therefore no difficulty in reaching the same result as your Lordship.

LORD JUSTICE-CLERK — This man was engaged in work for some time with the defenders. On a certain day while employed on work which involved his being on his knees he found on rising that he had some injury which prevented his continuing to work, and which led to his being taken to hospital, where it was discovered that his knee cartilage was torn and that he was in consequence unfit for work.

These facts, if proved, would, in my opinion, entitle the injured man to compensation. He would not need to prove anything more than that the accident arose out of his employment. The facts seem to me to make it impossible to find otherwise. He is just a workman who on a certain day ceased to be able to work on account of something which had happened to him while at his work. That is the ordinary case of accident under the Act. He would need to prove nothing more than I have said. If he prove that, it is still open to the defenders to bring forward evidence that it was not an accident in their employment but something else which incapacitated him, and their case is that that something else happened three years before. I think there is no alternative except either that he met with an accident on the occasion libelled, having never had an accident to his knee before, or that having had a previous accident he had so recovered that he was able to do his own regular work for a considerable time, and then that something happened to the same part of his body. In both of these cases the ultimate and immediate cause of his being no longer able to work was what happened on the day in question, when, on rising from his knees, it was found that his cartilage was torn, and could not have been torn during the three years before, otherwise he would not have been able to work during that time, as we are told that he did. I think it is one of the clearest cases we have seen, and we do not need to go to the anthrax case in order to decide it. It was an injury by violence occurring to the workman during his work, producing incapacity from which he was not suffering before; and on these grounds I am of opinion that compensation falls to be given, and the proper course will be to answer the question in the affirmative and remit the case to the Sheriff-Substitute to assess the amount of compensation.

LORD ARDWALL was absent.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Moncrieff—Fenton. Agent—James G. Bryson, Solicitor.

Counsel for Respondents—Horne, K.C.—Duffus. Agents—Macpherson & Mackay, S.S.C.

Tuesday, October 24.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

FLANNIGAN *v.* THE FIFE COAL COMPANY, LIMITED.

Reparation — Master and Servant — Negligence—Statutory Obligation—Liability of Master at Common Law — Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. c.* 58), *sec.* 49, *General Rules* 4 *and* 21—*Averments —Relevancy.*

In an action of damages at common law, and also under the Employers' Liability Act 1880, brought by a labourer against a coal company in respect of the death of his son through a fall from the roof of the mine in which the son was employed, the defenders admitted the relevancy of the pursuer's case under the statute, but disputed its relevancy at common law. In support of his case the pursuer averred that the defenders had committed a breach of the Coal Mines Regulation Act in failing (1) to properly secure the roof as required by section 49, general rule 21 of that Act, and (2) to appoint a competent fireman and roadsman as required by section 49, general rule 4. He proposed an issue in ordinary form with alternative schedules.

Held that the relevancy of the pursuer's case at common law could not be properly discussed apart from the facts, and consequently that the case must go to trial, and issue *approved*.

The Coal Mines Regulation Act 1887 (50 and 51 Vict. c. 58), section 49, enacts—"The following general rules shall be observed so far as is reasonably practicable in every mine:— . . . . . .

"Rule 4. A station or stations shall be appointed at the entrance to the mine or to different parts of the mine as the case may require, and the following provisions shall have effect—(1) As to inspection before commencing work—A competent person or persons appointed by the owner, agent, or manager for the purpose, not being contractors for getting minerals in the mine, shall, within such time immediately before the commencement of each shift as shall be fixed by special rules made under this Act, inspect every part of the mine situate beyond the station or each of the stations and in which workmen are to work or pass during that shift, and shall ascertain the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are concerned . . .

"Rule 21. The roof and sides of every travelling road and working-place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such travelling road or working-place which is not so made secure."

Hugh Flannigan, labourer, High Street, Kinross, brought an action against the Fife

Coal Company, Limited, in which he sued for £500 as damages at common law for the death of his son Gilbert Flannigan, who was fatally injured while at work as a wheeler and drawer in one of the defenders' pits. Alternatively, he sued for £250 under the Employers' Liability Act 1880.

The relevancy of the pursuer's case under the Employers' Liability Act was admitted.

In support of his case at common law he averred—"(Cond. 3) On or about the 30th day of March 1910 the pursuer's said son was fatally injured by the fall of a stone from the roof at said plates. He was so severely injured that he died within a few minutes. The stone which fell measured 6 feet in length, 13 inches in width, and 13 inches in thickness or thereby. The stone at the date of said accident, and for a considerable time prior thereto, had been exposed in the roof. The roof was composed of blaes and broken 'metals.' Owing to the movement of the strata following upon the excavation of the minerals the roof had given evidence of collapse several weeks before the accident. The defenders and their officials after named were aware of the movement of the strata, and they took down a portion of the roof near said stone and put in some timbering, but they neither removed said exposed stone nor timbered and secured it as after mentioned as they ought to have done. (Cond. 4) Notwithstanding the fact that pursuer's said son and the other wheelers and drawers employed at said wheel brae were practically continuously at work at or near said place and underneath said exposed stone, the defenders failed to prop and secure said stone as they ought to have done if said stone was to be allowed to remain in the roof. It was the duty of the defenders, in terms of the Coal Mines Regulation Act, and particularly section 49, general rule 21, to secure the roof and sides of every travelling road and working-place. Said stone could have been supported by crowns or cross-bars placed upon upright trees and having cleading props or poles placed between the crowns and the roof and at right angles to the said crowns so that said stone would have been kept in position; or otherwise, in the event of the roof threatening to collapse, sufficient warning would have been given by the straining or cracking of said timber to the pursuer's said son and any other of the workmen working under or near said stone as would have enabled them to withdraw to a place of safety. Notwithstanding that this is the usual and necessary method of support in such places, defenders failed to supply such support, and left the roof exposed as condescended on, with the natural result that the said stone, being loose, came away without warning and fell on the pursuer's said son, fatally injuring him as condescended on. Alternatively, the defenders ought to have removed said stone from the roof before allowing the pursuer's son to work near to same, and their failure to do so was the direct cause of the accident. . . . (Cond. 6) The said accident was also caused through the failure of the defenders to appoint a competent person to carry out the duties of fireman and roadsman and repairer in said section, under section 49, general rule 4, of said Coal Mines Regulation Act 1887. Under said general rule the defenders are bound to appoint a competent person to inspect every part of the mine situated beyond the station (said wheel brae being beyond the station), and in which workers are to work or pass during the shift, and to ascertain the condition thereof, so far as the presence of gas, ventilation, roof and side, and general safety are concerned. This, however, they failed to do. The fireman appointed by the defenders was William Clark, Bath Street, Kelty. He was ignorant of his duties as a fireman under said Act and special rules, and in particular of his duties to daily inspect said roof before making his daily report, and before allowing pursuer's said son to enter and work therein on said date. He was thus incompetent and quite unqualified for the position of fireman, to which he had been appointed by the defenders. He neglected to make any inspection of said roof on said date, or alternatively he failed to discover, as he would have done had he been competent, that the stone which fell on pursuer's said son was unsupported, and was in a dangerous condition, and liable to fall at any time as condescended on. The accident which happened was the natural result of his incompetence. Had he been competent, and had he observed the duties imposed upon him as condescended on, the said accident would not have happened. On the morning of said accident the said William Clark reported that said wheel brae was safe to work in, and he allowed the pursuer's said son to go to work therein."

The defenders pleaded, *inter alia*, that the action was irrelevant.

The Sheriff-Substitute (UMPHERSTON) having allowed a proof before answer, the pursuer appealed for jury trial, and proposed the following issue—"Whether, on or about 30th March 1910, in the defenders' Benarty Pit, in the county of Fife, the deceased Gilbert Currie Flannigan was killed through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages, at common law, laid at £500; or alternatively for payment of £250 as damages under the Employers' Liability Act 1880."

At the hearing in the Summar Roll the respondents objected to the relevancy of the case at common law, and argued—An employer who had appointed competent servants was not liable for their neglect of duty, for he did not warrant their competency—*Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R. 568; *Bartonshill Coal Company* (1858), 3 Macq. 266 and 300; *Tarrant* v. *Webb*, (1856) 25 L.J., C.P. 261. *Esto* that under the Coal Mines Regulation Act the *onus* of showing that the respondents had complied with the statutory requirements lay on the respondents—*Britannic Merthyr Coal Company, Limited* v. *David*, [1910]

A.C. 74—the mere averment that they had committed a breach of the statute was not sufficient to entitle the appellant to an issue, for the statute did not impose an absolute obligation on the employer but only a duty to take reasonable care—*Watkins* v. *Naval Colliery Company, Limited*, [1911] 2 K.B. 162. The dicta of Lord M'Laren in *Bett* v. *Dalmeny Oil Company, Limited*, June 17, 1905, 7 F. 787, 42 S.L.R. 638, on which the appellant relied, viz., that breach of the Coal Mines Regulation Act imposed absolute liability, had been disapproved in *Calder* v. *Nimmo & Company, Limited*, December 1, 1906, 45 S.L.R. 212, and also in *Black* v. *Fife Coal Company, Limited*, 1909 S.C. 152, 46 S.L.R. 191.

Argued for appellant—Where, as here, the case was admittedly relevant under the Employers' Liability Act, the Court would not determine *ab ante* that it was irrelevant at common law. The case, however, was clearly relevant at common law, for it was averred that the defenders had failed to comply with the requirements of the Coal Mines Regulation Act 1887 in failing (1) to appoint competent servants, which in itself was sufficient—*M'Carten* v. *M'Robbie*, 1909 S.C. 1020, 46 S.L.R. 776; and (2) to properly secure the roof. Breach of the statutory requirements, if relevantly averred, entitled the pursuer to an issue at common law, for they imposed absolute liability on the employer—*Bett, cit. supra; David* v. *Britannic Merthyr Coal Company*, [1909] 2 K.B. 146.

At advising—

LORD PRESIDENT—The defenders in this case have argued very strenuously that there is no case relevant to be admitted to probation which infers liability at common law. They admit that there is a relevant case under the Employers' Liability Act.

The form of issue is sufficient to embrace liability on either ground, and the schedule of damages is efficient to distinguish between them. I do not say that there might not be cases where there is such clear irrelevancy on one branch or the other, that we would not hesitate to strike out one of the alternatives of the schedule. But I do not think this is one of them. There is a clear averment of the breach of the statutory rules in two particulars. Now I do not say that the defenders may not meet that by proof other than proof showing that the rule was fully observed. I think there are rules and rules. Many, nay, most of them, cannot be personally attended to by the owner or occupier of the mine, and to them I think the common law doctrines laid down by Lord Cairns in *Merry & Cuninghame*, and by Lord Cranworth in *Bartonshill Coal Co.*, are applicable, even although the fault has its origin in breach of a statutory regulation. But this is a matter which cannot be properly discussed apart from the facts, and these are at present uninvestigated.

I am therefore for adhering to the view taken by the Sheriff-Substitute, and, as this is an appeal for jury trial, for approving of the issue before us.

LORD KINNEAR—I agree.

LORD JOHNSTON—I concur.

LORD MACKENZIE did not hear the case.

The Court approved of the proposed issue.

Counsel for Pursuer (Appellant)—Watt, K.C.—M'Robert. Agent—D. R. Tullo, S.S.C.

Counsel for Defenders (Respondents)—Macmillan—Pringle. Agents—W. & J. Burness, W.S.

Tuesday, November 1, 1910.

OUTER HOUSE.

[Lord Cullen.

MATHESON *v.* SMITH.

Poor—Parish Rates—Valuation of Lands—Deductions—"Average Cost of the Repairs, Insurance, and other Expenses"—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 37.

The Poor Law Amendment (Scotland) Act 1845, sec. 37, provides that in estimating the annual value of lands and heritages for the purpose of assessment there shall be deducted "the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same. . . ."

Held (*per* Lord Cullen, Ordinary) that the provision of the statute as to deductions was not adequately met where, in levying poor rate, the Parish Council, without considering the claims of individual ratepayers, made them a uniform allowance of 5 per cent., and that a ratepayer, whose expenditure in respect of the matters enumerated in the section exceeded the 5 per cent. allowed, was liable to be assessed only on the annual value of his property after deduction of the amount so expended by him.

Observations on the propriety of a rating authority attempting to fulfil the statutory requirement as to deduction, by making a uniform deduction from the valued rental of all lands and heritages in their area.

This was a note of suspension at the instance of Major Duncan Matheson of The Lews against Donald Smith, Collector of Rates for the Parish Council of Barvas, in the Island of Lewis. The complainer sought to suspend proceedings for poinding and sale under a warrant obtained at the instance of the respondent for payment of £827, 4s. 4d. of parish rates for the year 1907-8.

The circumstances of the case and the