upon the lorry and took a seat upon the front by the driver, with whom he began to talk about matters which had nothing to do with the work on hand. While he was in that position the driver called upon him to put on the brakes. Then he tried to jump off the lorry, which was in motion, with the intention of obeying these instructions, but he slipped and fell to the ground, and his left foot was caught by the front wheel of the lorry. I think that in putting himself in front of the lorry contrary to orders, and in such circumstances that he might be required to jump down while the lorry was in motion, he created a risk to himself which was not incidental to his employment. It was a new risk incurred voluntarily by the man himself. Whether he could be charged with serious and wilful misconduct in so doing is a totally different question. But he was not employed to do anything of the kind.

LORD MACKENZIE—I am of the same opinion. The facts, which are very distinctly stated by the Sheriff-Substitute, are in my opinion amply sufficient to warrant the conclusion which he has reached. They show that the workman, who was employed as a brakesman, got on to the front of the lorry in order to get a drive instead of walking at the rear, the only place where he would have been in a position to fulfil his duties as brakesman. The accident happened in consequence of his being in front for purposes of his own. The risk of that accident cannot reasonably be looked upon as incidental to his employment.

LORD JOHNSTON was absent.

The Court answered the question of law in the affirmative and dismissed the appeal.

Counsel for Appellant—Sandeman, K.C. —M'Robert. Agents — Fyfe, Ireland, & Company, W.S.

Counsel for Respondent—Horne, K.C.— Duffes. Agents—Erskine Dods & Rhind, S.S.C.

Friday, June 2.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

BREMNER *v.* DICK AND ANOTHER.

Sale—Sale of Heritage—Misrepresentation —Feu-Duty.

The missives of sale of a villa stated that the feu-duty was £2, 5s., but did not disclose that the said feu-duty was merely the rateable proportion applicable to the subject sold of a *cumulo* feu-duty of £4, 8s. In an action by the seller for payment of the price, or alternatively for damages for breach of contract, the Court assoilzied the defenders, *holding* that the pursuer did not obtemper his part of the contract by offering to convey a subject the feu-duty of which was not £2, 5s. but a share of a feu-duty of larger amount.

Nisbet v. *Smith*, June 6, 1876, 3 R. 781, 13 S.L.R. 493; and *Robertson* v. *Douglas*, July 9, 1886, 13 R. 1133, 23 S.L.R. 794, *distinguished* and *commented on*.

Question (*per* Lord Johnston) whether a mere statement of feu-duty, meaning thereby the immediate or sub-feu-duty, is sufficient notice to a buyer of the existence of a substantial over-feu-duty.

On 3rd January 1910 John Bremner, measurer, 28 Orchard Drive, Giffnock, *pursuer*, brought an action against Mrs Sophie Campbell Armour or Dick, wife of and residing with Robert Orr Dick, 8 Orchard Drive there, and the said Robert Orr Dick as her curator and administrator-in-law, *defenders*, in which he sought to have the defender (Mrs Dick) ordained to implement her part of certain missives of sale whereby the pursuer sold and the defender purchased part of a double villa in Orchard Drive aforesaid, and that by making payment to the pursuer of the sum of £830—under deduction of the pursuer's share of the expenses of the conveyance—in exchange for a valid disposition of the subject. Alternatively the pursuer claimed £200 in name of damages.

The defender, *inter alia*, pleaded—"(2) In respect that the pursuer has not tendered a valid title and fulfilled the other conditions of the contract averred, the action is premature and unnecessary, and ought to be dismissed. (4) The defenders are entitled to be assoilzied, in respect (1st) that the defender Mrs Dick has not refused or delayed to implement her part of the missives founded on; and (2nd) that pursuer is unable to implement his part of said missives."

The *facts* appear from the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on 15th July 1910, after a proof, sustained the second head of the defenders' fourth plea-in-law, and assoilzied them from the conclusions of the summons.

Opinion.—"This is an action by a seller against a purchaser concluding for specific implement of the contract of sale, or alternatively for damages for breach of contract; and the question which I have to decide after a proof is, whether the defender has succeeded in establishing the second branch of her fourth plea-in-law, which is to the effect that the pursuer is unable to implement his part of the missives of sale. The subject of the sale was the eastmost half of a double villa in Giffnock, and the missives stated 'that the feu-duty' was £2, 5s. It now appears that the pursuer is unable to obtain from the superior an allocation of the feu-duty of £2, 5s. upon the subjects sold, but the superior has allocated £4, 8s. upon the portion of the original feu on which the double villa built by the pursuer stands. This sum represents one-half *plus* 10 per cent. of the feu-duty of £8 reserved in the original feu-charter. The result is that the subject sold and the westmost half of the double villa—retained by the pursuer

—are subject to a *cumulo* feu-duty of £4, 8s. It is not disputed that £2, 5s., which is mentioned as the feu-duty in the missives of sale, is the rateable proportion which the subjects sold ought to bear of the *cumulo* feu-duty of £4, 8s. Further, it is not suggested that the westmost half of the double villa, retained by the pursuer, does not afford ample security for its own share of the *cumulo* feu-duty, viz., £2, 3s., so that the defender will be able to reimburse herself in the event of her being called upon to pay the full *cumulo* feu-duty to the superior.

"If I had been free to decide this case without reference to the authorities, I should have held that in a contract of purchase and sale the primary meaning of the word 'feu-duty' is the feu-duty which is exigible by the superior, and that it is only in a secondary and incorrect sense that the word can be used as describing the rateable share of a *cumulo* feu duty which effeirs to the subjects sold. Assuming that I am right in that view, I hold on the evidence that the pursuer has failed to prove any facts or circumstances which ought to have the effect of imposing upon the word 'feu-duty' as used in the missives a secondary signification. The pursuer's counsel, however, referred to two cases, viz., *Nisbet* v. *Smith*, 1876, 3 R. 781, and *Robertson* v. *Douglas*, 1886, 13 R. 1133, as authorities for the proposition that the primary meaning of the word feu-duty as used in a contract of sale is the feu-duty for which the subjects sold are liable 'ultimately and after all relief is had'—in other words, the rateable share of a *cumulo* feu-duty effeiring to the subjects. I have difficulty in following the reasoning of the learned Judges who in each of these cases decided that the feu-duty there referred to was not the actual feu-duty exigible by the superior but the share of the feu-duty for which the vendor was ultimately liable, and personally I prefer the view taken by Lord Curriehill, Lord Lee, and Lord Rutherfurd Clark, which was to the opposite effect. While a decision upon one contract is not binding in the construction of another and different contract, I have difficulty in seeing any way of escape from these two decisions, because, as I read the opinions of the majority of the Judges, they proceed upon very general grounds. Fortunately, however, it is not necessary to decide whether these two cases lay down a general rule as to what is the primary meaning of the word 'feu-duty' as used in a contract of purchase and sale, because I am prepared to sustain as valid another objection which the defender makes to the title offered by the pursuer, viz., that the pursuer is unable to furnish any title to the subjects except one which reserves to the superior the minerals, together with the right to work them on certain conditions. . . . [*His Lordship then dealt with other matters on which this case is not reported.*] . . ."

The pursuer reclaimed, and argued—The word "feu-duty" when used in a missive of sale did not mean the *cumulo* feu-duty which might affect the property. It meant, where the feu-duty had not been allocated, the proportion of the *cumulo* feu-duty applicable to the subjects sold, *i.e.*, the feu-duty payable from the subjects after all relief had been had—*Nisbet* v. *Smith*, June 6, 1876, 3 R. 781, 13 S.L.R. 493; *Robertson* v. *Douglas*, July 9, 1886, 13 R. 1133, 23 S.L.R. 794.

Argued for the respondents—Since the pursuer was unable to implement his part of the contract, viz., to convey to the defenders a villa burdened with a feu-duty of only £2, 5s., he was not entitled to call on them to implement their part. The case of *Nisbet* v. *Smith* (*supra*) was distinguishable, because in that case (1) the advertisements were imported into the missives, and (2) the sum advertised as the feu-duty payable by the purchaser was the sum which the seller did actually pay in respect of the subjects. The respondents also cited the cases of *Paton* v. *Stuart*, March 11, 1825, 3 S. 653, and *Steuart's Trustees* v. *Hart*, December 2, 1875, 3 R. 192, 13 S.L.R. 105.

At advising—

LORD KINNEAR—This is a case in which the pursuer seeks declarator that the defenders are bound to implement and fulfil their part of a contract of sale, constituted by certain missive letters passing between the parties, of a villa in Orchard Drive, Giffnock, by making payment of the price in exchange for a valid disposition of the subjects. There is also a conclusion for damages should they fail to implement the bargain. The Lord Ordinary has assoilzied the defenders from the conclusions of the summons, and has sustained the second head of the fourth plea-in-law for the defenders, which is, that the pursuer is unable to implement his part of the said missives, that is to say, the Lord Ordinary has held that the pursuer is not in a position to give the defenders a valid title to the subjects in conformity with the provisions of the contract. The Lord Ordinary points out that that plea was supported on two separate grounds. He held that there was a great difficulty in the way of the defenders' success on the first ground of objection, but he has held that the second ground of objection is valid, and that it is therefore unnecessary that he should formally decide the first question.

Now I agree entirely with the Lord Ordinary that if the defender has made out a good case upon either of these two grounds it may not be necessary to consider the validity of his contention upon the other—either is enough. I agree with him also in the result of his judgment, but I am not able to agree with him in the way in which he has disposed of the two separate objections which the defenders have taken to the pursuer's title. I think the first objection is perfectly well founded and fatal to the pursuer's case, and that the second objection raises a question which might give rise to a greater difficulty, but which it is unnecessary for us

finally to decide seeing that the first objection is sufficient in itself.

The first objection arises as follows: The subject of this contract of purchase and sale, as is quite clearly expressed and defined in the terms of the contract itself, is a double villa situated in Orchard Drive, Giffnock, the feu-duty being £2, 5s.; that is what the seller offers to sell—"I will sell you for £832 the villa described, on which there is the burden of a feu-duty amounting to £2, 5s." The defenders accept the terms of that offer. I do not myself entertain any doubt that that is a sale of specific subjects on which the feu-duty is represented as being £2, 5s., and no more. The defenders say—and it is not disputed—that the seller is not in a position to give a valid title for the subjects so described because, in point of fact, they are burdened with a feu-duty not of £2, 5s. but of £8, and all that the seller can give in performance of his contract is the conveyance of a subject for which the purchaser will have to pay a feu-duty of the annual value of £8, whereas he bought a subject with a feu-duty of only £2, 5s. I think it is so clear that an offer to give you a villa burdened with a feu-duty of £8 is not performance of a contract to give you a villa with a feu-duty of £2, 5s., that I should not think it necessary to say anything further about the matter were it not for my difference of opinion with the Lord Ordinary.

But then I am much less impressed by that difference than I should otherwise have been when I find the Lord Ordinary himself appears to be entirely of the same opinion as that which I have already expressed. The Lord Ordinary would have decided this question in the same way as I think it ought to have been decided were it not that he thought he was bound by two previous decisions which compelled him to put a different construction upon the contract of sale from that which, in in his opinion, and certainly in my opinion, the words of the contract plainly bear. Now I cannot say that I am impressed with any difficulty from these two decisions. The Lord Ordinary seems to think that they lay down a general rule as to the primary meaning of the word "feu-duty" which is binding upon the Court. He says that, according to these authorities, the primary meaning of the word "feu-duty" as used in a contract of sale is the feu-duty for which the subjects sold are liable "ultimately and after all relief is had—in other words, the rateable share of a *cumulo* feu-duty effeiring to the subjects." Now if that is to be applied as a general rule irrespective of circumstances, it means that in every case in which a proprietor of land undertakes to sell and specifies the feu-duty, there is an implication, first, that the subject sold is liable, along with other subjects, to a *cumulo* feu-duty, and, next, that the word "feu-duty," whatever the context in which it occurs, is to be held to mean ultimate liability for a proportion of such *cumulo* feu-duty after all the arrangements for allocating it have been made.

I think that is an impossible construction to be put upon any decision, because it involves the notion that you are to read by implication into any contract of sale conditions which are not mentioned or adverted to in any way in the contract of sale, and to consider the plain words of the contract by reference to such conditions. If the rule were applicable to the present case, we should have to hold that the mere mention of the word "feu-duty"—because there is nothing else to suggest it—shows that there is a *cumulo* feu-duty affecting this and other subjects. There is nothing of that kind in the contract. The contract is a sale of a particular and specific subject, and there is nothing to suggest that it forms part of a larger estate and is subject along with the other parts of that estate to feu-duty at all. It is sold as a separate subject upon the distinct representation that the feu-duty applicable to that subject is the specific sum of £2, 5s.

Therefore I should not for myself have been able to treat the decisions on which the Lord Ordinary relies as really creating any serious difficulty in the construction of the plain words of the contract. But then, when I come to look at the plain words of the decisions themselves, I cannot say that I agree with the Lord Ordinary in thinking that the learned Judges in the majority in these cases—because they were decided by a majority—intended to lay down any general rule of law at all. The question in each case arises on the construction of a particular contract. In the first case of *Nisbet* v. *Smith* (3 R. 781) the contract was created by an offer and acceptance referring in terms to an advertisement of the subjects to be sold. The buyer wrote—"I hereby make you the offer of £1200 for the villa as advertised." The advertisement was thus imported into the terms of the contract. The subject is described as the subject as advertised, and the advertisement contained a statement that for further particulars application was to be made to a writer at 112 West Regent Street, Glasgow, in whose hands were the title-deeds. That was the contract to be considered—an offer to take the subjects as advertised and an advertisement referring purchasers to the title-deeds. The Court held that upon the true construction of that contract the purchaser must be held to have accepted the property under all the conditions which the titles alone could accurately disclose. I do not think it at all necessary to consider what were the conditions or upon what ground the particular conditions were held to be enforceable. The decision is, that according to the true construction of that contract the buyer is to be held to have accepted under the conditions disclosed in the titles. If it turned out that one party thought the feu-duty to be one thing, and the other party thought it to be another thing, they were to be bound by what the titles disclosed it to be. That may be right or it may be wrong, but it is no authority for the proposition that when a seller speaks of a feu-duty it is necessarily or

generally to be interpreted as meaning that it is to be a proportion of a *cumulo* feu-duty, the proportion being subject to future allocation. This is a decision upon a particular contract and has no bearing upon the construction of the contract before us.

The case of *Robertson* v. *Douglas*, 13 R. 1133, is I think as inapplicable, and for exactly the same reason. It was the construction of different terms from those which we are considering, and I think that is brought out very clearly in the opinion of the Lord Justice-Clerk. The learned Judge proceeds on his construction of a particular contract, which he holds to be in its terms a contract for the sale of a subject liable along with other subjects to a *cumulo* feu-duty. Whether that was a fair reading of the whole transaction between the parties or not is of no consequence in the present case. That is the view which the learned Judge and those who agreed with him took of that contract. It was a contract to buy a subject liable, in the contemplation of the parties, to a *cumulo* feu-duty, and they say the only question is whether that implies an obligation on the part of the seller to get rid of the *cumulo* feu-duty. Now that is no authority, to my mind, in this case for the construction of a contract which contains no reference to the *cumulo* feu-duty at all, but which simply represents the burden for that specific subject and binds the seller to give a good title to the subjects so described.

I should therefore be for adhering to the Lord Ordinary's interlocutor.

LORD JOHNSTON—Were it necessary to dispose of this case upon the ground upon which the Lord Ordinary has proceeded I think we should require to have further time to consider it. But there is another ground of judgment on which I think the case may, and should be, disposed of, and that is the short and clear ground on which the Lord Ordinary has indicated a most decided opinion, but which he has not made the basis of his judgment because he thinks himself precluded from doing so by two authorities—*Nisbet's* case (3 R. 781, 13 S.L.R. 493) and *Robertson's* case (13 R. 1133, 23 S.L.R. 794).

The actual circumstances here are that on 13th October 1909 the pursuer offered to sell his villa at £830, "the feu-duty being £2, 5s.," and bound himself—and this I think is of importance—to deliver a valid title and the usual searches. Now that must be understood to mean a valid title to a subject the feu-duty of which was £2, 5s. This offer was accepted on the same day by Robert Dick, but the bargain was transferred to his wife, the principal defender, as the purchaser in her own right, on 26th November. It turned out that the subject was liable in a *cumulo* feu-duty of £8, and that the best the seller could do was to get an allocation of £4, 8s. on the villa in question and an adjoining villa, of which admittedly £2, 5s. would have been the proportion effeiring to the villa in question had the seller been able to obtain a further allocation, which he was not.

In these circumstances I have no hesitation in concluding that the seller cannot deliver the subject which he offered to sell. It is true that the difference is small, though not negligible, and one cannot help thinking that the objection is seized upon as a means of evading the bargain. But I cannot think that discrepancy between performance and contract is matter of degree, so long as it is a case in which the maxim *de minimis* does not apply. The same law must apply whether the proportional share of feu-duty applicable to the subject sold is £2, 5s. out of £4, 8s., or £2, 5s. out of £40, 8s., or any other sum, if in either case allocation cannot be obtained. Nor does it affect the question that the balance of the *cumulo* feu-duty is secured, as it appears to be here, or was entirely unsecured, as it might have been.

In this the Lord Ordinary would, I think, have concurred but for the decisions in the two cases referred to. I do not, however, think that these decisions are conclusive of this question. They establish no proposition in law, and are each of them cases of interpreting particular contracts. In *Nisbet's* case the advertisement stated "Feu-duty £9. . . . For further particulars apply to A B, writer, etc., in whose hands are the title-deeds and articles of roup." The sale was of the subjects as advertised. I think that the real ground of judgment was that the statement in the advertisement was writ short and on the face of it not exhaustive, but referred intending purchasers to the titles and articles of roup, from which the true situation as regards feu-duty would at once have appeared. I cannot, therefore, read this decision as supporting the view that the mention of feu-duty in missives of sale is to be held as a reference, not to the particular feu-duty of the subjects in question, but may equally be a reference to the share of an unallocated *cumulo* feu-duty which, after all matters of relief are adjusted, will fall upon the subjects of sale.

In *Robertson's* case, again, it is not so easy to reduce the judgment of the majority of the Court to any one ground. The circumstances were that the reference to the feu-duty was not in the advertisement or offer of the seller, but was in the offer of the purchaser and in these terms, "The feu-duty is understood to be not more than £4." Personally I should think that an offer in those terms, where in fact the property was subject to a *cumulo* feu-duty exceeding £4, put on the seller the duty of at once drawing the attention of the intending purchaser to the fact that his understanding was not well founded, and to point out to him what the real facts were. But upon that offer a sale was completed.

Now I think there was much to be said for the conclusion to which Lord Young came in that case, because in that case, differing from the present, the seller was able to obtain an allocation. The superiors

made no difficulty about it. But they demanded a slight augmentation for making the allocation; and therefore the feu-duty when so allocated and augmented came to be not £4 but £4, 6s. And the whole difference therefore was not with regard to the liability for the *cumulo* feu-duty, but the small extra sum of 6s. to obtain the allocation. I should have been disposed to regard that as a case *de minimis*, more particularly when I find that the seller was farther quite prepared and offered to compensate the purchaser for that small additional sum by making a deduction from the price. But I am bound to say that the Lord Justice-Clerk and Lord Craighill appear to decide the case on the footing that the purchaser was bound to understand that an offer to sell a subject on which there was a definitely stated feu-duty may be read as meaning that that was the amount which in the end was payable from the subject, on the assumption that in practice questions of relief here did arise in respect that the proportional part of the *cumulo* feu-duty referable to each part was in use to be paid and accepted without trouble.

I cannot read the opinions of those learned Judges in any other way. But I am bound to say that I cannot follow them, because I do not think that their conclusion is one which can be drawn from the facts.

But I should, for my part, follow implicitly the opinion which Lord Rutherfurd Clark gives. The bargain plainly was that the subjects were sold on condition that the pursuer undertook that the defender should get an entry from the superior on the footing of paying a feu-duty of £4 and no more. I think that is perfectly sound, and is applicable to the present case.

I think it is right to consider, as the consideration is corroborative of the general position of Mr Constable, the bearing upon this question of the analogous case where there is not a *cumulo* feu-duty but an over-feu-duty possibly burdening the subjects. Now upon that subject it is perfectly manifest that two different classes of cases may arise. There may be the case in which the over-feu-duty is merely nominal—is not a subject to be taken into consideration at all. But there may be the case in which the over-feu-duty is very material. The case of *Robertson* was an example of the first, because there the subjects were held of the town, who held them of Heriot's Hospital, who again held them of the Crown, but in the two latter cases the feu-duty was merely nominal. On the other hand, in the very well-known case of *Sandeman* v. *Scottish Property Investment Company Building Society, Limited*, June 8, 1881, 8 R. 790, 18 S.L.R. 559, one has an example of the second class. There the over-feu-duty was something like £480, the sub-feu of the part being only £23, and there being no other portion of the over-feu-duty secured except one other small sum of like amount. Now it is perfectly clear that in a case like the latter it would be a very material subject for consideration on taking a conveyance that there was such a large over-feu as in the case I have mentioned. When the question arises it will have to be determined whether the mere statement of feu-duty, meaning thereby immediate or sub-feu-duty, will be sufficient notice that there is a substantial over-feu-duty imposed upon the subjects of which the sub-feu is a part. But in the meantime I do not think it can be assumed that there is no obligation in such a case to draw attention to the fact that the sub-feu-duty—the immediate duty—is not the sole burden upon the property.

Upon that subject, and dealing with the case of *Robertson* (*supra*), where the over-feu-duty was nominal, Lord Rutherfurd Clark said in the case of *Robertson*—"It was said that people do not bargain about all the burdens incidental to the feudal tenure. That is quite true. It is very probable that the incidents of the Magistrates holding of Heriot's Hospital, who are said, I suppose accurately, to be the superiors of the Magistrates, or of the Hospital's holding of the Crown, do not form part of this contract. These are burdens about which the parties cannot possibly be held to deal. What they are bargaining about are the incidents of their relation to their immediate superiors. All the burdens above that remain untouched." Now that may be perfectly sound as applicable to such a case as that with which his Lordship was dealing; but I should enter a caveat on the question whether his Lordship's words were intended to apply or could be applied where the over-feu-duty was not merely nominal but was a substantial liability. But it is quite enough for this purpose to say that if people are bargaining about the burdens incidental to feudal tenure they are bound to bargain about the true burdens and not about a burden which is only part of a true burden; and therefore that in a case like this a contract of sale and purchase of an heritable property the feu-duty of which is represented as £2, 5s., is not obtempered by offering to convey a subject the feu-duty of which is not £2, 5s. but a share of a feu-duty of larger amount.

On that footing I think the case can be disposed of as I think the Lord Ordinary would have disposed of it if he had not felt himself bound by the two judgments referred to.

LORD MACKENZIE—I am of the same opinion. The question is whether the pursuer is in a position to fulfil the contract of sale. I am of opinion that he is not. What was to be sold, according to the terms of the missives, was "the eastmost half of double villa in Orchard Drive, Giffnock, for the sum of £830, the feu-duty being £2, 5s." What the pursuer tenders in implement is a subject with a feu-duty of £4, 8s. I arrive at this conclusion entirely on a construction of the terms of the contract, and am thus not precluded from doing so by anything said in the cases of *Nisbet* and *Robertson*.

On the other point I have formed no opinion and do not wish to express any.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Constable, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders (Respondents)—Ingram—Paton. Agents—Buchan & Buchan, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, July 4.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen.)

FALKIRK CORPORATION *v.* RUSSELL.

Justiciary Cases—Complaint—Relevancy—Statutory Offence—Gas-works Clauses Act 1847 (10 *Vict. cap.* 15), *sec.* 18—*Charge of Improper Use of Gas Supplied by Meter.*

The Gas-works Clauses Act 1847 enacts—"And with respect to waste or misuse of the gas . . . (sec. 18) Every person who shall lay or cause to be laid any pipe to communicate with any pipe belonging to the undertakers, without their consent, or shall fraudulently injure any such meter as aforesaid, or who, in case the gas supplied by the undertakers is not ascertained by meter, shall use any burner other than such as has been provided or approved of by the undertakers, or of larger dimensions than he has contracted to pay for, or shall keep the lights burning for a longer time than he has contracted to pay for, or who shall otherwise improperly use or burn such gas . . . shall forfeit to the undertakers the sum of £5 for every such offence. . . ."

A complaint charged a person with having improperly used and burned gas supplied to him by meter, contrary to the above-quoted section.

Held that the complaint was irrelevant, in respect that the only gas dealt with in the section of the statute was gas supplied otherwise than by meter.

Henry Russell, brassfounder, Falkirk, was charged in the Sheriff Court there, on 6th March 1911, on a summary complaint at the instance of the Provost, Magistrates, and Councillors of the Burgh, proprietors and administrators of the gas undertaking therein, in virtue of the Falkirk Corporation Gas Acts 1894 to 1910.

The complaint was thus stated—"That, having within the premises known as the Crown Brass Works, Falkirk, belonging to and occupied by you, a service of gas manufactured and supplied by the complainers under the provisions of the Falkirk Corporation Gas Acts 1894 to 1910, for which you were liable to pay to the complainers at the rate of 2s. 9d. per thousand cubic feet for the quantity of said gas used by you for ordinary lighting purposes as registered by a meter supplied for the purpose of registering such quantity, and at the rate of 2s. 4d. per thousand cubic feet for the quantities of said gas used by you for power purposes as registered by the two meters supplied for the purpose of registering such last-mentioned quantities, you did, on Wednesday 11th January 1911, within said premises, improperly use and burn gas so supplied to you by the complainers for power purposes, by having, at a part of your said premises used as an electro-plating shop, in which, prior to said date or at some date or dates unknown to the complainers, you had connected, or caused to be connected, piping for the purpose of supplying gas for ordinary lightning purposes with the main outlet pipe from the meter situated in said electro-plating shop for registering the quantity of gas used by you for power purposes in said electro-plating shop, and in the room adjoining same used as a lacquering room, also part of your said premises, used and burned or caused to be used and burned in said electro-plating shop, and for the purpose of lighting said electro-plating shop, gas supplied to you by the complainers for power purposes—contrary to the Gas-works Clauses Act, 1847, section 18, whereby you are liable to the penalty first set forth in said section."

On the case being called, the agent for the accused stated, *inter alia*, the following objection to the relevancy of the complaint—"2. The facts set forth in the complaint do not constitute an offence within the meaning of the section libelled."

The Sheriff-Substitute sustained this objection, and dismissed the complaint as irrelevant. The Magistrates of the Burgh thereupon required a case for appeal.

In the case stated by the Sheriff-Substitute (MOFFAT) he set forth the grounds of his judgment thus—"With regard to the second objection, the respondent contended that the part of section 18 of the Act of 1847 which he was charged with contravening does not apply to gas supplied by meters. I was of opinion that this contention is sound. The particular branch of section 18 which the respondent is charged with contravening is the clause 'or who shall otherwise improperly use or burn such gas.' It appeared to me that the word 'such' being inserted before 'gas' limited 'gas' to the class of gas last mentioned, viz., gas not ascertained by meter. I thought that to hold otherwise would be to hold that the word 'such' has no meaning. In the parts of the Act with respect to the supply of gas, being section 13 to 17, and 'with respect to the waste or misuse of the gas,' &c., being section 18 to 20, the word 'gas' is used throughout without the qualification of 'such,' except in the part of the section under consideration. If it had been intended that any improper use or burning whatsoever of gas supplied should be a punishable offence, the section would just have said 'gas' without any qualification. I therefore came to the con-