effectual requires to be made real by certain statutory procedure. It is the duty of the trustee when he comes to the knowledge of such acquisitions to apply to the Lord Ordinary to "declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee at the date of the acquisition thereof, to the same effect as is hereinbefore enacted in regard to the other estates." The estate dealt with in this section, therefore, cannot be practically brought under the sequestration without the intervention of the Court. It follows that till this is done earnings which are not vested by a declarator of the Lord Ordinary to the effect set out in the section remain open to the diligence of creditors whose debts have been incurred after the sequestration, and if any such creditor has made his right effectual by diligence before the trustee has made the right of prior creditors real by the statutory procedure, the right first made effectual must prevail. Now, the creditor John Grant used diligence to attach the fund, and his diligence was completed before any real right was vested in the trustee. I am of opinion that he is entitled to prevail in the competition.

The Lord Ordinary says that the sum in question represented capital of the bankrupt which he had put into the farm, and which the landlord was to repay him at the end of the lease, and that that capital being the creditors' money, its fruits, the sum in question, must belong to the creditors also. There is no evidence of this, and it cannot be assumed. On the contrary, we must assume, since there is no allegation of fraud, that the whole estate of the bankrupt had been honestly given up, and that when the trustee was discharged it had been divided among his creditors, and therefore that the bankrupt started with no capital of his own with which to carry on the farm, and therefore with no capital belonging to his creditors. No doubt he required money to carry on his business, but the obvious inference is that he carried on the farm with money not stolen from his creditors but supplied by his friends. His wife, who appears to have had money, and had bought from the trustee what belonged to him on the farm, may have supplied the money. At all events, we cannot assume that it was money stolen from his creditors. The case of *Abel* v. *Watt*, 11 R. 149, has no bearing. That was a case in which the creditors in the sequestration claimed to retain an abandoned asset. Here the question is one of competition between creditors as to priority in making their rights effectual.

I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, and the claimant Grant ranked to the extent of his claim. The trustee will be entitled to the balance, but it would be premature to give him a ranking at this stage, because he has not completed his right by the statutory procedure. It was suggested that the necessity for this is obviated by this process of multiplepoinding, because when a fund is in the hands of the Court it can be reached by the order of the Court, and that such order may be made with safety, as everyone interested was called in the multiplepoinding. But I think it would be premature to proceed on that view, because the point was not really argued to us, but was merely mentioned as tending to show that no vesting-order under section 103 was necessary, the fund having vested *ipso jure* in the trustee. The best course will therefore be to pronounce findings, and to remit to the Lord Ordinary to consider the best way of disposing of the trustee's claim.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court recalled the interlocutor of the Lord Ordinary, and ranked and preferred the claimant Grant in terms of his claim, and found *quoad ultra* that the claimant, the trustee on Green's sequestrated estate, was entitled to be ranked and preferred for aught yet seen to the balance of the fund *in medio*; and remitted to the Lord Ordinary to proceed.

Counsel for the Claimant and Reclaimer—Ure, K.C.—M'Lennan. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Claimant and Respondent—Campbell, K.C.—Hunter. Agent—Alex. Mustard, S.S.C.

Wednesday, June 26.

SECOND DIVISION.

[Sheriff-Court at Paisley.

FULLERTON, HODGART, & BARCLAY *v.* LOGUE.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1) *and* (2) (c) — *Accident Arising Out of and In the Course of Employment — "Serious and Wilful Misconduct" — Workman Using Hoist to Procure Tools Contrary to Notice.*

A workman in an ironfoundry was ordered to fill scrap iron into barrows. In order to procure hand leathers to equip himself for this purpose he ascended to the furnace platform in a hoist, and was killed. There was a ladder which led to the furnace platform, and the workmen were forbidden to use the hoist by a notice posted near it. Shortly before the accident certain alterations on the hoist had rendered it more dangerous. At the time of the accident the deceased had been for a fortnight employed in the foundry, but he had previously worked there before the alterations were made upon the hoist. The Sheriff did not find that the workman knew of the notice. It was not proved that his attention had been specially directed to the alterations in the hoist. All the workmen, in spite of the notice, made use of the hoist.

Held (1) that the accident arose out of and in the course of the deceased's employment within the meaning of section 1, sub-section (1) of the Workmen's Compensation Act 1897; and (2) that the Sheriff-Substitute was right in holding that the fatal injury was not attributable to the "serious and wilful misconduct" of the deceased within the meaning of section 1, sub-section (2) (*c*).

This was an appeal in an arbitration under the Workmen's Compensation Act 1897 before the Sheriff-Substitute at Paisley (LYELL) between Fullerton, Hodgart, & Barclay, engineers, Paisley, appellants, and Thomas Logue, Cashilinny, Donegal, claimant and respondent.

The facts stated by the Sheriff-Substitute were as follows—"On the 16th of November 1900 the deceased Thomas Logue junior was and had been for about a fortnight a labourer in the employment of the appellants at their foundry and engine works in Paisley. On the evening of the 15th of November he had received instructions from a fellow-labourer, who had authority to issue such instructions, to be at the works at four o'clock on the following morning for the purpose of filling scrap-iron into the barrows. This was not an unusually early hour for the performance of the work of so filling scrap-iron, which work may be done either with the naked hands, or by means of shovels, or with the hands covered with shields called hand-leathers. The deceased accordingly went to his work as ordered, and was heard asking first whether the scrap was too hot to be handled with hand-leathers, and second, where hand-leathers were to be obtained. In answer to this latter question, one of a group of his fellow-workmen replied, 'In the store,' but could not say whether the deceased heard. It was proved that these hand-leathers are kept in the store, and that there is also a supply of them on the furnace platform for the use of the furnacemen. The store is not open till 6 o'clock a.m., but up to that time the key is in the possession of the night watchman. It was not proved that the deceased knew or had means of knowing this latter fact. The furnace platform referred to is a considerable height above the floor of the moulding shop, and can be reached either by a fixed iron ladder or by means of a hydraulic hoist which may be set in motion either from the level of the floor or from the furnace platform. About 4·30 a.m., and shortly after the deceased was heard asking where hand-leathers were to be obtained, he was discovered standing on the hoist, in which he had obviously ascended from the floor, with his neck jammed between the beam of the hoist and the girder of a new furnace platform then in course of erection, and he was brought down dead. On a wall close to the hoist a notice was displayed bearing the inscription 'No allowance for any man to go up upon hoist.' It was also proved that shortly before the accident the hoist had become specially dangerous on account of the fact that its beam had been lowered some two feet in order to allow of the floor of the hoist being brought up to a level with the old furnace platform. The previous height of the beam of the hoist from its floor had been about six feet, but as the girder of the new furnace platform was only about four feet above the old furnace platform the beam of the hoist had been lowered. The result was, that if a man was standing erect upon the hoist he would be in danger of being crushed between the girder and the beam before the floor of the hoist reached the level of the old furnace platform. Strict injunctions had been given to the foremen to warn the men not to use the hoist, and the notice above referred to had been repainted. On the other hand, as I have said, the deceased had been only a fortnight in the employment at the time of the accident, although he had worked there on previous occasions when the hoist was comparatively safe. There was no proof that his attention had been specially directed to the changed condition of the thing, and the hoist, before and after the lowering of the beam, was regularly used by workmen whose business took them up to the old furnace platform. Some of the men never knew of the existence of the warning notice, some had never read it, and of those even who had read it, all used the hoist in spite of it. It was proved to my satisfaction that when the deceased thus attempted to ascend by the hoist to the furnace platform he was in quest of hand-leathers for the purpose of equipping himself to go on with his allotted task of filling scrap. I was therefore of opinion that, although he may have disobeyed orders in taking the easier way of ascending to the platform, and may have been negligent and even reckless in so doing, his endeavour to reach it was in pursuance of his proper work."

Upon these facts the Sheriff-Substitute held that the "fatal accident arose out of and in the course of the deceased's employment, and that the fatal injury he sustained was not attributable to his own serious and wilful misconduct," and awarded the respondent compensation.

The questions of law for the opinion of the Court were—"(1) Was the fatal injury to the deceased caused by an accident arising out of and in the course of his employment within the meaning of section 1 (1) of the Workmen's Compensation Act 1897? (2) Was the Sheriff-Substitute right in holding that the fatal injury was not attributable to the serious and wilful misconduct of the deceased in the sense of section 1 (2) (*c*) of the said Act?"

Argued for the appellants—(1) The facts found by the Sheriff were not sufficient to show that the deceased was in the course of his employment. If a workman did a risky and unnecessary act while in search of tools he was not in the course of his employment—*Callaghan* v. *Maxwell*, January 23, 1900, 2 F. 420; *Gibson* v. *Wilson*, March 12, 1901, 38 S.L.R. 450; *Lowe* v. *Pearson* (1899) 1 Q.B. 261. (2) In any view, the deceased was guilty of "serious and wilful misconduct" in disregarding the notice forbidding workmen to use the hoist. The

Sheriff had not found as a fact that he was unaware of it, and it must be presumed that he was aware of what was one of the ordinary conditions of his employment. The Court should reverse the Sheriff's judgment if upon the facts stated he had come to an erroneous conclusion in law—*Guthrie* v. *Boase Spinning Company*, March 20, 1901, 38 S.L.R. 483; *Dailly* v. *Watson, Limited*, June 19, 1900, 2 F. 1044.

Argued for the respondent—(1) It was not disputable that the deceased was in the course of his employment. He had come to the works at the hour appointed by one who had authority to give the order, and was seeking for the means to begin his work. (2) The mere breach of a rule was not serious and wilful misconduct—*M'Nicol* v. *Spiers, Gibb, & Co.* February 24, 1899, 1 F. 604; *Rumball* v. *Nunnery Colliery Co.* 80 L.T. (N.S.) 42. To establish that defence it must be shown that the workman knew of the rule, and that the danger was obvious. Here the Sheriff had not found that the deceased knew of the rule, which was habitually diregarded by the deceased's fellow-workmen. A workman might adopt a wrong and dangerous way of doing his work, but that did not amount to serious and wilful misconduct—*Durham* v. *Brown Brothers*, December 13, 1898, 1 F. 279; *Douglas* v. *United Mineral Mining Company* (1900) 2 Minton-Senhouse's Compensation Cases, 15.

LORD JUSTICE-CLERK—We must deal with this case upon the statement of facts as the Sheriff has found them. The question—assuming there may be a question of law involved in the matter of serious and wilful misconduct—is, whether the facts as stated by the Sheriff so clearly point to there having been serious and wilful misconduct as to debar the pursuer from succeeding in this petition. Without going into detail, I think here the facts are such that they might lead to either inference according to the view you choose to take of them, and that being so, the Sheriff who heard the evidence, and stated what he found to be the facts upon the evidence which he heard, is undoubtedly the best judge of that matter. I see no ground for holding that he could not legally upon these facts, which he found, come to the conclusion which he did. There are many cases in which that would be a nice question, but in this case I think we ought not to interfere with the judgment at which the Sheriff has arrived.

LORD YOUNG—I am of the same opinion. I do not know whether I can usefully add anything to what the Sheriff has expressed in the case, or your Lordship has expressed in explaining the conclusion to which you have come that there is no satisfactory ground for interfering with the Sheriff's judgment. The case presents two questions of law, which I think it is proper to keep quite separate as the Sheriff has done. The first is—[*His Lordship read the question*]—Now, the employment of this workman is stated in the case. Upon all the information I have, and I have none except what is stated in the case by the Sheriff, I have no hesitation whatever in sustaining his conclusion, which is, that the proof establishes to his satisfaction "that when the deceased thus attempted to ascend by the hoist to the furnace platform he was in quest of handleathers for the purpose of equipping himself to go on with his allotted task of filling scrap." The Sheriff states in detail that he was informed that these leathers which the deceased went for, and which were intended to enable him safely to go on with his work, were to be found in two places. One was the store, but the store was not open for two hours after he required them, and the other was the furnace platform, which was a considerable height above the floor of the moulding shop; and that he was ascending to that platform in order to get these leathers when the accident occurred to him. I therefore conclude without any difficulty or hesitation that the accident occurred in the course of his employment. That answers the first question. But then it is said that there was an obvious danger here. I think there clearly was not, upon the details which are stated by the Sheriff. The beam against which he struck had been lowered, and then there was a direction that the workmen should not ascend at that place. The Sheriff finds in point of fact that there was no proof that his attention had been specially directed to the changed condition of the thing. I attach no importance to the word "specially," and I read the statement therefore that there was no proof that his attention had been directed to the changed condition of the thing. The Sheriff-Substitute says—"The hoist before and after the lowering of the beam was regularly used by workmen whose business took them up to the old furnace platform. Some of the men never knew of the existence of the warning notice; some had never read it, and of those even who had read it, all used the hoist in spite of it." Now, when this young man who had been a fortnight in the service used this hoist in order to get the means of doing his master's work on that occasion, I do not think he was guilty of serious and wilful misconduct by going in the face of an obvious danger. I therefore agree with the Sheriff upon the second question that the accident was not attributable to the serious and wilful misconduct of the deceased. I think he was right in holding that it was not so attributable, although I think it is sufficient to say that we have no facts established here in the statement before us which will entitle us to say that the Sheriff was wrong in holding that the words "serious and wilful misconduct" are not applicable to his conduct on that occasion. I do not know that there is any real difference between the law of England and the law of Scotland in this matter—whether serious and wilful misconduct is a question of fact or a question of law. *Prima facie* it is a question of fact, although in any individual

case it may appear that upon the detailed incidents and facts which occurred, from which a conclusion is to be drawn, there was or was not serious or wilful misconduct. It may be that these facts do not justify the conclusion that there was, or do not justify the conclusion that there was not. But it is still a question of fact, although this Court, and I have no doubt the English Courts too, have corrected an erroneous conclusion upon the detailed facts which are submitted. I think we might here correct any error which the Sheriff had fallen into in holding that it amounted to serious and wilful misconduct, and which we thought an erroneous conclusion from the detailed facts of which he had informed us, and also negative a conclusion which we thought could not be drawn from the detailed facts. Here I am of opinion that upon the facts stated the conclusion and judgment of the Sheriff upon this question of law submitted to us is right.

LORD TRAYNER—I think the facts stated in this case deprive it of any difficulty. I have no doubt whatever upon the facts stated that this accident took place when the respondent's son was in "the course of his employment." I have equally no doubt that he was not guilty either of serious and wilful misconduct or of any misconduct whatever.

LORD MONCREIFF — I am of the same opinion. On the first question I have no difficulty. I think it is quite plain that the accident occurred in the course of the deceased's employment. The second question raises a more difficult point. The burden is upon the employer to show that the injury was attributable to the man's serious and wilful misconduct, and it is plain upon the findings in the Sheriff's statement that that has not been proved to his satisfaction. It may be that on the detailed facts found proved by the Sheriff he might have drawn the conclusion that the workman knew of the existence of the rule and disregarded it, and that his doing so amounted to wilful misconduct. But he has not done so. On the contrary, I infer that he drew the conclusion that the workman did not know of it, or at least that it was not proved that he knew of the rule. I therefore come to the conclusion that we cannot interfere with the judgment at which the Sheriff has arrived.

LORD JUSTICE-CLERK—I should have said, what I omitted to say, that I agree upon the first point, namely, that the accident took place in the course of the deceased's employment.

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

Counsel for the Appellants—W. Campbell, K.C. — Younger. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Claimant and Respondent—Baxter—A. M. Anderson. Agent—John Baird, Solicitor.

Thursday, June 27.

SECOND DIVISION.

[Lord Low, Ordinary.

MILLS *v.* BROWN'S TRUSTEES.

(*Ante*, June 19, 1900, vol. 37, p. 810, and 2 F. 1035).

Trust—Administration—Illegal Appointment of Trustee as Salaried Manager of Business—Repayment of Sums Received as Salary—Interest.

A testator empowered his trustees to appoint one of their own number to be their factor or cashier, and to pay him a salary. The trustees appointed one of their number as salaried manager of a manufactory which had been carried on by the testator, after obtaining the opinion of counsel that such an appointment was within their powers, and he acted as manager for several years, receiving a salary and commission. In an action brought by one of the trustees, who was also a beneficiary, the Court held that the appointment was *ultra vires* of the trustees, and that the trustee so appointed was bound to repay the amount of salary and commission received by him as manager. The pursuer maintained that the defender was liable in interest upon the amount falling to be repaid by him.

Held, that as the defender had been appointed manager, and had received his salary under a *bona fide* though erroneous view of the powers of the trustees, and as their action had resulted in no loss to the trust-estate, the defender was not liable in interest upon the sum falling to be repaid by him.

This case is reported *ante, ut supra.*

Robert Brown by his trust-disposition and settlement having empowered his trustees "to appoint one of their own number to be their factor or cashier, and to allow him a reasonable remuneration," the trustees appointed Robert Brown *tertius* (the present reclaimer) to be salaried manager of a manufactory which had been carried on by the testator, and which the testator had empowered his trustees to carry on after his death. They had previously obtained the opinion of counsel that such an appointment was within their powers. Robert Brown acted as manager and received a salary and commission for several years until the present action (reported *ut supra*) was raised. By interlocutor dated 16th March 1900, the Lord Ordinary (LOW) found that it was *ultra vires* of the trustees to pay salary or commission to the reclaimer, and appointed them to lodge a statement of the sums paid to Robert Brown by way of salary and commission as manager foresaid. On 19th June 1900 the Court, on a reclaiming-note by the defenders, adhered to the interlocutor of the Lord Ordinary.

The defenders thereafter lodged a statement of the salary and commission paid