sion to valuators, such as was before the Court in *Nivison* v. *Howat* (1883, 11 R. 182), where it was held that no formalities were necessary, all that was really desired or bargained for being the opinion of skilled persons on the question in dispute. In the present case I think that the parties and the committee, to use the terms of the clause of the charter-party, have not even treated the matter as if it was such a submission, but have allowed it to degenerate into a commission of their dispute to two friendly intermediaries or seconds, with powers. As the committee have acted accordingly, the parties have got what they bargained for, namely, not really an award, but a settlement of their dispute, and evidently on very wise and sensible terms. Their dispute was one regarding demurrage under the charter-party, and not regarding interest under the summons; and there I think the matter should have taken end. In these circumstances I should myself have been prepared to hold that the pursuers were barred by their conduct in the submission from pleading any of the points raised in the present action; but if the proceedings with which we have to deal can be raised to the higher plane, even of a reference to valuators, I should entirely concur in the opinion which your Lordship has expressed and in the judgment which you propose.

LORD M'LAREN was absent.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders.

Counsel for the Pursuers and Respondents—Anderson, K.C.—Kemp. Agents—Wylie, Robertson, & Scott, Solicitors.

Counsel for the Defender and Reclaimer—Murray, K.C.—W. T. Watson. Agents—Gordon, Falconer, & Fairweather, W.S.

Thursday, February 10.

FIRST DIVISION.

[Sheriff Court at Hamilton.

LEISHMAN *v.* WILLIAM DIXON LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (2) *c—Serious and Wilful Misconduct—Fact or Law.*

A miner in order to get a screw-key wherewith to repair a breakdown in the pit, the repair of which was a matter of some urgency, crossed the bottom of the shaft instead of going round by the "Boutgate" or by-pass provided for the purpose. The bottom of the shaft was about eight feet wide while the time taken by the cage to ascend to the top and descend was as a rule not less than three minutes and often more. The cage after leaving the pit-bottom was entirely under the control of the engineman, who sometimes, though rarely, had to stop and lower it again when caught in the shaft. The miner waited till he saw the cage leave the bottom and then proceeded to cross. In so doing he was caught by the cage, which the engineman had lowered, and he was severely injured. Though the "Boutgate" was never in practice clear of the general traffic of the mine, it was never so obstructed as to prevent a man easily passing through it. The shaft bottom was regarded as notoriously dangerous, and though there was no special rule prohibiting miners from crossing it, it was in practice never crossed unless the cage was in its seat.

In a claim by the miner for compensation under the Workmen's Compensation Act 1906, the arbiter found that the claimant had been guilty of serious and wilful misconduct and assoilzied the defenders.

Held that there was evidence on which the arbiter might properly find as he did, and appeal *dismissed.*

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) at the instance of John Leishman (*appellant*), miner, 11 Watson Street, Blantyre, against William Dixon Limited (*respondents*), coalmasters, Glasgow, the Sheriff-Substitute (THOMSON) at Hamilton assoilzied the defenders, and at the request of the claimant stated a case for appeal.

The *facts* as stated by the Sheriff-Substitute were as follows—"(1) That the appellant on 24th November 1908 met with an accident in the course of his employment with the respondents. (2) That on said date he was acting as emergency roadsman, and that a breakdown having occurred in a blind shaft from the ell to the splint coal, he went for a screw-key to screw up certain bolts. (3) That on account of said breakdown the whole pit was temporarily kept idle, and it was a matter of some urgency to have the breakdown repaired without undue delay. (4) That in order to get the key he went across the working shaft of the pit at the splint bottom, instead of going round by the passage after mentioned provided for the purpose. (5) That there is a circular passage called the 'Boutgate' or by-pass from one side of the shaft bottom to the other. (6) That the said 'Boutgate' is not reserved exclusively for the passage of men, but is often used to accommodate the general traffic of the pit, and as empty hutches on their arrival at the pit-bottom are marshalled in the said 'Boutgate,' and as they accumulate are hauled off into the workings by horses, which are backed into the 'Boutgate' to await the completion of a rake, and to be attached to said rake. (7) That the said 'Boutgate' was never in practice clear of said traffic of empty hutches, and that there were frequently horses in it. (8) That there were empty hutches standing in the said 'Boutgate' when the appellant went for the screw-key. (9) That when there are empty hutches in the said

'Boutgate' a man can quite easily pass through it. (10) That the main shaft, in crossing which appellant was injured, is 8 feet wide, and that three or four steps will take a man to the other side, and that an interval of three minutes at least, and often in practice more time, elapses between a loaded cage leaving the bottom and the return of the same cage with empty hutches, if the cage goes to the top. (11) That he waited till he saw the cage ascend from the bottom and then attempted to cross the shaft bottom, but the cage having been lowered again by the engineman at the pithead, he was caught by it and crushed against the bottom of the shaft and severely bruised. (12) That once the cage has left the bottom it is entirely under the control of the engineman, who may stop and lower it as he sometimes requires to do when the cage is caught in the shaft. (13) That the arresting of an ascending loaded cage in the shaft and the returning of it to the bottom is not of frequent occurrence, but that it sometimes happens, and that there is no appropriate bell-signal for such a set of circumstances. (14) That the cage moves rapidly and silently and gives no warning of its approaching the bottom, nor can it be seen until it is actually down. (15) That the shaft bottom is notoriously dangerous, not only on account of the possibility of the cage at any moment descending without warning, but on account of coal or material falling down the shaft, and that no one in practice crosses it unless the cage be in its seat. (16) That the appellant admitted that ordinary workmen and miners never cross the shaft bottom, but deponed that the officials of the pit and the bottomers do so regularly. (17) That it was not proved, however, that the officials or the bottomer do so, but that on the contrary it was proved that they regard it as a very rash thing to do, and avoid doing so. (18) That there is no special rule in writing or posted up prohibiting workers from crossing the shaft bottom, but that it is well recognised that the risk of doing so is always very great. (19) That there was not sufficient reason for the pursuer failing to proceed through the by-pass and preferring to cross the shaft. (20) That the appellant's injuries, although serious, were not permanent. (21) That the accident was in the above circumstances due to serious and wilful misconduct on the part of the appellant, and that he was in consequence barred from obtaining compensation in respect thereof."

The *question of law* was—"In the above circumstances was the pursuer entitled to an award of compensation?"

Argued for appellant — *Esto* that the appellant's conduct was rash it did not amount to more than an error of judgment committed in his employers' interest, and was not serious and wilful misconduct in the sense of the Act—*Todd* v. *Caledonian Railway Company*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784; *Praties* v. *Broxburn Oil Company, Limited*, 1907 S.C. 581, 44 S.L.R. 408. The *onus* of proving that it was so lay upon the respondents — *Johnson* v. *Marshall, Sons, & Company, Limited*, [1906 A.C. 409—and they had failed to discharge it.

Argued for respondents — There was ample evidence here on which the arbiter could find as he did, and that being so the Court would not interfere with his decision —*George* v. *Glasgow Coal Company, Ltd.*, 1908 S.C. 846, 45 S.L.R. 686, *aff.* 1909 S.C. (H.L.) 1, 46 S.L.R. 28; *Bist* v. *London and South-Western Railway*, [1907] A.C. 209; *John* v. *Albion Coal Company, Limited*, (1901) 18 T.L.R. 27. Reference was also made to *Dobson* v. *United Collieries, Ltd.*, December 16, 1905, 8 F. 241, 43 S.L.R. 260. *Esto* that no rule was broken, breach of a rule was not essential—*Condron* v. *Gavin Paul & Sons, Limited*, November 5, 1903, 6 F. 29, 41 S.L.R. 33. The misconduct here was serious, for it involved danger to life. It was also wilful, for what was done was notoriously dangerous.

At advising—

LORD PRESIDENT—In this case the question is, "In the above circumstances was the pursuer entitled to an award of compensation?"

I think that question is rather unfortunately framed, but the real point for decision is whether the Sheriff, having assoilzied the respondents on the ground that the workman was guilty of serious and wilful misconduct, was wrong in so holding.

The general observations which I have just made in the case we have decided (*Sneddon* v. *Greenfield Coal and Brick Company, supra*, p. 337) apply here also, for the two cases are *in pari casu*. The same view was taken quite distinctly by the House of Lords in the case of *George* v. *Glasgow Coal Company* [1909] A.C. 123, where the Lords simply considered whether there was evidence from which a reasonable man could find that the workman had been guilty of serious and wilful misconduct. I think it is impossible here to say that there is no evidence on which the arbiter was justified in doing as he did, whether one agrees with him or not. I think it is perfectly clear that there was ample evidence to support his judgment, and therefore I think the question as put must be answered in the negative.

LORD KINNEAR—I agree. The Sheriff has pronounced a series of findings in fact, and his last finding in fact is that the accident was due to serious and wilful misconduct on the part of the appellant. Now that raises for us exactly the same kind of question as we had to consider in the case which we have just decided (*Sneddon*, p. 337), but I must say I consider it with a different result in this case. The question for the Court is put clearly by Lord Halsbury in *Bist* v. *London and South-Western Railway Company*, [1907] A.C. 209, at p. 212, where he says, holding that a workman had lost his right to compensation because of his own serious and wilful misconduct, "We have no right to interfere with the finding of the County Court judge upon a matter of fact. We can say, because then

it becomes a matter of law, where there is no evidence upon which a reasonable man could find such facts as would give him jurisdiction—we can say, as a matter of law, that it was a thing that he had no right to find, because he had not the materials upon which to find it. But no one can say that that observation is applicable to this case." Now I say with reference to this case now before us that no one can say that there were no materials before the Sheriff from which he had a right to come to the conclusion that the accident was due to this man's serious and wilful misconduct. If that be so, then the question he puts, Was the pursuer entitled to compensation? must be answered in the negative. He was not.

The LORD PRESIDENT stated that LORD CULLEN, who was absent at the advising, concurred.

LORD JOHNSTON gave no opinion, not having heard the case.

LORD M'LAREN was absent.

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

Counsel for Appellant—M'Kechnie, K.C. —Kirkland. Agents—Sturrock & Sturrock, S.S.C.

Counsel for Respondents—Horne—Strain. Agents—W. & J. Burness, W.S.

Thursday, February 10.

FIRST DIVISION.

[Sheriff Court at Airdrie.

DONNACHIE *v.* UNITED COLLIERIES LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (2) *c*—"*Serious and Wilful Misconduct*"—*Breach of Rule as Prima facie Evidence of Misconduct—Fact or Law.*

A miner was injured in consequence of his bringing a cartridge too near a naked light. A special rule of the pit provided that "a workman shall not permit a naked light to remain . . . in such a position that it could ignite the explosive." The arbiter held that the miner "having permitted his naked light to remain in such a position that it ignited the gunpowder, and having failed to establish any circumstances justifying his doing so committed a breach of said special rule, and that therefore his injuries were attributable to his serious and wilful misconduct." *Held*, on an appeal, that while the breach of a rule did not *per se* infer serious and wilful misconduct, it was yet such *prima facie* evidence of misconduct as, taken with the facts found proved, might justify the arbiter's finding of serious and wilful misconduct, which was a finding in fact and not in law, and appeal therefore *dismissed.*

In an arbitration in the Sheriff Court at Airdrie, under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between John Donnachie and the United Collieries Limited, the Sheriff-Substitute (GLEGG) refused compensation, and at the request of the claimant stated a case for appeal.

The following *facts* were admitted or found proved—"(1) The pursuer John Donnachie was a miner in the employment of the United Collieries Limited, and earned an average weekly wage of £1, 15s. 4d. (2) On 21st July 1909 Donnachie met with the after-mentioned injury, which incapacitated him for work until 13th October 1909, when he had fully recovered. (3) On said 21st July Donnachie had bored a shot-hole at his working-face, and filled in a charge of powder from the canister in which the charges were kept. (4) Donnachie then replaced the lid on the canister, lit the fuse with his naked light, and retired about 15 yards from the shot. (5) At this point he sat down on the road, placing the canister on his left, and his cap with his lamp in it on the right, on the side of a piece of building which was a few inches above the level of the roadway. (6) The distance between the lamp and canister was about five feet. (7) Donnachie then removed the lid from the canister, and took out all the charges in order to count them. (8) His reason was to ascertain whether the number of charges left was sufficient for the work of the shift. (9) Counting the cartridges was in itself a reasonable thing to do, and it could not be done without taking them out of the canister. (10) The counting could be done, but not so conveniently done, in the dark. (11) The charges are in the form of balls, and are done up in pairs in a paper covering. (12) Sometimes the paper covering is undone and one ball only used, and the canister may contain balls from which the paper wrapping has been removed. (13) It is not proved whether there were uncovered balls on this occasion, or what the density or inflammability of the wrapping was. (14) In counting the charges Donnachie brought them nearer the lamp than the canister was, and nearer to the lamp than was necessary. (15) While the cartridges were in Donnachie's hands they were ignited by a spark from his naked light. (16) The explosion caused the injuries which incapacitated him. (17) The air current was moving from the lamp towards Donnachie, but it was very feeble (18) Miners and the pit officials consider that a distance of five or six feet was a sufficient interval to place between the lamp and the cartridges. (19) Sparks from lamps sometimes travel to a distance of two or three feet, and in exceptional circumstances further. (20) Special rule No. 1, which applied to said pit, and with which Donnachie was acquainted, enacts '. . . a workman shall not permit a naked light to remain in his cap or in such a position that it could ignite the explosive.'"