strued as issued, and its validity determined as at the date of its issue without any explanation or addition which does not appear on the face of the decree itself. It appears to me therefore that this first finding of the decree-arbitral must be set aside, because it is consistent with (that is, does not exclude) the view that the arbiter has not exhausted the reference. But I think the decree-arbitral is open to another objection equally fatal to its validity. He finds that on implement of his award as pronounced, the parties are mutually free of all claims the one against the other, and ordains them to execute and deliver mutual discharges accordingly. This part of the decree the Lord Ordinary has reduced as *ultra vires*, and if it is separable from the first finding then it may no doubt be reduced without affecting the validity of the decree so far as *intra vires*. But I cannot regard them as separable. The order to grant mutual discharges implies that in the arbiter's mind there existed mutual claims. But what did the arbiter consider to be the claims by the defenders that the pursuers were thus to discharge? There is nothing in the decree-arbitral which indicates the existence of such a claim, but I deduce from what the arbiter has done that he gave effect to some part of the defenders' claim for damages (the only claim made by them) and ordained the remainder to be discharged. It is, however, impossible to say what the arbiter's finding in favour of the pursuers would have been if no mutual discharges were to be granted. I take it that the granting of such mutual discharges had some value in the estimation of the arbiter, and had therefore some influence in determining the amount for which he held the defenders liable to the pursuers. In that view the addition of a finding which is admittedly *ultra vires* and not separable from the rest of the decree makes the whole decree invalid. I would only further observe that if the mutual discharges were not granted then the defenders' claim for damages for breach of contract remains untouched. It has not been disallowed. This again shows that the arbiter has not exhausted the reference. He has decided only on the pursuers' claims and left the defenders' counter-claim—which was as much presented for determination as the pursuers'—unconsidered, or at all events undetermined. I therefore think that the pursuers are entitled to decree of reduction as concluded for, and that the interlocutor of the Lord Ordinary should be altered to that effect.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent at the hearing.

The Court recalled the interlocutor reclaimed against, and pronounced an interlocutor in the following terms:—

"... Sustain the reasons of reduction; reduce ... as craved, conform to the conclusions of the action: ... Find no expenses due to or by any of the parties up to 14th April last: Find the pursuer entitled to expenses since said 14th April." ...

Counsel for the Pursuers and Reclaimers—Campbell, K.C.—Cooper. Agents—Fletcher & Morton, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—Hunter. Agents—Somerville & Watson, S.S.C.

Wednesday, November 4.

FIRST DIVISION.

CONDRON v. GAVIN PAUL & SONS, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (2) (c)—"Serious and Wilful Misconduct"—Stated Case—Competency—Question of Fact or of Law.

A case for appeal under the Workmen's Compensation Act set forth:—In the mine in which the accident in question took place, special rules, Nos. 81 and 100 of the Coal Mines Regulation Act 1887, were in force, providing that workmen should stand clear of hutches in motion, and prohibiting all workers from entering or remaining in any place throughout the whole mine where not absolutely required by duty to be at the time, and from proceeding through any fence or passing any notice erected to indicate that danger existed. The appellant, a workman in the mine, had no personal knowledge of these rules, but could have read them at the pithead, where they were exhibited. The appellant worked at a bench to which the only approach was by a wheel brae carrying two sets of rails on which hutches ran. Opposite the opening to this wheel brae was a disused road which was fenced off, but in the fence a breach had been made, and, unknown to the pit officials, several of the workmen were in the habit of going through this breach and using the disused road as a convenient place to relieve nature. The appellant, who had gone through the breach to the disused road for this purpose, while attempting to return to his bench across the rails was caught by a hutch and injured. The Sheriff-Substitute held that the appellant's injury was attributable to his serious and wilful misconduct, and dismissed the application for compensation. The workman appealed, the question of law being whether his injury was attributable to his serious and wilful misconduct in the sense of the Act.

The Court *dismissed* the appeal and answered the question in the affirmative, on the ground that the question put was a question of fact, and that as there was ample evidence to support the Sheriff's finding and nothing to

show that he had proceeded upon any error in law, his decision was not subject to review.

Observations (*per* Lord M'Laren and Lord Kinnear) as to the circumstances under which such a question might raise a question of law.

This was a case stated by the Sheriff-Substitute (MACLEOD) at Linlithgow on appeal by Michael Condron, miner, Durhamtown Rows, Bathgate, in an arbitration under the Workmen's Compensation Act 1897 between him and Gavin Paul & Sons, Limited, coalmasters, Bathgate.

The material facts stated in the case were summarised in the opinion of the Lord President as follows:—"The appellant, who is twenty years of age, and has had four years' mining experience, was a drawer in the employment of the respondents in one of their pits in which Special Rules Nos. 81 and 100 of the Coal Mines Regulation Act 1887 were in force. Special Rule 81 provides, *inter alia*, that persons employed in connection with inclined or engine planes shall stand clear of hutches in motion so as to avoid danger from breakages or runaways; and Special Rule 100 prohibits all workers from entering or remaining in any place throughout the whole mine where not absolutely required by duty to be at the time, and provides that they shall on no account proceed through any fence or pass any notice erected to indicate that danger exists. The Sheriff-Substitute has found that the appellant had no personal knowledge of those rules, but that he could have read them at the pithead, where they were exhibited.

"The only approach to the part of the pit in which the appellant worked was by a wheel brae, the incline of which was 1 in 3, and on the ascent of the wheel brae three benches opened out to it on the right hand, known, in ascending order, as John M'Coll's bench, M'Keown's bench, and Hannah's bench. On the wheel brae there are two sets of rails, and as the workmen ascend to their respective benches they must walk between either one or other of the two sets of rails. Opposite to the opening to the wheel brae of M'Keown's bench, at which the appellant was a drawer, there is a disused road which is supported at its opening by two trees, and inside these two trees there had been a stone building which fenced off all entrance into the disused road, but for a considerable time before the accident there had been a breach in the building large enough to admit of easy ingress by a man in a crawling position. It appears that for a considerable time prior to the accident several of the workmen had, unknown to the pit officials, been in the habit of going through the breach in the building and using the discarded road as a convenient place for the relief of nature.

"On the morning of the accident the appellant, in proceeding to his work, arrived at the foot of the wheel brae, and finding that the hutches had not begun to run, he walked up between the rails until he came to the opening of M'Keown's bench, where it was his duty to wait until an empty hutch should arrive for him. While the appellant was so waiting he felt a call to relieve nature, and for the purpose of doing so he crossed the rails of the wheel brae and crawled by the breach above described into the disused road. While the appellant was in this place he became aware that the hutches on the wheel brae had begun to run, and on emerging from the place described he stood by the side of the rails nearest to the disused road, watched a full hutch descending the rails next to him from the top bench till it passed him, and then, in the full knowledge that the empty hutch ascending to the top bench must be very near, attempted to cross the rails to M'Keown's bench when he was caught by the ascending hutch and injured by pressure between it and the pavement.

"The Sheriff-Substitute has found that the appellant was well acquainted with the haulage system in use on the wheel brae, and was well aware that it was a most dangerous thing to cross the rails while hutches were in motion upon it. He has further found that the appellant was aware that there was no necessity for him to cross when he did, as he knew that his bench could not be served until the service of the top bench had ceased, and that if he had waited until the hutches had stopped running he could, by shouting to the man in charge at the top of the wheel brae, have been enabled to re-cross in safety.

"The Sheriff-Substitute states that he was unable, apart altogether from the printed or written rules of the pit, to regard the appellant's action in re-crossing the rails in the full knowledge of the imminent danger which he ran, and without any object to serve, as other than serious and wilful misconduct, and he therefore dismissed the application with expenses."

The question of law for the opinion of the Court was—"Was the appellant's injury attributable to his own serious and wilful misconduct in the sense of section 1 (2) (*c*) of said Act?"

Argued for the appellant—The form of the question of law in the case was competent. A question in identical terms had been considered and answered by the Court in *Dailly* v. *John Watson, Limited*, June 19, 1900, 2 F. 1044, 37 S.L.R. 782. This Court might correct the Sheriff if it were of opinion that he was wrong in holding that the appellant's conduct on the facts stated amounted to serious and wilful misconduct—*per* Lord Young in *Logue* v. *Fullerton, Hodgart, & Barclay*, June 26, 1901, 3 F. 1006, 38 S.L.R. 738. The question whether conduct amounted to serious and wilful misconduct "in the sense of the Act" involved a question of law, *i.e.*, the interpretation of these words in the statute. Mere rashness or imprudence did not constitute it—*M'Nicol* v. *Speirs, Gibb, & Co.*, February 24, 1899, 1 F. 604, 36 S.L.R. 428; *Todd* v. *Caledonian Railway Company*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784. In every case where the defence of serious and wilful misconduct had been sustained there had either been (1) a violation of a known rule, or (2) disobedience to

the order of a lawful superior. There was no evidence before the Sheriff of wilful misconduct. That had been the conclusion of the Court of Appeal in England in a case where the facts were very similar to the facts in the present case—*Rees* v. *Powell Duffryn Steam Coal Co., Limited*, January 27, 1900, 64 J.P. Rep. 164. In a very recent case the decision of the arbiter on the question whether certain conduct was serious and wilful misconduct had been considered and overturned by the Second Division—*O'Hara* v. *Cadzow Coal Co., Limited*, February 6, 1903, 5 F. 439, 40 S.L.R. 355.

Counsel for the respondents were not called on.

At advising—

LORD PRESIDENT—The question in this case is whether any sufficient cause has been shown for holding that the Sheriff-Substitute has erred in deciding that an injury suffered by the appellant in a coal pit belonging to the respondents was attributable to his own serious and wilful misconduct, in the sense of section (1) (2) (*c*) of the Workmen's Compensation Act 1897?

The following are the more material facts which the Sheriff-Substitute finds to have been proved—[*His Lordship then stated the facts*].

It appears to me that the question whether the injury which the appellant suffered was due to his own serious and wilful misconduct in the sense of section 1 (2) (*c*) of the Act is a question of fact rather than of law. It is properly, and at all events primarily, a question of fact, and this Court has in my view no power to review the judgment of the Sheriff-Substitute upon it, unless either (1) there is no evidence to support it, or (2) there is ground for holding that, in arriving at the conclusion which he reached, the Sheriff-Substitute proceeded upon some erroueous or mistaken view of the law. I consider that in the present case there is ample evidence to support the conclusions of fact at which the Sheriff-Substitute arrived, and I am unable to find anything in the case tending to show that he was under any error or mistake as to the law applicable to the case. I am therefore of opinion that no ground has been established for altering the judgment which he pronounced.

LORD ADAM—The question which we are asked to decide in this case is whether the appellant's injury was attributable to his own serious and wilful misconduct in the sense of the Act. It appears to me that the question whether an injury to a person is attributable to his own serious and wilful misconduct is *prima facie* at least a question of fact, and I do not think that the addition of the words "in the sense of the Act" makes any difference in the matter, because the Act attaches no particular meaning to the words "wilful and serious misconduct," but uses them in their ordinary and usual sense.

I agree with what your Lordship said in he case of the *Glasgow and South-Western Railway* v. *Laidlaw*, 2 Fr. 708, 37 S.L.R. 503 — "It is clear from the initial words of the sub-section that it was contemplated that the question whether a workman had been guilty of serious and wilful misconduct would generally at all events be a question of fact. Accordingly the Sheriff, quite properly, treating the question as one of fact, has found that it is not proved that Laidlaw was asleep, or that there was serious and wilful misconduct on his part, or that, if there was, the injuries were attributable to such misconduct. Unless the Sheriff is wrong in holding that question to be one of fact, we have no power to interfere with his judgment, and while I do not say that in no circumstances a point of law can enter into the question whether there has been serious and wilful misconduct, I am clear there is no such point of law in this case."

The Sheriff has in the present case found certain specific facts, and from these has drawn the inference that the appellant has in fact been guilty of serious and wilful misconduct. Your Lordship has stated these facts so far as material, and I do not propose to repeat them. I have, however, carefully considered these facts as found by him, and they appear to me to be all questions of pure fact, and that the Sheriff has not considered and did not require to consider any question of law in order to reach the conclusion at which he has arrived. The Sheriff might very well have drawn a different conclusion from the facts stated, and had he done so I would not have disturbed his judgment, even although I might have differed from it, because in my opinion it is he who is directed by statute to determine whether serious and wilful misconduct has been proved, and not this Court.

I therefore think the appeal should be dismissed.

LORD M'LAREN—I am of the same opinion, but I wish to make it clear that in my view the question whether a party has been guilty of serious and wilful misconduct may and probably would in many cases raise a question of law. We may keep in view that under the statute we can only deal with questions of law, and that in general the questions of law that come to us are questions of construction of the Workmen's Compensation Act and the statutes incorporated therewith. Of course there might be questions of common law arising incidentally, but from my experience of the working of thi Act I think the questions we are dealing with are mainly, if not exclusively, questions of construction of statutes. Now, the point whether a certain line of action taken by the injured man amounts to serious and wilful misconduct raises not only a question of degree, whether the misconduct be serious, but also a question of the character of the action, viz., whether it amounts to misconduct. The general question whether the facts amount to wilful misconduct is not a question of degree but one of substance. Where there is nothing

but a question of degree involved, that would in general be a pure question of fact, though I agree with your Lordship that we might alter the Sheriff's findings if we thought that there was not the necessary minimum of evidence to support the finding that the violation of the rule or whatever it was amounted to misconduct. But on the question whether the facts amount to wilful misconduct at all, we have been in the habit of considering the meaning of the statute—the meaning of these words in the statute—and in the case of *M'Nicol* v. *Speirs & Gibb*, 1 F. 604, we held that in the first place a man's not having read a rule which required him to wait twenty minutes before firing a second shot did not amount to misconduct, especially as the rules were not put in a convenient place for the workman to read; then we held that the workman not having read a rule which prescribed the period of twenty minutes, and having applied his own judgment to the question of how long he ought to wait before firing a second charge, he could not be charged with wilful misconduct because he had not anticipated an explosion, or because the fact that the first charge was still smouldering was unknown to him. I mention that case because it is an illustration of what I have been endeavouring to state, that there may be a question whether a particular line of action on the part of a workman amounts in law to misconduct—in other words, whether there is a *malus animus*, or at least a reckless disregard of consequences, which might be properly characterised as wilful misconduct. In the present case I hold that upon the facts stated the Sheriff was entitled to come to the conclusion that the injury was attributable to such misconduct.

LORD KINNEAR—I quite agree with your Lordship in the chair as to the way in which this case should be disposed of. I have, however, some difficulty in holding that there is no question except a question of fact raised for consideration. I agree that the case stated by the Sheriff does not on the face of it disclose a question of law. And I should agree also with what I understood Lord Adam to say, that I should not by my own unaided efforts have discovered the point of law which turns out to be that raised for our decision, but I think the counsel for the appellant stated quite distinctly what his point upon the construction of the statute was, and I think he was entirely within his right in making more specific than the Sheriff had done the ground of law on which he complained of the judgment, because it was a ground within the scope of the question put by the learned Sheriff, although the Sheriff's question shows only that his decision is challenged as involving a wrong construction of the statute without bringing out the specific ground on which it is said that his construction is erroneous. I think it is not correct to say as an absolute proposition that the question of wilful and serious misconduct is a question of pure fact and not a question of law. It may be a question of fact or a question of mixed fact and law according to the circumstances in which it is raised and to the precise question which is put about it. It is, of course, the duty of the arbitrator or the Sheriff to find every fact as to the man's conduct, and as to the circumstances in which he so conducted himself, on which the question of serious and wilful misconduct depends, and when he has ascertained all the facts which may be proved by testimony it may be that he may have to draw some additional inference of fact from the facts deponed to. When it is proved what the man has done it may be very well that there is a question whether he did it wilfully or not, and that may be a mere inference of fact from his conduct. But then when all the facts have been ascertained the Sheriff must go on to determine whether they amount to what the Act of Parliament calls wilful and serious misconduct, and in order to find that he has not to find an additional fact either as proved by testimony or by inference from what is so proved. He has to form his judgment as to the character of the facts proved, and to determine whether they answer to the description contained in that provision of the statute which in respect of serious and wilful misconduct deprives the workman of his right of compensation. Now, that I think is not a question of pure fact, if it be a question of fact at all; it is either law or mixed fact and law. The question he has to consider is whether the facts which he finds proved, which we must take from him as truly proved, are relevant to infer a charge of wilful and serious misconduct, and that involves the construction of the Act of Parliament on which the Sheriff must form his opinion, but as to which his opinion is not final but is subject to the review of this Court. If it appear on the face of the Sheriff's findings that he has come to his conclusion on a wrong construction of the statute the party aggrieved is certainly in my opinion entitled to come to this Court and to have the error corrected, and if a question of that kind be raised, then it is a question on which this Court is entitled, and I think bound, to express its opinion. I think further that there might be a question of law, and I think that question is quite correctly formulated by the learned Sheriff when he says that the question is whether the appellant's injury was attributable to his own serious and wilful misconduct "in the sense of section 1 (2) (c) of the Act of Parliament." I do not agree that it is a just criticism upon that mode of putting the question to say that the Act of Parliament does not use the words "serious and wilful misconduct" in any technical or special sense, but uses them as words of ordinary and common language. In the first place, because we cannot tell whether it is so or not till we have construed the statute; and in the next place, because when we have construed the statute we see these words are used by Parliament for the purpose of defining conditions in which in certain cases a workman's right to compensation is to be

admitted or rejected. Now, I think that is a question of construction of an Act of Parliament for the Court. I quite agree that the right way of construing that is to read it fairly, giving to these words their ordinary signification as used in ordinary language. But it is still a question of construction, and the series of cases which have been considered both here and in England on this Act of Parliament are quite enough to show that it is a question of construction which is not more simple but rather more difficult and more complicated than it would have been if the words in question had been technical words or used in some special sense defined by the Act of Parliament itself. Words of ordinary language are often not easier of construction than technical words, but more difficult because they are more indefinite. They are used with many different shades of meaning, and in order to see the precise signification which the statute intends them to bear it is necessary not to confine our attention to the words themselves but to read them in connection with their context, and accordingly it is quite certain that a great many questions have been raised as to the true signification of words of ordinary meaning in this Act of Parliament—questions on which the Courts have differed, and questions on which therefore we must assume that there was room for serious and difficult argument. The word "accident," for example, is a word of ordinary and usual language just as much as the words "serious and wilful misconduct," and yet the Courts have differed as to the meaning of it, and there can be no doubt that what it does mean is a question of law for the Court, because it has been entertained and decided by the House of Lords. So again the question what is the meaning of the words "on, in, or about" is a question for the Court. It is a question of construction, though these are words of as ordinary language as could be employed. Therefore it appears to me quite impossible to say as to any question of the meaning of words used by an Act of Parliament that it is a mere question of fact without seeing exactly what the point is which the appellant coming to this Court desires to have determined. Now, in this case, as I have followed the argument, the appellant's counsel stated a perfectly clear and specific objection to the Sheriff's construction of the statute, because the only ground of objection was that the Sheriff in construing the statute had failed to observe what the learned counsel represented as a fixed rule established by decision that in order to constitute serious and wilful misconduct you must have a breach of a well-known rule of a mine. It was said upon the authority of *M'Nicol* v. *Speirs*, 1 F. 604, in this Division, that what the statute requires is a breach of some known and specific rule. Now, I think that view is altogether unsound. I think nothing of the kind has been settled. The dicta on which the learned counsel relied must of course be read in reference to the particular cases in regard to which they were used. The question was whether a man was chargeable with wilful and serious misconduct because of his having transgressed a rule of the mine which was not published—which was not known to him—which was daily transgressed with the assent of the mine-owner, and of which he was held in fact to have been excusably ignorant. And therefore it was said that if wilful misconduct was to be proved by violation of a rule of a mine it must be a rule which the man knew or was bound to know.

On the argument submitted to us I am of opinion, and very clearly, that the objection to the Sheriff's judgment is quite unsound, and if that objection be disregarded then I am of opinion, with your Lordship, that there remains nothing else except the question whether the Sheriff's judgment is or is not right in fact, and that is not a question which can be raised upon appeal. But then there is no question, because his findings in fact are not objected to. It is not said he was wrong in fact on the evidence, and it is not said that he was wrong in the inference of fact that the man's conduct was wilful or serious. It is only said that he misconstrued a statute. I am of opinion that he did not. But I do not think that it is the best way to dispose of this question to dismiss the appeal without adverting to the only point of objection to the Sheriff's judgment that was stated to us. I think it the better way to consider the point and to decide that the appellant's argument has failed. I therefore agree that the appeal should be refused, but I do not think that it should be refused without answering the question put to us by the Sheriff.

The Court answered the question in the affirmative and dismissed the appeal with expenses.

Counsel for the Appellant—Watt, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

RAILWAYS AND CANALS VALUATION APPEAL COURT.

Monday, May 4.

(Before Lord Kincairney.)

WEST HIGHLAND RAILWAY COMPANY *v.* ASSESSOR OF RAILWAYS AND CANALS IN SCOTLAND.

Valuation Cases—Railways and Canals—Valuation Roll—Entry in Valuation Roll of Subject whose Liability to Local Assessment is Limited by Act of Parliament—Railway.

The West Highland Railway Guarantee Act 1896 (59 and 60 Vict. c. lviii.), sec. 2, enacts— . . . "The railway shall