county, and if that jurisdiction does not extend to licensing offences this can only be the result of some provision of the Licensing Statutes. But there is no evidence in the Licensing Act of 1903, or in its analogue of 1862, that any amendment was intended either for enlarging or abridging the existing jurisdictions of magistrates and justices of the peace. The words "as the case may be" are distributive words, and their effect according to known rules is to apply each subject to its proper predicate. Therefore if county justices had a concurrent jurisdiction with the magistrates of police burghs these words are sufficient for the purpose of applying the concurrent jurisdiction to the particular cases of licensing offences within the area over which that concurrent jurisdiction extends. It is not intended to treat counties as discontinuous from the burghs, or burghs as separate areas within which the justices of the county could have no concurrent jurisdiction with the magistrates. I mean that the language of the enactment is consistent with an intention not to disturb existing jurisdictions. Now, if that be so, it follows that the Justices of Fife still have within the area of the burgh of Buckhaven that concurrent jurisdiction with the magistrates which they had prior to the Licensing Act of 1903. By that statute the jurisdiction has not been taken away, and therefore when this case was brought before them the justices were not entitled to decline jurisdiction.

LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Find that His Majesty's justices of the peace of a county have concurrent jurisdiction along with the magistrates of a police burgh to try offences under the Licensing (Scotland) Act 1903 where such offences are committed within burgh by persons residing therein: Therefore answer the question in the case in the negative, sustain the appeal, and remit to the Justices to proceed," &c.

Counsel for the Appellant — Munro. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondent—C. D. Murray. Agents—Macpherson & Mackay, S.S.C.

COURT OF SESSION.

Tuesday, March 8.

SECOND DIVISION.

[Sheriff-Substitute at Hamilton.

LANARKSHIRE STEEL COMPANY, LIMITED *v.* POWELL.

Master and Servant—Workmen's Compensation Act 1897, *sec.* 1, *sub-secs.* (1) *and* (2) (c)—*Accident Arising out of or in Course of Employment—Disobedience to Orders Constituting Wilful Misconduct.*

Some boys employed in a steel manufactory were allowed an interval between two jobs. During this interval the boys, or some of them, set in motion some waggons on an inclined line of rails in the steel yard, and one of the boys was killed in endeavouring to sprag the moving waggons. The boy who was killed and the other boys had no occasion to go near the waggons, and had been repeatedly warned against doing so.

Held (1) that the accident did not arise "out of" the boy's employment within the meaning of section 1, subsection (1), of the Workmen's Compensation Act 1897; and (2) that it was attributable to his "serious and wilful misconduct" within the meaning of section 1, sub-section (2) (c), of the Act.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) enacts, section 1—"(1) If, in any employment to which this Act applies, personal injury by accident arising out of and in course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation. . . . (2) Provided that . . . (c) 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 be disallowed."

In an application under the Workmen's Compensation Act 1897, by Patrick Powell, labourer, Craigneuk, Motherwell, against the Lanarkshire Steel Company, Limited, in respect of the death of his son Patrick Joseph Powell, upon whom he was partially dependent, the Sheriff-Substitute at Hamilton (THOMSON) found that the claimant was entitled to compensation.

The Lanarkshire Steel Company, Limited, obtained a case in which it was stated that the following facts were admitted or proved:—"(1) The deceased Patrick Joseph Powell, aged fifteen, was in the employment of the respondents on 21st May 1903, when he met with an accident in their works which resulted in his death on the following day; (2) the deceased was employed in a rolling mill, and the work in connection with that mill having ceased about 3 a.m. he had occasion to resume work in another mill which lay some distance off in respondents' yard; (3) there was on this occasion, as there usually was, an interval of half-an-

hour or thereby between the stopping of the one mill and the starting of the other, during which interval boys like the deceased were not expected to work, but were allowed to sit down and rest; (4) between the two mills there are lines of rails on which railway waggons stand, the rails at the head of the incline being below the level of the adjacent ground, so that the tops of some of the waggons are on a level with the ground; (5) the gradient of the rails is steep, being 1 in 50 at first, and afterwards 1 in 100; (6) on account of this gradient waggons will not stand stationary unless they are trigged and snibbled, and if set in motion may run violently down the incline for nearly a quarter of a mile, involving serious danger to life and property; (7) on the night of the accident a number of waggons were standing on the rails; (8) in the interval of work above referred to, the deceased and some other boys, about his own age and doing the same work, got into one of the waggons and lay down; (9) after lying in the waggon for about five minutes the other boys felt the waggon beginning to move and at once jumped out, being afraid that something was wrong and that the waggons might dash down the incline; (10) the deceased had left the waggon before the other boys, but it is not proved how long before; (11) the waggons only moved a few feet and then came to rest; (12) they were stopped by the body of the deceased, who was found lying in front of the wheel of a waggon much further down the gradient than the one in which he and the other boys had been lying—five or six waggons being between; (13) the parents of the deceased deponed that he had stated to them in the infirmary, after the accident, that he had got into a waggon, that he had felt it beginning to move, that he jumped out and spragged the waggons; that in doing so he was struck by the sprag and thrown down on the rails and so sustained his injuries; (14) this statement was made to the parents and is true; (15) he and the other boys had no occasion to cross the line of rails, or to be near the waggons, and indeed had been repeatedly warned against doing so for fear of accidents, and they knew they were doing wrong if they did so."

In these circumstances the Sheriff-Substitute "found that the said accident arose out of and in the course of deceased's employment, and that said accident was not due to his serious and wilful misconduct, and that the claimant was entitled to £60 as compensation under the Act."

The questions of law for the opinion of the Court were, *inter alia*, as follows:—"(1) In view of the fact that the deceased's death was caused by his being struck by the sprag in the circumstances above set forth, and that this occurred at the respondents' lye, a place where he had been repeatedly warned not to go, did the said accident arise out of and in the course of his employment with the respondents? (3) Was the deceased, in the circumstances above set forth, guilty of serious and wilful misconduct?"

It was argued for the appellants that the accident did not arise out of the deceased's employment within the meaning of section 1, sub-section 1, of the Act, and that it was proved that the injury was attributable to the serious and wilful misconduct of the deceased within the meaning of section 1, sub-section 2 (*c*), of the Act.

It was argued by the respondent that the deceased was injured while in the appellants' service and while acting in their interest in endeavouring to sprag the waggons and so prevent probable damage, and that, on the authority of *Rees* v. *Thomas* [1899], 1 Q.B. 1015, where a workman, for the protection of his master's property, took upon himself, in an emergency, to do something outside his usual and general employment, an arbitrator was justified in finding that an accident occurring to him at such time arose out of and in the course of his employment.

LORD JUSTICE-CLERK—I am unable to hold that this accident arose out of the employment of the deceased. Giving the statute a wide meaning it might be held that he was "in the course of" his employment, because although he was resting in the works, that was under an arrangement that the boys were to have their rest at that time, and therefore it might be held that his work was continuous and that he was at the time in the course of his employment. But it is plain that the accident did not arise "out of" his employment, because the Sheriff has found as matter of fact that he had no occasion to cross the rails or to be near the waggons, and indeed had been repeatedly warned against doing so for fear of accident, and the boys knew they were doing wrong if they did so. Therefore they were doing wrong when they went on these waggons and were in a place where they had no business to be. But there is the further question whether he was guilty of serious and wilful misconduct in being there. I cannot hold anything else than that he was. I do not know what serious and wilful misconduct is if it be not being at a place in spite of repeated warnings—such warnings as led to this, that he knew that he was doing wrong if he went there.

LORD TRAYNER—I am of the same opinion. By a very liberal interpretation of the statute it might be held that the accident happened in the course of the employment of the deceased. The boy was allowed that rest between his two jobs, and therefore it may be held that the work was continuous. But the accident could not arise out of his employment, because it happened out of something and out of circumstances which were absolutely forbidden, and therefore not out of the work that he engaged in, or the thing that he was ordered to do or was paid for doing. But a more important question is the third—whether the boy was guilty of serious and wilful misconduct? Upon that matter the Sheriff's finding in fact is conclusive. The defenders (the appellants) had given this boy and others like him positive instructions that they were not to go across the line of rails or

near the waggons. They had been repeatedly warned against doing so for fear of accident, and they knew that in doing so they were doing wrong. I cannot figure anything more serious or wilful than positive and intentional disobedience to a strict and positive order. That is the character of the case here, and I must hold accordingly that the third question should be answered in the affirmative.

LORD MONCREIFF—I have with considerable regret come to the same conclusion. It is quite plain that this poor boy at the last was doing his best to remedy the mischief that was being done, to prevent further mischief, and to save his master's property. But I am satisfied that the judgment of the Sheriff is wrong. The answer to the question depends very much upon the point of view. The respondent asks us simply to look at the proximate cause of the accident, and the proximate cause of the accident was that the waggons were slipping down the incline, and that in order to stop them the boy tried to sprag them, and was injured in consequence. If that was all—if the boy had gone across the line to try to stop the waggons—it would have been a very meritorious act, and upon the authority of the case of *Rees* v. *Thomas* I think we might have been entitled to hold that what he did arose out of his employment, and that it was certainly not wilful misconduct to try to stop the waggons. But that was not the way of it. The accident resulted from the waggons on that line being set in motion. They were set in motion by some boys, one of whom was the boy who was killed. There is no doubt on the statement of facts found by the Sheriff that the boys had been warned not to go near the waggons for fear of accident, and it was found that they were wrong in doing so. That was the ultimate cause of the accident—a wrongful act on the part of the deceased boy in crossing the line, getting into the waggons, and setting them in motion, contrary to orders. Had this boy in getting out of the waggon been run over I do not see how there could be any doubt whatever that the accident did not occur in the course of or arise out of his employment, or that he had been guilty of serious and wilful misconduct in going into the waggons. The peculiarity of the case is that he made a meritorious attempt to repair the mischief done. But that cannot affect our judgment in this case.

LORD YOUNG was absent.

The Court answered the first question of law in the negative and the third question of law in the affirmative, sustained the appeal, and recalled the award of the arbitrator.

Counsel for the Appellants — Guthrie, K.C.—Hunter. Agents—Anderson & Chisholm, Solicitors.

Counsel for the Respondent—G. Watt, K.C. — J. A. Christie. Agents — St Clair Swanson & Manson, W.S.

Friday, December 16.

SECOND DIVISION.

[Lord Kincairney Ordinary.

THE ROSEWELL GAS COAL COMPANY, LIMITED *v.* M'VICAR.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *First Schedule* (14)—*Claim for Expenses Cannot be Set off by Employer against Weekly Payment Due to Workman.*

Held that by the Workmen's Compensation Act 1897, First Schedule (14), an employer is precluded from setting off against a weekly payment of compensation due by him to a workman expenses awarded to him against the workman in an application under the Act for a diminution of the weekly rate of payment.

The Workmen's Compensation Act 1897, First Schedule (14), provides—"A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same."

This was an action of suspension at the instance of the Rosewell Gas Coal Company, Limited against Daniel M'Vicar, miner, Kelty. The facts and the contentions of the parties are fully stated in the following opinion of the Lord Ordinary (KINCAIRNEY) of 26th July 1904:—"This is a suspension by the Rosewell Gas Coal Company, which carries on business in Fife, against Daniel M'Vicar, who is a miner in their employment.

"M'Vicar suffered injury on 12th April 1902, and on claiming compensation before the Sheriff the parties agreed on a weekly sum of 15s. 8d., and a memorandum of the agreement was registered under the Workmen's Compensation Act on 7th January 1903. Proceedings were taken by the Rose well Company under the provisions of the Act for diminution of the weekly rate of compensation. These proceedings were at first unsuccessful, and on 30th May 1903 the application of the Rosewell Company was dismissed, and the company was found liable in expenses, which were taxed at £5, 15s. 6d. But on a second application by the Rosewell Company the Sheriff-Substitute pronounced an interlocutor dated 10th October 1903, by which the weekly compensation was reduced to 10s. 8d. from 3rd July 1903. By this interlocutor the Rosewell Company were found entitled to one-half of their expenses, which half amounted as taxed to £13, 4s. 1d. There was thus a balance of expenses due to the Rosewell Company of £7, 8s. 7d.

"The complainers have paid the compensation of 15s. 8d. until 3rd July 1903, and have since paid the reduced compensation to 30th October 1903.

"They then intimated to M'Vicar that they would withhold payment of the com-