then Boyns, and then Shaw, and by sheer intimidation compelled these individuals to stop working. And when these terror-stricken people refused to draw some of the fires, these five, with the assistance of those left outside, drew these fires and stopped the working of the colliery. That being so, I entirely agree with the Sheriff when he says in his fifteenth finding in fact—[*His Lordship quoted the finding*]. If that be so, then the objection to the initial part of the complaint appears to me to fall to the ground.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Sandeman, K.C. — Cooper. Agents — Macpherson & Mackay, W.S.

Counsel for the Respondent—D. P. Fleming, K.C., A.-D. —Fenton, A.-D. Agent—John Prosser, W.S., Crown Agent.

COURT OF SESSION.

Thursday, February 3.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

INLAND REVENUE *v.* MORTON (WISHAW) LIMITED.

Revenue—Excess Profits Duty—Assessment — Ultra vires — Appeal — Enforcement Pending Appeal—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 45 (6).

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) enacts — Section 45 — "(6) The duty assessed by the Commissioners of Inland Revenue shall be payable notwithstanding any appeal under this section except in cases where the Commissioners of Inland Revenue direct to the contrary, but the Commissioners shall make such repayments, if any, as are necessary to give effect to any decision on appeal as soon as possible after such decision has been given."

The Commissioners of Inland Revenue, in virtue of powers conferred on them by section 45 (7) of the Finance (No. 2) Act 1915, made certain assessments on a firm of engineers in respect of excess profits duty, the firm themselves having failed to make a return. The firm appealed against the assessments, and pending the appeal the Commissioners sued the firm for payment of the assessments. *Held* that the fact that wilful default or negligence on the part of the defenders in failing to make the return had not been shown did not make the assessments *ultra vires*, and that the pursuers were entitled to decree notwithstanding the dependence of an appeal against the assessments.

The Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, *pursuers*, brought an action against Morton (Wishaw) Limited, engineers and iron-founders, Wishaw, *defenders*, for payment of three sums of £12,000, £6400, and £24,000 in name of excess profits duty for three separate accounting periods for which the defenders had been assessed at these amounts.

The defenders pleaded, *inter alia*—"2. The assessments sued for being (*a*) *ultra vires* of the Commissioners, and (*b*) in any event random assessments, the defenders should be assoilzied. 3. The regulations under which the Commissioners have purported to make the assessments sued for being *ultra vires* of the Commissioners, the defenders should be assoilzied."

The *facts* of the case appear from the opinion of LORD BLACKBURN (Ordinary), who on 20th November 1920 granted decree against the defenders in terms of the conclusions of the summons.

Opinion.—"In this action the defenders are sued by the Inland Revenue for three sums assessed upon them as excess profits duty, viz., a sum of £12,000 for the accounting period ending 31st December 1916, and two sums of £6400 and £24,000 for the period ending 31st December 1917, amounting *in cumulo* to a sum of £42,400. The defenders had been previously assessed, and had paid under protest sums of £600 assessed on them for the first period and £1600 for the second.

"The defenders are a private company limited by shares and incorporated in 1910. They carry on a business as engineers and ironfounders at Wishaw. The managing director of the company is Mr William Morton. In 1911 Mr Thomas Morton was appointed manager, and Mr James Morton secretary and assistant manager, neither of them being according to the defenders' averments shareholders in the company. As these two gentlemen possessed rights in certain valuable engineering inventions which they were prepared to place at the disposal of the company, their remuneration became the subject of consideration at a general meeting of the company held in June 1913. A resolution was passed that the net profits of the company in any year should, after deduction of a sum of £500 for payment of dividends to the shareholders, be divided equally between Thomas, James, and William Morton 'as their remuneration for services rendered in conducting the business of the company.'

"When the defenders paid the original assessments of £600 and £1600 for the two periods respectively, their ground of protest was that the remuneration paid to Thomas and James Morton in terms of the above resolution fell to be deducted from the profits of the company before the amount liable as excess profits could be ascertained, and an appeal was taken against the assessments.

"Thereupon, on 11th June 1917, the Commissioners, in terms of section 44 (1) of the Finance Act (No. 2) 1915, called upon the defenders to furnish them with a return of the profits of their business. This the defenders were unable to do on account, in the first place, of questions upon certain contracts between themselves and the Ministry of Munitions which had not been settled,

and in the second place on account of the inability of their auditor to complete the accounts owing to the depletion of his staff. Eventually, as the result of an action against their auditor, the defenders recovered their accounts from him, but it was not until 19th February 1920 that the statement called for was furnished to the Commissioners. This statement is said to show a total profit for the accounting period of 1916 of £11,489, and for the period of 1917 of £24,000. If the defenders' contention that the remuneration of the two managers is a proper deduction the sum liable to excess profits duty will be only one-third of what it would otherwise have been.

"Between 11th June 1917 and 19th February 1920 the Commissioners had not been idle. They might under sub-section (2) of section 44 of the Finance Act have proceeded summarily against the defenders for failure to implement the call for their accounts, in which case the defenders would have been liable on conviction to a fine not exceeding £100, with a continuing fine not exceeding £10 per diem until the call was satisfied. But this course the Commissioners did not adopt, contenting themselves by exercising the powers they possess under their regulations.

"As it is argued that these regulations are *ultra vires* of the Commissioners' powers under the Finance Act, I must digress to consider this question before dealing with their effect. By section 45 (7) of the Finance Act the Commissioners are empowered to 'make regulations with respect to the assessment and collection of the excess profits duty,' . . . and 'may by those regulations apply and adapt any enactments relating to the assessment and collection of income tax . . . which do not otherwise apply.'

"In exercise of this power the Commissioners on 6th January 1916 made certain regulations, the second of which is as follows: — 'If in any case any person required by law to make a return fails to do so, or if the return made by him appears to the Commissioners of Inland Revenue to be incorrect or insufficient, the Commissioners may, without prejudice to the enforcement of any penalty which may have been incurred, make an assessment of excess profits duty according to the best of their judgment.'

"There is also appended to the regulations a schedule of the sections of the Income Tax Acts applied to the assessment and collection of excess profits duty. The powers assumed by the second regulation of making an additional assessment on persons failing to make a return called for are similar to those conferred upon the Income Tax Commissioners by section 113 of the Income Tax Act 1842, although not *ipsissimis verbis*, but this section is not enumerated in the schedule attached to the regulations. It was argued for the defenders that the first part of section 45 (7) of the Finance Act only refers to the machinery for assessing and collecting the tax, and that under the second part the Commissioners are only empowered to adopt an enactment in the income tax Acts by reference to the enactment and in its own words. I do not think I need deal with the argument on the first part of the section, because in my opinion that on the second is not well founded. The Commissioners are not instructed to 'adopt' such enactments as they think necessary from the Income Tax Acts, but are authorised to 'apply and adapt' them, and as it is not suggested that the powers assumed by regulation 2 are in excess of or different from the powers in section 113 of the Income Tax Act of 1842, it appears to me that they have applied and adapted those powers within the meaning of section 45 (7) of the Finance Act, and that regulation 2 is not *ultra vires*.

"In exercise of their powers under the regulations the Commissioners proceeded to impose on the defenders the additional assessments of £12,000, £6400, and £24,000 now sued for. It is pleaded by the defenders that these assessments are *ultra vires* of the Commissioners, in respect that they are random assessments, and that in imposing them the Commissioners had no material to enable them to exercise their best judgment in arriving at the amount. A complete answer to this plea is probably to be found in a sentence at the end of the opinion of Lord President Dunedin in the case of *Macpherson & Co.* v. *Inland Revenue*, 1912 S.C. 1315, where he disposed of a similar complaint against an assessment under the Income Tax Acts by saying, 'If they (Messrs Macpherson & Co.) do not choose, as they have not chosen, to state an account so that the amount of profits may be strictly determined, they cannot complain if a random assessment is made upon them by the Crown.' If, however, the defenders' statement is true, that in addition to the above assessments for the accounting periods in question the Commissioners from time to time imposed additional assessments amounting to another £100,000 this amounts to a total sum so out of proportion to the apparent character of the defenders' business as to suggest that the Commissioners had made no attempt to exercise any judgment as to the true amount of the duty payable, but were using their powers under the regulations to coerce or penalise the defenders. That, in my judgment, would be a misuse of their powers under the regulations, and for such purposes the penalty clause in the Act should alone be resorted to. But this suggestion does not necessarily apply to the initial assessments which are alone sued for in this action, and I do not think that their amount warrants the suggestion that in imposing these assessments the Commissioners were acting in any way *ultra vires* of the regulations, or that the assessments can be criticised on any other ground than that the sums fixed were random sums.

"Appeals have been taken against these assessments, and as they are still pending before the General Commissioners, I do not think it is competent for me in this action to deal with the question whether the managers' remuneration is a proper deduction in arriving at the taxable profits, or to

deal with any question other than the pursuers' right to payment of the assessment meantime. Now, section 45 of the Finance (No. 2) Act, 1915, provides in sub-section (1) that the duty shall be payable at any time not less than two months after it is assessed; in sub-section (3) that the amount of the duty payable shall be recovered as a debt due from the person on whom it is assessed; and by sub-section (6) that the duty assessed shall be payable notwithstanding any appeal, the Commissioners making such repayments as are necessary to give effect to any decision on appeal. In my judgment these provisions leave me no option but to grant decree in terms of the summons.

"But I may add, that unless the accounts rendered by the defenders to the Commissioners in February 1920 are quite inaccurate, the figures show that the defenders have been over-assessed for the two periods in question to such an extent that to endeavour to enforce the decree against them for the full amount might cause serious injury to them and their business. I cannot understand the delay that has taken place in disposing of the appeals, seeing that the accounts were rendered nine months ago. But in any event, the Revenue authorities have now the means of ascertaining approximately the utmost amount of the duty for which the pursuers could eventually be held liable. To insist on payment of a larger sum would be an act of injustice, and although, as I was informed at the debate, there may be some technical difficulties in the way, I think steps should be taken to restrict the amount of the assessments before payment is insisted on."

The defenders reclaimed.

LORD PRESIDENT—The ground on which this reclaiming note has been supported in law was an attack against the legality of a regulation under which the assessment of excess profits duty was made. In my judgment that attack entirely fails. The regulation was an application and adaptation to the purposes of excess profits duty of section 113 of the Income Tax Act of 1842 and of section 50 of the Taxes Management Act of 1880, and that being so, it is, in my opinion, entirely within the powers given to the Commissioners of Inland Revenue by sub-section 7 of section 45. I think I need say no more upon that head, because as regards the decision of it my opinion is in agreement with that of the Lord Ordinary. The case itself arises out of circumstances the nature of which is indicated upon record, and I think as the merits of the questions so raised will fall to be determined in the appeals against the assessments which have been taken by the reclaimers, and as it is possible that those questions may form the subject-matter of ulterior proceedings, it would be better that I said nothing whatever about them. It, is no doubt, a severe measure to take a decree for assessments that have been made under circumstances similar to those in which these assessments have been made; but it is in the right of the Inland Revenue to get such a decree, and I cannot say, in view of the circumstances, that this measure has been resorted to either with unnecessary haste or without what appears to be reasonable cause. Accordingly I think what we should do is simply to affirm the Lord Ordinary's judgment.

LORD MACKENZIE—I am of the same opinion. There are two questions argued to us—first, that the regulations were *ultra vires*, and on that point I do not wish to add to what your Lordship has said. The other point was, that even if the regulations were not *ultra vires*, the assessment was *ultra vires*, because there was a failure to show in this case that there had been anything in the nature of wilful default or negligence. I think it is impossible to maintain that argument in view of the facts which are admitted at the Bar and the interval of time which has elapsed. I note that no alternative was suggested from the defenders' side of the Bar to the decree which the Lord Ordinary has granted. No counter proposal was made. If such a counter proposal had been made it might have been necessary to consider it, but as there was no suggestion and no alternative put forward, I think in these circumstances the proper course is as your Lordship proposes.

LORD SKERRINGTON—I concur, and I have nothing to add on the merits. I may say, however, that I should have considered favourably any argument which tended to show that an oppressive use had been made by the Inland Revenue of the very drastic powers conferred upon them by the statute, but I should certainly have expected, if any claim for indulgence was to be addressed on behalf of the defenders, that there should have been some willingness on their part either to find caution or to pay a part on the basis of the commercial accounts which have been audited. No proposal having been made from the defenders' side of the Bar, I do not see any course open to us except to affirm the Lord Ordinary's judgment.

LORD CULLEN did not hear the case,

The Court refused the reclaiming note.

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

Counsel for Defenders and Reclaimers—Hon. William Watson, K.C.—Aitchison. Agents—Ketchen & Stevens, W.S.