society's liability for income tax under Schedule B, the directors desire to make a test case as to whether the Society would be liable or not, if they decided to be assessed under Schedule D as provided for in the Finance Act 1887, section 18, in view of the fact that Schedule D is specially exempted in the Industrial and Provident Societies Act 1893, section 24.' (6) On 3rd June 1919 the appellants' manager wrote to the Surveyor of Taxes as follows:—'With reference to the appeal which is pending *re* the taxation of the co-operative farm profits or surplus under Schedule D for 1918-19, I hereby elect to be assessed under Schedule D in place of Schedule B for the year 1919-20. This intimation is merely to keep the matter in order for this latter year pending the result of the appeal for exemption under the provisions of the Industrial and Provident Societies Act 1893 for the former year.'"

"After full consideration of the facts and arguments the Commissioners being satisfied that the objects of the appellants in electing to be assessed to the duties of income tax chargeable under Schedule D in place of under Schedule B was with the view of escaping chargeability in terms of section 24 of the Industrial and Provident Societies Act 1893, were of opinion that election with such an end in view was not '*lawful*' and refused to grant relief for the sums assessed under Schedule B."

Argued for the appellants—The assessments being in respect of land occupied for the purposes of husbandry only the appellants had a statutory right to elect to be assessed under Schedule D for the years ending 5th April 1919 and 5th April 1920—Customs and Inland Revenue Act 1887 (50 and 51 Vict. cap. 15), sec. 18; Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), Schedule B, Rule 5; *Kensington Income Tax Commissioners* v. *Aramayo*, (1916), 1 A.C. 215. As a registered society the appellants were exempt from taxation under Schedule D—Industrial and Provident Societies Act 1893 (56 and 57 Vict. cap. 39), sec. 24; Income Tax Act 1918, sec. 39 (4); Industrial and Provident Societies Act 1876 (39 and 40 Vict. cap. 45), sec. 11 (4); Customs and Inland Revenue Act 1880 (43 Vict. cap. 14), sec. 8. The principle of the exemption was that the society traded co-operatively. Farming was a trade and was primarily made taxable under Schedule B instead of Schedule D, only because of the difficulty of keeping books. The appellants' farm was managed co-operatively and along with the co-operative business formed one concern. Losses on the farm could be set off against profits on the co-operative business—*Brown* v. *Watt*, 1886, 13 R. 590, 23 S.L.R. 403; Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 101; Income Tax Act 1918, Schedule D, Rule 13. It followed that the appellants, having elected to be assessed in respect of their farm under Schedule D, were exempt from taxation on the assessments. This was not the result of mere choice but also of the fact that the appellants were farming co-operatively. Alternatively the appellants were entitled under the statutes to be assessed for the profits of the farm under Schedule D, whether they were chargeable under that schedule or not, and the assessments under Schedule B were bad.

Argued for the respondents—The determination of the Commissioners was right. A co-operative society was assessable under Schedule B, and could adjust their liability with reference to their losses—Customs and Inland Revenue Act 1890 (53 Vict. cap. 8), sec. 23; Income Tax Act 1918, sec. 34, and Schedule B, Rule 6. The appellants had no right to elect to be assessed under Schedule D. Section 18 of the Customs and Inland Revenue Act 1887 and Schedule B, Rule 5 of the Income Tax Act 1918 did not apply to the appellants. These provisions could only apply if the appellants were chargeable under the Schedule, but they were not—Industrial and Provident Societies Act 1893, sec. 24; *Kensington Income Tax Commissioners* v. *Aramayo*. The occupation of a farm did not make the appellants chargeable under Schedule D. A co-operative society could have dealings in land—Industrial and Provident Societies Act 1893, sec. 4—but were exempt under that schedule. Further, a co-operative society managing a farm co-operatively was not a person occupying land for the purposes of husbandry only within the meaning of the Acts. The intention was to give the right of election to be assessed under Schedule D to persons trading in the ordinary way for profits and to charge on these profits under the schedule. Co-operative trading was not such trading.

At advising—

LORD PRESIDENT—It is found as matter of fact in the case that the appellants are persons occupying land for the purposes of husbandry only. They were assessed to income tax under Schedule B for 1918-19, in terms of the Income Tax Acts in force prior to 5th April 1919. They were assessed under the same schedule for 1919-20 under the Income Tax Acts in force subsequent to 5th April 1919.

I deal first with the assessment for 1918-19. By section 18 of the Customs and Inland Revenue Act 1887 persons occupying land for purposes of husbandry only were given the right to elect to be assessed under Schedule D, and in accordance with the rules of that schedule, in lieu of assessment under Schedule B. The section provided that upon delivery of a statutory notice to the surveyor the charge should be under Schedule D, and the profits deemed for all purposes to be profits of a trade chargeable under that schedule. The appellants timeously delivered the statutory notice. By legislation both prior and subsequent to the date of the Customs and Inland Revenue Act 1887 it was enacted that industrial and provident societies should not be chargeable under Schedule D unless in certain circumstances which do not apply to the appellants. The latest in date of these enactments was that contained in section 24 of the Industrial and Provident Societies Act 1893.

The appellants' main contention is that the combined effect of their election and of the statutory provisions which forbade them to be charged under Schedule D is to give them immunity from income tax on the profits arising to them from the occupation of land for husbandry only, because (1) their election entitles them to avoid assessment under Schedule B, and (2) the statutory provisions referred to prohibit assessment in their case under Schedule D. Alternatively they claim to have the benefit of their election, and have the profits arising to them from the occupation of land assessed under Schedule D.

The answer of the respondent is that the right of election given by the Act of 1887 to the appellants in their capacity of occupiers of land for purposes of husbandry only was rendered incapable of exercise by the statutory provisions referred to, because those provisions removed from the possibility of choice by the appellants (as an industrial and provident Society) one of the two alternatives with reference to which the election was to be made.

Both the main contention of the appellants and the answer of the respondent are based on the view that the two sets of enactments—those of the Act of 1887 and those contained in the other statutory provisions referred to—cannot be read consistently together as applying to the appellants. I think they can and should be so read. As things stood in 1887, profits derived from the occupation of land for husbandry only were not chargeable except under Schedule B. The right given to the taxpayer by section 18 was a power placed in the taxpayer's hands, not in those of the taxing authority; and it was the force of the taxpayer's election, and that alone, which put the taxpayer in the position of demanding as matter of right that his profits should be treated and deemed to be that which they were not, namely, profits assessable under Schedule D. The effect of the taxpayer's election was—for the purposes of assessment—to put profits in, so to speak, the wrong schedule, and to make them chargeable as profits under Schedule D, although the taxing authority had neither right nor power of its own so to charge them. The other statutory provisions above referred to merely removed from chargeability under Schedule D those profits which the taxing authority was bound under the existing Income Tax Acts to assess under that schedule. But this did not prevent an industrial and provident society from demanding, in like manner with any other taxpayer—individual or partnership—to whom profits arise from the occupation of land for husbandry only, that its chargeability under Schedule B should be subject to assessment as if—contrary to the fact—the profits in question were properly assessable under Schedule D. The result of the appellants' election is not to mix up those profits with any other profits of theirs which independently of their election fell to be, and would have been, assessed under Schedule D but for the statutory prohibition against so charging them. Nor does their election entitle the appellants to avoid or qualify the assessment of the profits arising to them from the occupation of land, by reference to their privileges as an industrial and provident Society with regard to other classes of profits. I am therefore unable to sustain either the appellants' main contention or the respondent's answer to it, but I think the appellants' alternative contention is well founded.

Now I turn to the assessment for 1919-20. The provisions of Rule 5 of Schedule B in the 1918 Act are the same as those of section 18 of the Act of 1887: and the provisions of section 39 (4) of the Act of 1918 are practically the same as those of section 24 of the Act of 1893, except that the former provisions give "exemption" to industrial and provident societies from tax under Schedule D, instead of directing that their profits "shall not be chargeable" under that schedule. The considerations applicable are not substantially different from those on which my opinion with regard to the 1918-19 assessments is founded. But they apply the more easily because the argument which arose on the particular form of the enactment of 1893 (*prohibiting* the taxing authority from charging the profits under Schedule D) is not available to either party with regard to the assessment for 1919-20.

The case is brought to try a question of importance, and the fact that the appellants made their election with the object, *inter alia*, of testing their claim to immunity from income tax does not afford a good ground on which the Commissioners were entitled to reject the alternative contention of the appellants. The appeal must therefore be sustained.

LORD MACKENZIE—This appeal involves the consideration of two enactments, viz., section 18 of 50 and 51 Vict. cap. 15, and rule 5, Schedule B, of 8 and 9 Geo. V, cap. 40, but it is common ground that there is no substantial difference between the two statutes. Under each any person occupying lands for the purposes of husbandry only is given a right of election. The Co-operative Society falls within this category. So far as regards husbandry the Society is in the same position as the individual farmer. In neither case, apart from election, is there any assessment under Schedule D. In either case something requires to be done by the taxpayer to bring him under Schedule D instead of under Schedule B. The reason for giving the right of election in the case of the Co-operative Society is the same as in the case of the individual. The assessable value, which is now double the annual value of the land, may exceed the figure which would be brought out under Schedule D. There is no reason for denying the privilege of election to the co-operative farmer which is given to the individual.

The result of giving this privilege to the Co-operative Society is not, however, attended with the result for which they contend. They found on the exemption in favour of industrial and provident societies contained in section 24 of 56 and 57 Vict. cap. 39, and section 39 (4) of 8 and 9 Geo. V, cap. 40, under which they are entitled to an exemption from tax under Schedule D. This applies to their trading profits. It does not apply to the case in which by their own action they voluntarily submit to a tax under one schedule rather than under another. The election, to be an election at all, must be an effective one. I am not impressed with the argument that assessment under Schedule D is not appropriate in the case of a co-operative society. It was suggested that the Society might escape taxation if only the actual profits available for dividend fell under Schedule D, as the dividends are merely a redistribution of assets contributed by the members. If the Society elect to be assessed under Schedule D, as they have done here, they are, in my opinion, not entitled to plead they have exemption; nor will they be entitled to have their profits from farming estimated on a different basis from anyone else who occupies land for the purposes of husbandry only.

LORD SKERRINGTON—The appellant is a society registered under the Industrial and Provident Societies Act 1893, and as such it admittedly is not liable to be assessed for income tax under Schedule D in respect of its general trading profits. On the other hand, it is *prima facie* liable to be assessed under Schedule B in respect of its profits or gains arising from the occupation of land. Seeing, however, that it occupies this land "for the purposes of husbandry only," the appellant claims that in common with all other farmers it is entitled to elect to be assessed in respect of such occupation under Schedule D instead of under Schedule B. If the appellant possesses this right, as it *prima facie* does, it has duly and timeously signified its election to the Inland Revenue, and it would follow that the assessments appealed against are invalid because they were laid on under Schedule B and not under Schedule D. It appears from a letter by the appellant's manager to the Surveyor, which is quoted in the case, that the appellant's object in electing to be assessed under Schedule D was "to make a test case" as to whether the Society could by means of this device avoid all liability for income tax in respect of the occupation of its farm, seeing that according to the appellant's view of the law a registered society cannot legally be taxed under any circumstances whatever according to the provisions and rules of Schedule D. There is a bold simplicity about this contention which compels one's admiration, though, as was pointed out by the Inspector of Taxes, the appellant's claim appears to involve "a fundamental contradiction." I should have thought it obvious that there can be no election unless two courses are open, and that it is a contradiction in terms to say that one elects to be taxed according to a method which one contends to be in the circumstances incompetent and illegal. Accordingly I am not surprised that the General Commissioners decided that the appellant Society must be taxed in respect of the profits of its farm according to what *ex hypothesi* of the argument was the only competent and legal method in the case of a registered society, viz., the rules of Schedule B. Nor am I surprised that the Commissioners lost sight of an alternative and very subordinate contention on behalf of the appellant which is obscurely and inaccurately adumbrated in the case, and which lies hidden in the midst of a long argument in favour of the view that the appellant's farming profits are totally exempted from income tax.

According to this alternative and contradictory contention the appellant Society maintains that while it cannot be taxed against its will according to the rules of Schedule D, it may competently and legally be so taxed in respect of its farming profits if it duly signifies its preference for that method of taxation within two months after the commencement of the year of assessment. The privilege of election which was conferred upon farmers for the first time by the Customs and Inland Revenue Act 1887, section 18, is re-enacted by the Income Tax Act 1918, Schedule B, rule 5. It was and is given in general terms to "any" farmer. Side by side with this privilege, farmers enjoyed before 1918, and they still enjoy (Act of 1918, Schedule B, rule 6), a much older privilege which was originally conferred upon that class of the community by the Income Tax Act 1851, section 3, viz., the right to prove if they can at the end of any year that the "profits or gains" arising from the occupation of their farm fell short of its assessable value. The Lord Advocate maintained that registered societies are regarded by the law as incapable of earning "profits" in the proper sense of the word, and he argued that as they had for that very reason been exempted from taxation under Schedule D they

could not competently be taxed under that schedule even if they voluntarily submitted themselves to taxation in that form. He admitted however (somewhat inconsistently as I thought) that a registered society has the right to be taxed under Schedule B upon its actual "profits or gains" so far as arising from the occupation of a farm. If that is the law it is difficult to construe the legislation which exempts such societies from assessment under Schedule D as supporting the theory that they are deemed to be incapable of earning profits, or as doing more than conferring upon them a privilege which they may waive if they have an interest to do so, as they manifestly may have in the case of a farm. Moreover, I should suppose that the primary purpose of section 18 of the Act of 1887 was to save trouble both to the taxpayer and to the Inland Revenue by rendering it unnecessary to assess a farmer upon a conventional profit if it was foreseen that at the end of the year he would require an account to be taken of the profit actually earned during the year. I can conceive no reason why registered societies should have been dealt with differently from other farmers in regard to the method of assessing the amount of their farming profits. One of the two assessments appealed against was imposed after, and the other before, the Act of 1898 came into force. Section 39 (4) of that Act enacts that a registered society "shall be entitled to exemption from tax under Schedules C and D." The language of this enactment lends no support to the contention that such a society is legally incapable of being taxed under Schedule D. On the contrary it is easy to reconcile section 39 (4) with rule 5 of Schedule B. As regards the other and earlier assessment, it is necessary to compare section 24 of the Industrial and Provident Societies Act 1893, which enacts that "a registered society shall not be chargeable under Schedules C and D of the Income Tax Acts," with section 18 of the Customs and Inland Revenue Act 1887 already referred to. The language of this legislation is somewhat more favourable than that of the Act of 1918 to the theory that taxation under Schedule D is inconsistent with the statutory constitution of a registered society, but this contention seems to me to be so unreasonable and fanciful that I have no difficulty in rejecting it. I agree with the Lord Advocate in thinking that the Consolidation Act of 1918 did not intend to alter the law as regards this matter, and that our decision as regards each of the assessments appealed against must depend not upon a minute comparison of the language of the corresponding clauses of the earlier and of the later legislation but upon considerations of a broader character.

For these reasons I think that the assessments were bad and that the determination of the Commissioners was erroneous.

LORD CULLEN—While societies such as the appellant's Society have for a long period been exempted from assessment under Schedules C and D, they have always been and still are left subject to assessment under Schedules A and B. The present question arises from the fact that the appellants occupy certain land for purposes of husbandry only, and in respect thereof are in the first instance directly liable to assessment under Schedule B. It is a feature of Schedule B that it provides an artificial standard for measuring the liability of such occupiers of land assessable under it which does not turn on the amount of the profits and gains derived from the occupation. While this is so, relief has always been provided to an occupier overtaxed by an application of that standard if at the end of a year he can show that his actual profits and gains for the year have been less than the amount on which he has been assessed and has paid, in which case he may claim repayment *pro tanto*. A similar alternative basis of measuring liability has since the Act of 1887 been made available to the occupier in a different way. Instead of having first to submit to assessment and payment on the artificial standard and then having to reclaim at the end of the year, he may at the stage of assessment elect to require that in measuring his liability to assessment the artificial standard of Schedule B shall not be applied, but that in lieu thereof he shall be assessed under Schedule D. And as Schedule D does not by itself apply directly to the case of such an occupant which the statutes have expressly relegated to Schedule B, the statutory provision for such election goes on to say that on the election being made the profits and gains arising from the occupation of the land in question shall be *deemed to be* profits or gains of a trade chargeable under Schedule D. The assessment which then ensues is thus one not springing from Schedule D in itself, but one resulting from the joint operation upon the occupant's case of (1) his original liability to assessment under Schedule B, and (2) his own voluntary act in availing himself of the alternative method of satisfying that liability by electing for assessment under Schedule D. This being so, it appears to me that to such an assessment the exemption founded on by the appellants does not apply. If it did apply it would have this effect, that while the Society's express exemption includes only liability under Schedules C and D and thus excludes Schedule B, this exclusion of Schedule B from exemption would be neutralised, and exemption under that schedule would be equally obtained by a side wind, and that in virtue of a provision the general purpose of which clearly is to measure by an alternative method the liability to assessment imposed by Schedule B. The provision of an option to elect for assessment under Schedule D was not in existence when the exemption under Schedules C and D was originally given by statute, and cannot then have been in contemplation. The exemption has been from time to time repeated, and it appears in section 39 (4) of the Act of 1918 where it continues to be limited to Schedules C and D. Had the Legislature intended to make a new departure by giving exemption under Schedule B as well, I

think that this privilege would have been given expressly, and not in the obscure and circuitous mode in which the appellants conceive it has come to them. And the determining consideration, as it seems to me, is that, as already observed, the liability to assessment which the appellants seek to avoid is not a liability directly imposed by Schedule D itself, but is the fruit of a joint operation on their case of Schedule B which imposes on them liability and of their choice to have that liability measured in a particular way — that is to say, through their profits and gains from the occupation of the land being *deemed to be* profits and gains of a trade chargeable under Schedule D.

From an application of the views above expressed it follows (1) that the respondent is wrong in his contention that the appellants are not entitled to elect, and (2) that the effect of their election is not to procure them exemption but to make them assessable as under Schedule D in respect of their profits and gains as occupants of the lands in the same way as any ordinary occupant who makes such an election.

The Court reversed the determination of the Commissioners and remitted to them to sustain the appeal.

Counsel for the Appellants — Watson, K.C.—W. H. Stevenson. Agents—Robson, M'Lean & Paterson, W.S.

Counsel for Respondent—The Lord Advocate (Morison, K.C.) — R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, January 15.

SECOND DIVISION.

[Sheriff Court at Airdrie.

BROWN *v.* BATON COLLIERY COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising out of and in the Course of the Employment — "Added Peril."*

A workman's appointment as an assistant electrician at a colliery carried with it the duty of removing dirt from a gate-end box, but in order to do so it was his duty antecedently to switch off the current by taking out a fuse at the pit bottom so as to prevent his hands coming in contact with live wire. Each afternoon the current was switched off for certain purposes at the surface of the pit and outwith the control of the workman, the time during which it was off not being fixed or calculable but variable. On the day in question the workman, observing that the current had been switched off, and seizing what he conceived to be an opportunity of cleaning the box, proceeded to remove the dirt. At that moment the current was again switched on and his hands were severely burned. The workman had not been forbidden to do any part of his work in any particular way, but he knew the correct way of performing the operation, and knew that he was taking a very grave risk. *Held* that the accident did not arise out of his employment, in respect that it was due to an "added peril" voluntarily superinduced by the workman himself, and not reasonably incidental to his employment.

William Brown, apprentice electrician, Dykehead, Shotts, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Airdrie (MACDIARMID) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by him against the Baton Colliery Company, Limited, Dykehead, Shotts, *respondents*, appealed by Stated Case.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, in which the Sheriff as arbitrator is asked to award the pursuer and appellant compensation in terms of the Workmen's Compensation Act 1906, and War Additions Acts 1917 and 1919, and with expenses.

"The following *facts* were admitted or proved:—(1) That on 27th October 1919 the pursuer and appellant, who is nineteen years of age and an apprentice electrician, was injured by accident while employed by the defenders and respondents and working in their Baton Colliery, Dykehead, Shotts. (2) That at the date of said accident the pursuer and appellant was working in said pit as an assistant electrician, having been duly appointed by the manager, conform to certificate dated 20th February 1919 in the following terms:—'Coal Mines Act 1911.—Baton Colliery, 20th February 1919.—William Brown is hereby appointed to examine and repair electrical apparatus.—Signed, Ed. Somerville, Manager. I hereby accept the above-mentioned appointment.—Signed, William W. Brown'; and that he and John Stevenson, also duly appointed, were responsible under the chief electrical engineer for the examination and repair mentioned in said certificate. (3) That the said accident occurred as follows:—Stevenson and the pursuer and appellant had on the day in question, in allocating the work to be done between them, arranged that the pursuer and appellant should proceed to the gate-end box in the Smithy Coal Section for the purpose of pulling a negative earthing wire around said box. For this job it was not necessary that the electric current should be switched off. The pursuer and appellant proceeded to said box and duly completed the job. At three o'clock each afternoon the electric current in said pit was switched off in order that the load might be transferred from two generators to one, and this operation was performed on the surface of the pit and outwith the control of the pursuer and appellant, the time during which the current was off not being fixed and calculable but variable. At three o'clock on the said day the pursuer and appellant, who had completed the job above referred to, had shut the gate-end box, and was gathering up his tools preparatory to departure, observed