it had been constituted against him. In these circumstances I am of opinion that the first question should be answered in the affirmative.

Lord Young—That is my opinion also. The facts in this case are simple and raise no questions of difficulty. I think the case is so simple as this. During the grandfather's life, many years before his death, his only son had gone abroad leaving a destitute lunatic daughter behind. The grandfather recognised his obligation to relieve the ratepayers of her maintenance. He admitted his liability for her support, and down to the date of his death paid the sum required therefor. The grandfather died leaving estate worth about £2000, £900 of heritage, and about £1200 of moveables. Half of the £1200 has been set apart to meet the claim on the estate for legitim if the son who has gone abroad should ever return and demand it. The sum therefore in the hands of the testamentary trustees laid aside to meet this claim for legitim is £600. The interest of that sum will be more than sufficient to meet the claim for aliment of the lunatic granddaughter. If the son ever turns up, that expenditure of the interest could not be objected to by him; if he do not, the voluntary beneficiaries would not on any rational or I think legal ground object, because the aliment of a granddaughter whom the grandfather supported during his lifetime attaches to the estate which he leaves. That exhausts the matter.

Lord Trayner—I am of the same opinion. I think that there can be no doubt that this aliment, which was due by the grandfather *ex debito naturali*, and which was paid by him during his lifetime, continues a good charge against his estate after his death. Although I have formed an opinion on the point, I do not think it necessary to enter into the question as to whether the aliment of his granddaughter would have been a good debt against the estate of the grandfather if the obligation had not been admitted by him during his lifetime. Here the obligation was so admitted.

I think that the first question should be answered in the affirmative, with the declaration that the aliment may be charged in the first place against the portion of the estate set apart to provide for the legitim of George Gibson, the father of the lunatic, and failing it against the rest of the estate.

Lord Moncreiff— I am of the same opinion. The claim for aliment was made during the lifetime of the grandfather and was acknowledged by him. The question is, whether his testamentary trustees are now liable to support the lunatic out of his estate. I had occasion to consider this point in a case of *Govan* v. *Govan's Trustees*, reported as *A* v. *B*, December 22 1892, 3 Poor Law Mag. 239. The facts in that case were similar to the present, and I held that the estate was liable. I had there occasion to consider the two judgments of Lord Fraser, mentioned during the debate. From the report of the case decided by myself I seem to have been under the impression that the test proposed by Lord Fraser, in the second case decided by him, in order to decide whether a grandfather's estate should or should not be held liable, was whether the claim had been constituted during the grandfather's lifetime. In that I must have been mistaken, as the test, which Lord Fraser seems to have proposed, is whether the claim has been made and acknowledged during the grandfather's lifetime. It is, however, not necessary in the present case to consider what would have been the result if the claim had not been made and acknowledged during the grandfather's lifetime, because here it was made and acknowledged until the grandfather's death.

I agree with Lord Trayner that the portion of the estate set aside to provide for the legitim of the father of the lunatic should, *primo loco*, bear the expense of the maintenance of the lunatic.

The Court pronounced this interlocutor:—

"Answer the first question therein stated in the affirmative, with the declaration that the payments made and to be made by the first parties on account of Isabella Gibson shall primarily be charged against the sum set aside by the second parties to meet any claim for legitim on the part of George Gibson: Answer the second question therein stated in the affirmative, and the third question in the negative: Find and declare accordingly and decern."

Counsel for the First Parties—Guthrie, Q.C. — Graham Stewart. Agent—W. J. Lewis, S.S.C.

Counsel for Second Parties—Campbell, Q.C. — Cook. Agent — James Skinner, S.S.C.

Friday, February 24.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

M'NICOL *v.* SPEIRS, GIBB, & COMPANY.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 31), *sec.* 1, *sub-sec.* (1)—"*Accident Arising out of and in the Course of the Employment*"—*Sub-sec.* (2) (c)—"*Serious and Wilful Misconduct.*"

In a case stated under the Workmen's Compensation Act 1897 the facts were as follows:—The pursuer, a miner, having lighted the train in order to fire a shot, and the shot not having exploded, after an interval of six minutes returned to examine the shot-hole, and while so engaged the shot went off, whereby he suffered serious injury. One of the special rules of the mine prohibited any person from entering the place where a

shot was lighted until after the lapse of thirty minutes, if the shot failed to explode. It was not proved that the pursuer was aware of this special rule, and it appeared from the evidence that the rule was not generally observed in the pit.

Held that the pursuer was entitled to compensation, as (1) the accident had arisen out of or in the course of his employment, and (2) his ignorance of the rule did not amount to "serious and wilful misconduct."

This was a stated case under the Workmen's Compensation Act 1897, following upon an interlocutor pronounced by the Sheriff-Substitute of Renfrew and Bute (HENDERSON) in a statutory arbitration in which John M'Nicol, the respondent in the case, sued Speirs, Gibb, & Company, the appellants, for compensation at the rate of 15s. per week.

The facts held by the Sheriff-Substitute to be proved were as follows—"(1) That on 28th July 1898 the respondent was employed as a miner in the appellants' fireclay pit or mine at the Caledonia Works, Paisley, under a sub-contractor named James Hamilton, miner, 27 New Street, Paisley; (2) That about 5 o'clock A.M. on that day the respondent, in the usual course of his employment, drilled a shot-hole in the material of said pit or mine, and having charged the same with blasting powder, put a straw in the usual manner, into the powder and set fire to the wick at the end of the straw and retired to a place of safety; (3) That the straw having burned out without an explosion having taken place, the respondent, after an interval of about six minutes from the time of having set fire to the straw, thinking that the shot had missed fire, left his place of shelter and went forward to the shot-hole, and while he was examining the hole the shot went off; (4) That in consequence of this explosion the respondent was severely injured and has lost the sight of both his eyes; (5) That at the pithead of the appellants' mine a printed sheet of 'Special Rules' under the 'Coal Mines Regulation Act 1887' is exposed to the view of all the miners in a shallow case with a hinged door, which can be closed in wet weather, but which door is not and cannot be locked; (6) That rule 95 of the special rules is as follows:—'If a shot has been lighted and does not explode, no person shall enter the place where it was lighted until thirty minutes shall have elapsed;' (7) That it was not proved that respondent was aware of this special rule, and that it appeared fully established on the evidence that this rule was not generally observed by the miners in this pit or mine, it being their practice to return to a delayed or missed shot whenever they thought in their opinion that it was safe so to return."

On the above facts the Sheriff-Substitute found in law that the pursuer "met with his injuries by accident arising out of or in the course of his employment in terms of section 1, sub-section (1), of the Workmen's Compensation Act 1897, and that said injuries were not attributable to such serious and wilful misconduct as is contemplated by sub-section (2) (*c*) of section 1 of that Act," and therefore found the defenders liable to the pursuer in a weekly payment of 15s.

The questions of law stated for the opinion of the Court were as follows—"(1) Was the injury to the respondent caused by an 'accident arising out of and in the course of the employment' in the sense and within the meaning of section 1 (1) of the Workmen's Compensation Act 1897? (2) On the facts proved as to the publication of the special rules, was the Sheriff-Substitute justified in holding that the respondent's injuries were not attributable to such serious and wilful misconduct as is contemplated by section 1, sub-section 2 (*c*), of the said Workmen's Compensation Act, in returning to the shot within thirty minutes after he had lighted the straw or fuse, in contravention of said rule No. 95?"

The Workmen's Compensation Act 1897 (66 and 61 Vict. cap. 37), section 1 (1), enacts that "if in any employment to which this Act applies, personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation . . . (2) Provided that . . . (*c*) if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

Argued for the appellants—The Sheriff-Substitute was wrong. (1) The accident had not arisen "out of or in the course of" the respondent's employment. The Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), section 51, enacted "(1) There shall be established in every mine such rules (referred to in this Act as special rules) for the conduct and guidance of the persons acting in the management of such mine, or employed in or about the mine, as under the particular state and circumstances of such mine may appear best calculated to prevent dangerous accidents, and to provide for the safety, convenience, and proper discipline of the persons employed in or about the mine. (2) Such special rules when established . . . shall be observed in and about every such mine . . . in the same manner as if they were enacted in this Act. (3) If any person who is bound to observe the special rules established for any mine acts in contravention of or fails to comply with any of them he shall be guilty of an offence against this Act." Section 57 (1) of the same statute enacted that every owner, agent, or manager of the mine should cause a copy of such special rules "to be posted up in legible characters in some conspicuous place at or near the mine, where they may be conveniently read by the persons employed." It was part of the respondent's employment to know and observe the special rules of the pit—*Heaney* v. *Glasgow Iron and Steel Company*, May 27, 1898, 25 R. 903—and rule 95 of this pit expressly forbade him to return to the shot,

if it had not exploded, until thirty minutes had expired from the time of lighting it. The Sheriff had not found expressly whether the respondent knew of this special rule or was ignorant of it, but in either case his proceeding to examine the shot six minutes after lighting it was outwith the course of his employment—*Smith* v. *Lancashire and Yorkshire Railway Company*, L.R. (1899), 1 Q.B. 141; *Higginson* v. *Tapley* (1869), 19 L.T., N.S. 690; and *Low* v. *Pearson*, 15 Times Reports, 124, also referred to. (2) Even assuming that the accident arose out of the course of the respondent's employment, he was debarred from claiming compensation, because his injuries were attributable to his own serious and wilful misconduct either in not observing rule 95, if he knew it, or in failing to make himself acquainted with it. A miner must be presumed to know the special rules of his pit, and must take the consequences if he deliberately violated any one of them—*Heaney*, *ut sup.* It was irrelevant to found upon the practice observed in the pit when the rule was there in black and white. There was nothing mysterious about the epithet "wilful." It meant merely that the person whose conduct was so described was a free agent —*In re Young & Heirston's Contract*, L.R., 31 Ch. Div. 168, *per* Bowen, L.J., 175. Ignorance coupled with indifference as to whether mischief would arise from a particular act or not was enough to constitute wilful misconduct—*Lewis* v. *Great Western Railway Campany*, L.R., 3 Q.B.D. 195, *per* Bramwell, L.J., 206. On the face of the facts as stated, the statutory requirements with respect to publication of special rules had been complied with.

Argued for the respondent—The Sheriff was right. (1) The respondent in going back to the shot was engaged in no business or pastime of his own, but strictly and literally in the business of his employer. It was much too strained a construction of the Act to suggest that because any one of over a hundred or more special rules of varying degrees of importance was broken the course of employment at once ceased. The course of employment continued until it could be substantially made out that when the accident occurred the person injured had forsaken his employment and devoted his attention to something else—*Durham* v. *Brown Brothers & Company*, December 13, 1898, 36 S.L.R. 190. The case of *Smith* v. *Lancashire and Yorkshire Railway Co.*, *ut sup.*, was in pointed contrast to the present, and afforded a valuable illustration of what was meant by an accident arising out of the course of employment. (2) It was said that the respondent had been guilty of serious and wilful misconduct in not making himself acquainted with the special rules. But it did not appear that these rules had been affixed and exhibited in terms of the Coal Mines Regulation Act, and they were not binding until that had been done. The respondent was justified in not knowing the rules, and it would not do to say that he must be presumed to have known them, and to charge him with wilful misconduct in not observing them. Wilful misconduct was one thing, neglect or ignorance was another.

LORD M'LAREN—Questions in the form stated in this case will in all probability come frequently before the Court. In answering these questions with reference to the facts of the present case, I desire as far as possible to avoid generalisation, because while it may be useful to state principles for determining whether a case of injury falls within the scope of the statute, this can only be done upon a larger induction of facts than we are at present possessed of.

I begin with the first question—Was the injury to the respondent caused by an "accident arising out of and in the course of the employment?"

Subject to what I shall have to say on the second question, I think it hardly admits of dispute that the injury complained of was the result of an "accident." The respondent, rightly or wrongly, thought that the shot which he prepared had missed fire, and in that belief, and using his judgment as to the time he ought to wait, went forward to examine the shot-hole. While he was examining the hole with its charge, the charge exploded and caused the injuries for which the respondent seeks compensation. I am here repeating the facts as stated in the case, and I think that the statement is descriptive of an accidental injury.

But then in order to entitle the respondent to compensation, the accident must be one "arising out of and in the course of the employment," and this condition is negatived if it appears that the injury was sustained when the workman was not engaged upon his master's business, but was going about the premises on some business or pastime of his own. On the facts of the present case it is clear that when the respondent went to examine the shot-hole he had no motive or purpose other than that of attending to his master's business. This would of course be true if he had waited for the period of thirty minutes prescribed by the rules of the mine, and I think it is not the less true because the respondent, without intending to break any rule, returned to his work without waiting thirty minutes. It may be granted that the respondent ought not to have proceeded to examine the shot-hole after so short an interval as six minutes, yet as it results from the statement of facts in the case that the respondent did not know the rule, and that he acted according to the best of his judgment in the matter, it appears to me that the accident was one arising out of the employment which the respondent was exercising, not perhaps in the right way, but according to his own understanding and belief as to the nature of his duties.

If a workman, in the knowledge of a rule framed for the protection of himself and his fellow-workman, disregards the rule and is injured, a different question would

arise. In such a case it would no doubt be maintained that an accident arising out of an intentional breach of contract is not an action arising out of the contract. I do not desire to anticipate in any way the grounds of decision in such a case. But I think it would not be a sound construction of the Act of Parliament to say that any deviation, great or small, on the part of the workman from the terms of his contract of employment, or rules incorporated therewith, is sufficient to displace the right to compensation, or to put the accident in the category of an occurrence not connected with the employment. The language of the Act is not such as to suggest that strict obedience to the letter of the contract is a necessary condition of the right to compensation. If that were the meaning of the enactment the provision of sub-sec. (*c*) would seem to be superfluous, because wilful misconduct by a workman on duty would disentitle him to compensation under the suggested construction of the leading enactment. In the present case I must hold that, according to the contract of service the respondent ought to have informed himself of the rule, and to have acted upon it. But as he did not know the rule, and there was no breach of duty other than the neglect to inform himself as to the rules of the mine bearing on his work, I think he must be held to have been in the course of his employment, and, if so, the accident certainly arose out of the work on which the respondent was engaged.

Coming now to the second question, I notice that in sub-sec. (*c*) the word "accident" is not used—the expression used is "that the injury to a workman is attributable to the serious and wilful misconduct of that workman." I conclude from this that according to the theory of the statute the injury is not regarded as accidental if it is attributable to the serious and wilful misconduct of the person injured, and that the case considered in sub-section (*c*) is rather an alternative to the principal enactment than an exception from it. Of course there may be misconduct having no relation to the employment, but resulting in bodily injury, and with such cases it is easy to deal. There is more difficulty in a case such as this, where the alleged misconduct consists in a breach of a material condition of the contract of employment, to which breach the injury is attributable. As already said, I consider that the respondent committed a breach of his contract in going to examine the shot-hole only six minutes after the fuse had failed to take effect, because he ought to have known the rule, and his omission to inform himself in a matter affecting his own safety, and probably the safety of other workmen, was in a sense misconduct. But in my judgment it was not serious and wilful misconduct, because it is consistent with all the facts stated in the case that the respondent believed it was left to his own judgment as a miner to determine how long it was necessary to wait before examining the shot-hole. In this connection I am disposed to give some weight to the finding that the rule in question was not generally observed in the mine, and that it was the practice of the miners "to return to a a delayed or a missed shot whenever they thought in their opinion that it was safe so to return." Now, this general neglect of the rule rather suggests the absence of proper supervision. In any view, the respondent was not put on his inquiry as to the existence of a definite rule, and if he only followed the practice which he found existing in the establishment, his fault would not, even by a strict disciplinarian, be classed as serious and wilful misconduct.

I therefore propose that we should answer both questions in the affirmative, and remit to the Sheriff to make an award of compensation in terms of the findings set forth in the case.

Lord Kinnear—I am of the same opinion. I agree with Lord M'Laren that the answer to the first question must depend upon whether at the time of the accident the man was engaged in his employer's business or in some business or pastime of his own. That is just the distinction which has been taken in a series of cases as to the liability of an employer for an accident caused by his servant, and the meaning of the words used by the statute must be the same whether the question involves the liability of the employers to a third person or his liability under the statute to his own workmen. It is a question of fact whether according to the ordinary use of language the man was at the time of the accident in the course of his employment or not, and for the reasons already given by Lord M'Laren I am satisfied that in this case the accident did so arise.

Upon the second question I think it might very well be that a miner's disobedience to the special rules of the mine might amount to serious and wilful misconduct, and it may be that if he were in fact ignorant of the particular rule which he had broken, the case might come under that definition, if his ignorance of the rule were owing to serious and wilful misconduct. But then I do not think that any such case is raised upon the facts stated by the Sheriff. All that appears from what the Sheriff has found is that this man's ignorance of the rules may have been innocent, or may have been due merely to negligence, and in neither case would it in my opinion be wilful misconduct. The Sheriff says that as matter of fact he did not know the rule. He says also, as Lord M'Laren has pointed out, that the rule was not generally observed by the miners in this pit; and then he makes a statement as to the method in which the rules were made public, from which I think it impossible to infer that any ignorance on the part of the miner must necessarily have been owing to his misconduct. I think if the question were whether the respondent in this appeal were negligent or not in failing to inform himself of the rules, we should not be in a position to determine it without more specific information than the Sheriff has

given us. But then I am quite clear that we have enough for the present case, for negligence would not amount to wilful misconduct, because negligence implies merely a man's failure to advert to something which it is his duty to do, or which a reasonably prudent man in his circumstances would have done; whereas what the statute requires is a wilful violation of some known rule. I am therefore of opinion with Lord M'Laren that both questions should be answered as he proposes.

LORD ADAM, who was absent from the debate, intimated that the LORD PRESIDENT who was absent from the advising, had had the opportunity of considering Lord M'Laren's opinion and concurred therein.

The Court answered both questions in the affirmative and remitted to the Sheriff to make an award of compensation in terms of the findings set forth in the case.

Counsel for the Appellants—D-F. Asher, Q.C.—J. Wilson. Agents — Anderson & Chisholm, Solicitors.

Counsel for the Respondents—Shaw, Q.C —Scott Brown. Agents—Mitchell & Baxter, W.S.

Friday, February 24.

SECOND DIVISION.

[Lord Kyllachy Ordinary.

MANDERSON *v.* SUTHERLAND

Husband and Wife—Foreign—Divorce—Domicile—Jurisdiction—Separate Actions of Divorce and for Patrimonial Rights—Res judicata.

Decree of divorce in absence was pronounced in the Court of Session on 23rd February 1898 in an action by a wife against her husband. The defender was described as "tobacco manufacturer, sometime in Edinburgh, at present in Douglas, Isle of Man." His domicile of origin was in Scotland, and some of the acts of adultery libelled and proved in the action were committed before the defender left Scotland in 1889. Thereafter he lived in the Isle of Man. On 29th March 1898 the wife raised an action against her former husband to have it declared that she was entitled to *jus relictæ* out of his estate, and for an accounting to have the amount ascertained. The defender averred that at the date of the decree of divorce and at the date of the present action he was domiciled in the Isle of Man, and pleaded no jurisdiction.

Held (*diss.* Lord Young) that until the decree of divorce was reduced the defender must be presumed to have been domiciled in Scotland at its date, and that the pursuer was entitled to decree for her *jus relictæ*

Opinion (by Lord Moncreiff) that decree of divorce having been competently pronounced, the pursuer's right to terce and *jus relictæ* immediately emerged, and that the Court which pronounced the decree of divorce was entitled and bound to follow it up by imposing on the defender the penalties due according to the law of Scotland.

On 12th January 1898 Mrs Jessie Manderson, domestic servant, Edinburgh, raised an action of divorce in the Court of Session against James Sutherland, "tobacco manufacturer, sometime in Edinburgh, at present in Douglas, Isle of Man," on the ground of adultery committed in Edinburgh in 1880 and 1889 and intervening years, and in the Isle of Man in 1889 and 1895 and intervening years. On 15th October 1873 the pursuer and defender, who were then domiciled in Scotland, had been married to each other in Edinburgh and cohabited as man and wife for upwards of seven years, during which one child had been born of the marriage. This action was duly served on the defender and personally intimated to him, but he did not defend the same. Proof in the cause was led before Lord Kyllachy on 19th February 1898. The defender was cited as a witness but did not appear. On 23rd February Lord Kyllachy found the adultery proved, including acts of adultery libelled as having occurred in Scotland, and pronounced decree of divorce against the defender with expenses. These expenses were paid by the defender.

On 29th March 1898 the pursuer raised another action before Lord Kyllachy against the defender. In this action she asked the Court (1) to pronounce declarator that she was entitled to her terce out of the lands and heritages belonging to the defender on 23rd February 1898, and to ordain the defender to condescend upon the lands and heritages belonging to him so that the terce might be ascertained, and (2) to pronounce declarator that she was entitled to her *jus relictæ* as at 23rd February, and to ordain the defender to hold just count and reckoning and to make payment to her of the amount thereof, failing which to pay to her £500.

The pursuer averred that at the date of the decree of divorce the defender was heritable proprietor infeft in part of the top flat and attics of house property at 112 Leith Street, Edinburgh, let to several tenants, the rental being about £45 *per annum*. She further averred that he had for many years been engaged in business as a tobacco manufacturer, and had made a considerable sum, amounting to about £1500.

The defender admitted that he was proprietor of part of top flat and attics at Leith Street mentioned by the pursuer, and offered to satisfy the pursuer's claim to terce as far as that property was concerned, but alleged that the tobacco trade in the Isle of Man was unprofitable, and at the date of the divorce he had no moveable estate and that he had none now. He averred that at the time the action of divorce was raised and decree pronounced he was not subject to the jurisdiction of the Court, and that the decree was invalid.