It would not serve any good purpose to analyse the evidence in detail. My impression is that both the pursuer and Davidson intended by their ceremony to contract a real and immediate marriage. On the other hand our knowledge of the circumstances is fragmentary and incomplete, and I cannot say that the marriage has been satisfactorily proved. Accordingly I am for adhering to the Lord Ordinary's interlocutor.

LORD CULLEN did not hear the case.

The Court adhered.

Counsel for Pursuer and Reclaimer—Morton, K.C.—Lillie. Agent—W. Melvin Ross, S.S.C.

Counsel for Defenders and Respondents—Wark, K.C.—Scott. Agents—J. & J. Galletly, S.S.C.

Saturday, January 22.

FIRST DIVISION.

[Sheriff Court at Hamilton.

SMITH *v.* ARCHIBALD RUSSELL, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (2) (*c*)—*Serious and Wilful Misconduct — Explosives in Coal Mines Order 1st September* 1913, *Rule* 3 (*a*)—*Breach of Rule.*

The Explosives in Coal Mines Order of 1st September 1913 provides—Rule 3 (*a*)—"If a shot misses fire the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

Two miners, S. and M., were firing shot-holes in pairs by applying naked lights to the strums or fuses. M. lit his strum, and S., who had applied a light to his fuse, but believed it was not ignited, retired with him to a place of safety. M's. shot having exploded, S. went back immediately to light his fuse. Before he reached it the shot exploded and he was injured. He knew that the Explosives in Coal Mines Order was in force in the colliery, but considered that in going back to light his strum he was not committing a breach of the Order.

Held that S. had been guilty of serious and wilful misconduct.

Fife Coal Company, Limited v. *Colville*, 1920, 58 S.L.R. 85, and *George* v. *Glasgow Coal Company, Limited*, 1909 S.C. (H.L.) 1, 46 S.L.R. 28, *followed.*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (2) (*c*) provides—"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, unless the injury results in death or serious and permanent disablement, be disallowed."

George Smith, miner, Hamilton, claimed compensation under the Workmen's Compensation Act 1906 from Archibald Russell, Limited, coalmasters, Hamilton, in respect of injuries sustained by him while in their employment on 31st May 1920.

The matter was referred to the arbitration of the Sheriff-Substitute of Lanarkshire at Hamilton (SHENNAN), who refused the claim for compensation, and at the request of the pursuer stated a Case.

The Case stated—"The following *facts* were admitted or proved:—1. On 31st May 1920 and for some time prior thereto the appellant was employed by the respondents as a miner in their Ross Colliery, Hamilton, and was engaged in producing coal. His average weekly earnings prior to the accident were £5, 14s. 2. On said 31st May 1920 the appellant and his neighbour David M'Cutcheon bored and stemmed four shots in their working-place. The shot-holes were prepared in pairs, one pair on each side of the working-place with 10 or 12 feet between them. Each pair consisted of one shot-hole near the floor and another 2 or 3 feet above it. The appellant and M'Cutcheon first lit the bottom shots of each pair and then retired to safety. These shots exploded successfully. They returned to light the upper shots. M'Cutcheon duly lit his. The appellant applied his naked light to the end of the strum of his shot, but he believed that the strum had not been ignited. As, however, M'Cutcheon had lit his he told the appellant that it was time for them to retire to a place of safety, and they did so. 3. M'Cutcheon's shot duly exploded about a minute thereafter. The appellant, believing that his shot was not lit, went back immediately to light it. M'Cutcheon asked him if he was sure he had not lit it and the appellant said that he was sure. When the appellant had reached a point about 20 feet from the shot it exploded and injured him. The delay in the explosion was due to the dampness of the strum. 4. In consequence of said injuries the appellant was totally incapacitated for work for a period of ten weeks, after which he regained his full earning capacity. His injuries were thus not serious and permanent. 5. Paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913 (which is in force in said colliery) provides—'If a shot misses fire the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means. The appellant knew that this rule was in force in the colliery. Believing that his shot had never been lit he considered that in going back to light it he was not breaking the rule. I held that in thus going back the appellant was in breach of the said Order and that this breach amounted to serious and wilful misconduct. On 29th October 1920 I issued my award, refusing the appellant's claim for

compensation on the ground that the accident was due to his serious and wilful misconduct, his injuries not being serious and permanent.

"The *question of law* was—On the foregoing facts was I entitled to refuse to award compensation to the appellant on the ground that his accident was due to his serious and wilful misconduct?"

Argued for the appellant—There was no breach of the Order. The Order only applied where the shot missed fire, which meant that fire had been communicated to the strum by the workman and the shot had failed to explode in the usual way. There was no finding to that effect. The appellant had applied a naked light to the strum, but that was not enough to bring the case within the Order. There was no finding that the appellant had actually ignited the strum, and such a finding could not be implied from the fact that the arbiter held that the delay in the explosion was caused by the dampness of the strum. On the facts as stated the explosion might have been due to a spark or to concussion caused by the explosion. Further, to come within the Order the workman must have believed that he had ignited the strum, and there could be no breach of the Order where, as here, he believed he had not done so. The Order contemplated the workman remaining at the shot-hole until he was satisfied that he had ignited the strum (Rule 2 (*e*)), and there was nothing in the Order to prevent the appellant from going back to his shot as soon as the other one had exploded. If, however, the appellant was in breach of the Order, the breach did not amount to serious and wilful misconduct. He went back believing that he had not ignited the strum, and considering that in acting on that belief he was not committing a breach of the Order. His conduct was the result of a justifiable misinterpretation of the Order—*Bist* v. *London and South-Western Railway Company*, 1907 A.C. 209, *per* Lord James at p. 213; *Johnson* v. *Marshall, Sons, & Company*, 1906 A.C. 409. The cases of *Fife Coal Company, Limited* v. *Colville* (*sup.*), p. 85, and *Waddell* v. *Coltness Iron Company, Limited*, 1912, 50 S.L.R. 29, were distinguishable. In the former a notice was posted at the pit-head directing that the Order should apply "to all cases where an attempt has been made to light a shot and the men have retired." In the latter case the workman concluded that the strum was not lighted because there was no explosion. In any event before deciding against the appellant the Court should remit to the arbiter to make findings as to whether (1) the appellant lighted the strum, and (2) the shot missed fire. The following authorities were also cited:—*M'Kenna* v. *Niddrie and Benhar Coal Company, Limited*, 1916 S.C. 1, 53 S.L.R. 1; *Lynch* v. *Baird & Company, Limited*, 1904, 6 F. 271, 41 S.L.R. 214.

Argued for the respondents—The case was ruled by authority, and particularly by the decisions in *Waddell's* case, *M'Kenna's* case, and *Colville's* case.

At advising—

LORD PRESIDENT—The facts of this case closely resemble the facts in *Colville* v. *Fife Coal Company* recently decided in the House of Lords. Both that case and this are concerned with the breach of the statutory prohibition against returning to the locality of a shot which has missed fire until the elapse of a prescribed period of time. In both cases the workman believed he had not succeeded in lighting the fuse of his shot. It was decided by the House of Lords that the prohibition in question belonged to the first of the two categories defined in *Plumb v. Cobden Flour Mills* ([1914] A.C., at p. 67)—that, namely, of "prohibitions which limit the sphere of employment," as distinguished from "prohibitions which deal only with conduct within the sphere of employment.' In *Colville's* case there was adjected to the statutory prohibition a special notice by the employer to the workmen in his service to the effect that the statutory prohibition was to apply to "all cases where an attempt has been made to light and the men have retired." In the present case the statutory prohibition stands alone, and the workman did not comply with it because, confidently believing that he had not got the fuse to burn, he did not think the statutory prohibition applied.

While the special notice is referred to and quoted by the Lord Chancellor, the judgment did not, as I read the opinions pronounced in the case, turn on the special notice. Lest I should be mistaken in this, it is right to say that in my opinion the notice was merely exegetical of the statutory prohibition and added nothing to it. My reasons will appear in the sequel. I venture to add, however, that I do not myself find the statutory prohibition to be expressed as clearly as might be desired in the case of a regulation which has the sanction of prosecution and punishment behind it, and breach of which is attended—as we are now instructed—with the serious consequence of depriving the injured workman of all title to compensation.

It is found by the learned arbiter that the workman applied a naked light to the fuse, or "strum" as it is called, but believed that the fuse had not been actually ignited. His neighbour having lit the fuse of an adjoining shot, the workman desisted from further attempts at ignition and went with his neighbour to a place of safety. Immediately after the neighbour's shot went off the workman returned, and was injured by the explosion of his own shot. The learned arbitrator finds that the delay in the explosion of the workman's shot was due to the fuse being damp. This means that the workman was mistaken in his confident belief that his fuse had not ignited when he applied a naked light to it. In terms of paragraph 2 (*f*) of the Order, and of the Fourth Schedule annexed thereto, the proper method of firing a shot in a mine such as that in which the workman was employed is "by means of a fuse . . . ignited by means of a naked light." That the fuse had been actually ignited is clear from the

fact that the shot went off, and from the learned arbitrator's finding that the true cause of delay in the explosion was the damp condition of the fuse. I cannot read the findings as being consistent with any but a serious attempt having been made by the workman to ignite the fuse—such an attempt as would in ordinary circumstances have ignited it. Now it is enacted by paragraph 2 (*e*) of the Order that "the person firing the shot" shall take shelter, and by paragraph 3 (*a*)—being the enactment said to have been breached in this case—that "if a shot misses fire, the person firing the shot shall not approach . . . the shot-hole until" at least one hour thereafter, *i.e.*, after firing the shot. A shot "misses fire" in the sense of the latter paragraph if it does not explode in the usual time. *Firing the shot* is the equivalent of *igniting the fuse by applying a naked light*, in the language of the Order. But what does the latter expression imply? I think it means such application of the naked light to the fuse as in ordinary circumstances will cause the fuse to take light. If this is not its true meaning the whole of the provisions of the Order on this topic become useless. For the ordinary interval between the ignition of the fuse and the explosion is short, and the Order would fail of its object if it permitted the workman to go on applying the naked light to the fuse until he was satisfied that he had successfully ignited it. I think what I have said is in accord with the remarks made on this subject in *Waddell* v. *Coltness Iron Company* (1912, 50 S.L.R. 29), although in that case the workman was not—like the workman in this case—confident that he had not succeeded, but was only doubtful of his success. If the fuse is in perfect condition its behaviour will probably leave him in no doubt as to its ignition, but if it does not show the usual signs described in *Waddell's* case, the workman who has performed those acts which in ordinary circumstances would have ignited it is not entitled to prolong his efforts or his investigations into their success beyond the time reasonably necessary for the performance of the acts referred to, nor to return to the shot-hole before the elapse of the prescribed interval. This is a hard rule, but it is probably not difficult in observance, and, as I have said, the Order would on a more loose construction be rendered unserviceable. Accordingly, notwithstanding the absence of any exegetical notice to the workman, I think the present case is indistinguishable so far as the *species facti* is concerned from that of *Colville*.

The question submitted to us is, however, not the same as that submitted in *Colville*. In the latter the issue raised was the broader and prior one, as to the sphere of the workman's employment. Here it is the narrower issue of serious and wilful misconduct, and that issue, strictly speaking, cannot arise if the workman was not acting within the sphere of his employment. I must conclude that the employer did not raise the broader and prior issue in his defence against the claim. But the only result is to put the case in the same position as that in which *George* v. *Glasgow Coal Company, Limited* (1909 S.C. (H.L.) 1, 46 S.L.R. 28) was presented to and decided by the House of Lords, and having regard to the opinions there expressed I feel no doubt, even if the workman be deemed, in consequence of the form of the pleadings, to be acting within the sphere of his employment, it was serious misconduct to violate the statutory prohibition, and that the learned arbitrator was entitled to hold that that misconduct was wilful, because an erroneous interpretation of statutory provisions does not make a breach of their terms other than wilful.

LORD MACKENZIE—I agree with the opinion of your Lordship, which I have had an opportunity of reading.

LORD SKERRINGTON—I also concur.

LORD CULLEN—I also agree.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Sandeman, K.C.—Gillies. Agents—W. & J. Burness, W.S.

Friday, January 28.

SECOND DIVISION.

[Sheriff Court at Airdrie.

COSTELLO *v.* ROBERT ADDIE & SONS (COLLIERIES), LIMITED.

Master and Servant—Workmen's Compensation—"Arising out of and in the Course of the Employment"—Breach of Statutory Rule—"If a Shot Misses Fire"—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Coal Mines Act* 1911 (1 *and* 2 *Geo. V, cap.* 50), *sec.* 86—*Explosives in Coal Mines Order, dated* 1*st September* 1913, *par.* 3 (*a*).

The Explosives in Coal Mines Order of 1st September 1913, par. 3 (*a*), provides that "If a shot misses fire the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

Two shots were laid close together in a mine by two miners, A and B, each of whom applied a light to his respective fuse. Both A and B were of opinion that A's fuse had failed to ignite, but they retired to a place of safety as B's fuse was burning. B's shot went off, and thirty or forty minutes thereafter A returned for the purpose of lighting the fuse attached to his shot. As he approached his shot it went off, and he was seriously and permanently injured. *Held* (*following Smith* v. *Archibald Russell, Limited*, 1921, 1 S.L.T. 171) that A's shot had "missed fire" within the