Counsel for the Petitioners (Respondents)—Horne. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

Counsel for the Respondents (Reclaimers)—Thomas Trotter. Agent—A. W. Gordon, Solicitor.

Friday, May 31.

SECOND DIVISION.

[Sheriff Court at Airdrie.

WALLACE *v.* GLENBOIG UNION FIRECLAY COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (2) (*c*)—"*Serious and Wilful Misconduct*" — "*Attributable*" — *Naked Lights in a Mine—Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 49, *Rule* 8.

A fireman finding gas in a fireclay pit put up a notice "Gas found in mine" on certain bratticing as he returned. He also nailed up two boards to prevent further passage into the mine, and warned an overman (his superior) of his discovery. The bratticing, which was for regulating the outlet and inlet of air, required to be repaired, and to do this it was necessary to take down and pass the boards. The overman, with three assistants, proceeded with naked lights to take down the boards preparatory to repairing the bratticing, and went as far as a pump about 19 feet beyond the notice. One of the assistants then, without the orders or knowledge of the overman, advanced with his naked light about 100 feet farther into the mine, when his lamp lighted the gas and caused an explosion which killed the overman. It was proved that while the bratticing remained unrepaired, as it was, there was no danger of the gas penetrating to the pump.

Held that the death of the overman was not attributable to his serious and wilful misconduct.

Praties v. *The Broxburn Oil Company, Limited*, February 26, 1907, 44 S.L.R. 408, *commented on, approved*, and *followed*.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, (2) (*c*), enacts — "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."

The Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), section 49, enacts, *inter alia*—"Rule 8. No lamp or light other than a locked safety lamp shall be allowed or used—(*a*) In any place in a mine in which there is likely to be any such quantity of inflammable gas as to render the use of naked lights dangerous; or (*b*) in any working approaching near a place in which there is likely to be an accumulation of inflammable gas. And when it is necessary to work the coal in any part of a ventilating district with safety lamps, it shall not be allowable to work the coal with naked lights in another part of the same ventilating district situated between the place where such lamps are being used and the return air-way."

The additional special rules of the Glenboig Union Fireclay Company, Limited, framed in pursuance of the Coal Mines Regulation Act 1887, *inter alia*, provided—"'Overman' means a person having charge of the mine below the surface, or any part thereof, and the workers employed therein. . . ."

"*Overman.*—6. Subject to the control and direction of the manager or undermanager, the whole operative details shall be under the care and charge of the overman. He shall see that the workers of every class in their several departments discharge their duties; and shall receive and attend to all reports made to him as to the state of repair of the air courses, machinery, mid-walls, trap-doors, roads, ventilating appliances, and working-places. He shall cause remedies to be provided where needed, and shall have power to hire and discharge workers.

"7. He shall see the general and special rules faithfully and vigorously enforced.

"67. Miners and other workers shall not proceed into travelling roads or working-places until it shall have been reported to them by the fireman, roadsman, or other person appointed for the purpose, that such travelling roads or working-places are safe to be entered.

"68. Until such report or intimation of safety is so made, no miners or other workers shall pass beyond the station appointed; and if no other place or station has been appointed, they shall always understand that the pit-head is the station at which they are required to wait the necessary examination and report.

"71. Miners are expressly forbidden to go into or improperly near any place throughout the whole mine where danger is known or suspected to exist. They are forbidden to continue at any part of a face where a sudden outburst of fire-damp shall happen, or where danger from any cause whatever shall apparently threaten, until the same shall have been examined and reported safe, or the impurity or other cause of danger removed.

"100. All workers are prohibited from entering or remaining in any place throughout the whole mine where not absolutely required by duty to be at the time; and on no account shall they proceed through any fence or pass any notice erected to indicate that danger exists."

This was a stated case on appeal from the Sheriff Court of Lanarkshire at Airdrie in an arbitration under the Workmen's Compensation Act 1897, brought by Mrs Mary Allan or Wallace, Station Cottages, Livingstone, widow of Joseph Wallace, colliery overman, as an individual and as tutor for her pupil children, against the

Glenboig Union Fireclay Company, Limited, who appealed.

The following were the *facts* as stated by the Sheriff-Substitute (GLEGG) on appeal:—"1. The *locus* of the accident is a cross-cut mine in a fireclay pit.

"2. On proceeding along the mine from the pit bottom, and about 760 yards therefrom, there is met a wooden frame 'A' carrying two wheels, over which the haulage rope passes, 7 feet 6 inches farther on there is a similar frame 'B,' 11 feet 6 inches farther there is a pump, and beyond the pump the mine extends about 120 feet to the working face.

"3. The mine dips to the pump at 1 in 12, and rises from the pump to the face at 1 in 4.

"4. The bratticing for separating the inlet and outlet of air is continued to within a short distance of the working face.

"5. On the night of 1st June 1906 some repairs to the pump had been finished, but a space of about 8 feet of the bratticing which had been removed to effect these repairs had not been replaced.

"6. On the morning of 2nd June the deceased Wallace, who was overman in that section of the pit and in charge of the repairs, was to fill in the hole in the bratticing, and took for that purpose three men, Gilson, Paterson, and a Pole called Simon Peter.

"7. Prior to the commencement of work on said morning the fireman John Beattie had inspected said mine and found gas at a point about 115 feet from the pump towards the face.

"8. Beattie duly marked this, and on returning towards the pit bottom marked 'Gas found in mine' on the frame 'A,' and nailed two boards across so as to prevent passage farther into the mine.

"9. He proceeded to the pit bottom on his way to enter this in the report book.

"10. He did not stop the workmen who were then going to their work at various places on the return-air course between the frame 'A' and the pit bottom from proceeding to their places, but he warned Wallace, whom he met, that he had found gas in the mine, and said that no one was to go beyond the fence he had put up till his return.

"11. It does not appear that Beattie led Wallace to understand that the gas was likely to reach out as far as the pump or near it while the ventilation remained as it was.

"12. Beattie had no authority to prevent Wallace, who was his superior, from passing this fence, and to perform the necessary work of repairing the bratticing Wallace required to take down and pass the fence and to take others with him.

"13. Wallace with his three assistants proceeded, with naked lights, taking down the fence on their way to the pump, when Gilson and Paterson were sent back towards the pit bottom for tools or materials, leaving Wallace and Simon Peter at the pump.

"14. A few minutes thereafter, and before anything had been done to close the hole in the bratticing, an explosion occurred, by which Simon Peter was severely burned, and Wallace was killed by being dashed against the frame 'A,' but was not burnt.

"15. Simon Peter had proceeded up the mine towards the face with his naked light till about 18 feet from the face, when his lamp ignited the gas.

"16. Wallace had in the meantime gone towards the pit bottom, and was somewhere between the two frames when he was caught by the force of the explosion.

"17. The pit is not a fiery one, though gas is occasionally found in it, the last occasion being 14th May 1906, and is in use to be worked with naked lights.

"18. On the occasion in question Wallace had been told by the manager, as a precautionary measure, though he was not then aware that Beattie had found gas, to take safety lamps with him, and Wallace had taken two, which were found hanging at the pump but had not been used.

"19. While the bratticing remained unrepaired at the pump, there was no danger of the gas actually in the mine, as shown by the *locus* of the ignition, finding its way to the pump, and the men were in no danger in using naked lights there until they began to close up the hole.

"20. The gas, being lighter than air, ascended the mine, and consequently accumulated at the working face, and unless it had enormously increased in volume would not extend as far as the pump.

"21. When the hole in the bratticing was closed, the air current, which had been making a short circuit through it, would be forced past the working face, and would sweep the gas along the return side of the bratticing, and thus out of the mine.

"22. When the hole was so far closed as to send part of the air current past the working face it would have been dangerous to use naked lights, and it would have been obligatory to have extinguished these and to have used the safety lamps.

"23. When the air current was restored all the workers on the return air course between the frame 'A' and the pit bottom would also have been in danger, and it was Beattie's intention to have them removed after signing the report book.

"24. Beattie considered that it was unnecessary to remove them at once on his finding gas, as this danger would not arise till the bratticing was repaired.

"25. It was admitted that Simon Peter, who was not called, was ignorant of English, and was unable to give any explanation of his going up the mine.

"26. It is not proved that Wallace sent him up the mine, or that Wallace knew that he had gone there.

"27. The general and special rules were duly posted, and Wallace was acquainted with them.

"28. I also found that it would have been prudent of Wallace to have regarded General Rule VIII of the Coal Mines Regulation Act as applying to the mine at and near the pump, and to have prevented workers taking naked lights there, but the

application of the rule was a matter of opinion, and it was not proved that Wallace disregarded the rule.

"29. Wallace was not in breach of any other rule."

On these facts the Sheriff-Substitute (GLEGG) found in law—"(1) Wallace was fatally injured by accident arising out of and in course of the employment; (2) his injury was not attributable to his serious and wilful misconduct. I assessed the compensation payable by defenders at the agreed-on amount of £290, 10s. sterling. I awarded the pursuers Mrs Mary Allan or Wallace £100, 10s., and Mary Arthur Wallace, Margaret M'Allister Wallace, Eva Wallace, John Allan Wallace, and Joseph Wallace each £38, and directed the sums awarded to the children to be invested in the Post-Office Savings Bank in name of the Sheriff-Clerk-Depute of Airdrie for their behoof, and found the pursuers entitled to expenses."

The question of law for the opinion of the Court was:—"Was the injury to and the death of the said Joseph Wallace attributable to his serious and wilful misconduct?"

The defenders (appellants) argued—The overman was in breach of his duty as defined in Special Rules 6, 7, 67, 68, 71, 100. These rules were duly published. It was serious and wilful misconduct for him to go past the barrier with a naked light, and, in any case, in allowing to go past or taking with him a workman, it being his duty to see that no workman went past. Any breach of a properly published rule, at least if it was a rule for safety and not merely for convenience, was serious and wilful misconduct—*Dobson* v. *The United Collieries, Limited*, December 16, 1905, 8 F. 241, 43 S.L.R. 260. The decision in *Johnson* v. *Marshall, Sons, & Company, Limited* [1906], A.C. 409, which drew a distinction between rules for convenience and rules for safety did not conflict with *Dobson*. It was not competent to inquire whether there was or was not safety immediately beyond the barrier

Argued for pursuer (respondent)—Articles 28 and 29 amounted to a finding in fact by the arbitrator that there was no breach of any rule of the mine. The overman, in disregarding the notice of the fireman and going beyond the barrier, was not in breach of any rule. Rule 100 had no application to the overman. Nor was he in breach of any rule in taking an assistant with him. Even assuming he was rash or negligent, that was not equivalent to serious and wilful misconduct. In any case, the accident was not "attributable" to anything done by the overman, for the arbitrator had found that there was no danger in going as far as the pump.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the respondents in the arbitration have failed to show ground for answering the question in this appeal in the affirmative. The Sheriff-Substitute has stated the facts of the case very clearly and fully. It appears that the deceased Wallace, who was overman, and the Pole Peter were at a place where it was quite safe to carry naked lights; that the deceased was alone with Peter; that Peter moved further forward, and thus caused the explosion by his naked light firing an explosive mixture. This he did when Wallace had gone towards the pit bottom. It was not proved that Peter went forward as he did by any instructions from the deceased, nor that the deceased had any knowledge of his going forward. In these circumstances the arbitrator held in law that the deceased's injury was not caused by his serious and wilful misconduct. These are the words of the statute, and are used obviously to make sure that a workman suffering from an accident shall not lose his claim to compensation merely because his conduct may not have been absolutely prudent, or strictly in accordance with the rules imposed upon him. The act must be both a wilful act of misconduct and must be not trivial or doubtful as regards quality, but must be serious. I cannot hold that the Sheriff was wrong in law in deciding that the circumstances of this case do not disclose serious and wilful misconduct, and therefore I would move your Lordships to answer the question in the negative.

LORD STORMONTH DARLING—A fatal accident occurred on 2nd June 1906 to an overman named Wallace in one section of a fireclay pit, and in the arbitration which followed between his dependants and the employers the latter stated the plea that the claim should be disallowed in respect that the injury was attributable to Wallace's serious and wilful misconduct. Sheriff Glegg, who heard the case as arbiter, found that the injury arose out of and in the course of the employment; (2) that it was not attributable to Wallace's serious and wilful misconduct; and he assessed the compensation at an agreed-on amount. The question of law submitted to us is whether the second of these findings is correct.

Now, in order to justify an affirmative answer to the question, it might be enough to say that the arbitrator being final on the facts, a finding by him which negatives the contention of serious and wilful misconduct ought not to be overturned, provided the arbitrator had any evidence at all to support his judgment. But as I not only think that there was such evidence, but also that his conclusion was the right one in the circumstances, I will shortly state my reasons for so thinking.

The defence that a workman (or his representatives), otherwise entitled to statutory compensation, has lost his right to it by his own "serious and wilful misconduct" is a defence which requires proof, and the onus of proof undoubtedly lies upon the employer. The first thing required is that the employer must prove that the injury was "attributable" to the misconduct; the second is that he must prove it to have

been "serious and wilful," in the sense of being something far beyond mere negligence, and more than bare misconduct. If there is any reasonable doubt about these two matters, the proof fails, and the rule of the statute (to which this provision forms an exception) must have its way. I think the case of *Johnson* v. *Marshall, Sons, & Company, Limited*, in the House of Lords, [1906] A.C. 409, settles all that, and settles it in a way which is quite consistent with the previous decision of seven judges of this Court in *Dobson* v. *United Collieries, Limited*, [1905] 8 F. 241. I concurred in that decision, and am very far from suggesting any doubt of its soundness, even if I were not bound by it, which I am. But the feature of that case was that it was a naked light carried by the workman which ignited a cartridge, and so caused the injury for which he claimed compensation, and the sole question was whether his ignorance of the duly published rule prohibiting such conduct, and his following a practice in breach of that rule, had the effect of excusing him. We held that it had not that effect, and so that his injury was attributable to his own serious and wilful misconduct. But I fail to see how that advances the argument where the question is, as here, not whether the workman was excusably or inexcusably ignorant of a rule, but whether he himself broke any rule at all, to the breach of which his death was *directly* attributable. I am justified in using the adverb "directly" as qualifying the statutory adjective "attributable," because I find in a case in the First Division which has been reported since the debate in the present case—*Broxburn Oil Company* v. *Praties*, 44 S.L.R. 408—the Lord President, while adhering to the language which he used in *Dobson's* case, expands that language by adding the words "and the accident (which happens in consequence) is directly attributable to the breaking of the rules." His Lordship accordingly takes the view that the man who was killed did "do a thing which was rash, and which in a civil case would have amounted to contributory negligence but is not wilful misconduct." Lord M'Laren in the same case adopts as the test of serious and wilful misconduct (at least in certain circumstances) whether moral blame could have been imputed to the workman, and, holding that there was no moral blame, agrees that he does not come within the scope of the statutory exception.

Now, I say the same here. I say that Wallace's death was not directly attributable to the breaking *by him* of any rule of the pit, but to the wandering away of the Pole Simon Peter with a naked light till he got within 18 feet from the face, when his lamp ignited the gas, and so caused the explosion which killed Wallace. The Sheriff finds (article 28 of the case)—and he is final on fact—that "it would have been prudent of Wallace to have regarded General Rule 8 of the Coal Mines Regulation Act as applying to the mine at or near the pump, and to have prevented workers taking naked lights there, but the application of the rule was a matter of opinion, and it was not proved that Wallace disregarded the rule"; and (article 29) that "Wallace was not in breach of any other rule." Now what is that but to say that the worst that can be charged against Wallace is that he perhaps—to use the Lord President's words in the *Broxburn* case—"did do a thing that was rash . . . but was not wilful misconduct." If moral blame be sometimes the test of serious and wilful misconduct, where was the moral blame of what he did?

The wording of General Rule 8 makes the danger of using naked lights so much a matter of opinion that I cannot doubt that the Sheriff was within his right in holding, as a matter of proof, that it was not proved that Wallace disregarded the rule. The fireman (Beattie) had no doubt found gas in the mine, and had marked a notice to that effect on the frame A, and had told Wallace, when he met him, that no one was to go beyond the two boards which he had put up there as a fence till his return. But Beattie did not think it necessary himself to stop the workmen who were then going to their work at various places on the return air course between the frame A and the pit bottom, or to prevent them from proceeding to their places (article 10), and he did not lead Wallace to understand that the gas was likely to reach out as far as the pump or near it while the ventilation remained as it was (article 11). Now, the explosion occurred from the Pole's lamp igniting the gas before anything had been done to close the hole in the bratticing (article 14), and it is found as a matter of fact that the men were in no danger in using naked lights *at the pump* until they began to close up the hole (article 19). It must be remembered that Wallace, who was overman in that section of the pit, was in charge of the repairs to the pump, in connection with which the hole (of about 8 feet) in the bratticing had been made, and it was to fill in this hole that he had taken 3 men, including Simon Peter, with him. There was, therefore, nothing wrong in his taking these men past Beattie's fence and on to the pump. Indeed, it is found as matter of fact (article 12) that he required to take down and pass this fence and to take others with him in order to perform the necessary work of repairing the bratticing. The Pole was wrong, as the event proved, in wandering up the mine to the face with a naked light. But Wallace did not send him up the mine, and did not know that he had gone there (article 26), and he was not of course to blame for Simon Peter being a Pole, ignorant of English, and unable to give any explanation of why he went up the mine (article 25). If anybody is to suffer for his ignorance of English, it must surely be those who employed him.

But then it was urged, strangely enough, by those very employers that, though it was not any act of Wallace's own which caused the explosion, though he was per-

fectly safe in being where he was (between the two frames) at the time of the explosion —though, in short, his injury and death was in no way attributable to his own serious and wilful misconduct — still, in some roundabout way, he was to blame for allowing Simon Peter to be where he was. I asked Mr Hunter, as counsel for the employers, on what rule he relied as fixing that duty on Wallace the overman, and his answer was to point to Special Rules Nos. 7, 67, 71, and 100. Rule No. 7 merely requires that the overman "shall see the General and Special Rules faithfully and vigorously enforced." But the overman cannot be at more places than one at a time, or stand over each individual worker who has to obey the rules. Rule 67 forbids miners and other workers to proceed into travelling roads or working-places until it shall have been reported to them by certain officials that such places are safe to be entered. Rule 71 (speaking generally) contains a similar prohibition against miners going into or improperly near any place throughout the whole mine where danger is known or suspected to exist. And Rule 100 is to the same effect, although it is more specific than Rules 67 and 71 in providing that workers of all descriptions are not to proceed through any fence or pass any notice erected to indicate that danger exists. But none of these rules can apply to Wallace and his three assistants in passing the fence erected by Beattie, when it is found as a fact in the case that to perform the necessary work of repairing the bratticing Wallace "required to take down and pass the fence, and to take others with him," and that, so long as they remained at or near the pump, they were perfectly safe in using naked lights until they began to close up the hole. The whole *gravamen*, therefore, of this charge against Wallace resolves itself into the Pole having been allowed—or rather not forcibly prevented — from passing up the mine towards the face with a naked light when Wallace's back was turned. A more slender or captious ground on which to base a charge of even bare misconduct against Wallace I cannot conceive, and the charge becomes, in my opinion, grossly unreasonable when it is carried so far as to be not merely misconduct but "serious and wilful misconduct." I take leave to say that nothing at all approaching it has ever been sustained since the Act was passed. It is no light matter to bring a charge of that kind against a superior workman in a pit, and in my opinion it cannot be justified unless the employer can bring clear proof of a deliberate infraction by the workman so accused of some general or special rule of the pit. Without attempting any precise or exhaustive definition of what will constitute "serious and wilful misconduct," I think it is at least safe to say that it must be something positive and personal.

It was said in the course of the argument that the fireman (Beattie) was the proper person to judge of the safety of the mine as regards the presence of gas. I do not recapitulate the findings of fact which show that even Beattie did not consider it necessary to remove the men at once on his finding gas, as no danger would arise till the repair of the bratticing was begun. But on this matter I am content to rely on the Sheriff's finding in fact that Beattie had no authority, even if he had desired, to prevent Wallace, who was his superior in the mine, from passing the fence which he had erected for the purpose of performing a necessary work. I am, therefore, for answering the question of law in the negative, and so for upholding the Sheriff-Substitute's decision.

LORD LOW and LORD ARDWALL concurred.

The Court answered the question of law in the negative.

Counsel for the Pursuer (Respondent)—G. Watt, K.C.—Munro. Agent—W. R. Tullo, S.S.C.

Counsel for the Defenders (Appellants)—Hunter, K.C.—Horne. Agents—Anderson & Chisholm, Solicitors.

HIGH COURT OF JUSTICIARY.

Friday, May 31.

(Before the Lord Justice-General, Lord M'Laren, and Lord Kinnear.)

STOTT & SHAW *v.* RENTON.

Justiciary Cases — Betting — Circular Inviting Persons to Communicate to a Given Address as to Betting—"No Callers"—No Statement in Circular that Bets would be Accepted at Address Given—Betting Act 1853 (16 *and* 17 *Vict. cap.* 119), *sec.* 1—*Betting Act* 1874 (37 *Vict. cap.* 15), *sec.* 3 (3).

A firm of bookmakers issued circulars inviting persons to bet and containing an address to which communications might be sent, but also intimating that business was done only by letter or telegram, "no callers." The circulars contained no intimation that bets would be accepted at the address given. *Held* that there being an invitation to bet, and an address given for correspondence relative thereto, it was immaterial that there was no mention of the precise place where the bet would be accepted, and that therefore an offence had been committed within the meaning of the Betting Acts.

Cox v. *Andrews*, L.R., 1883, 12 Q.B.D. 126; and *Hawk* v. *Mackenzie*, [1902] 2 K.B. 225, *commented on.*

The Betting Act 1853 (16 and 17 Vict. cap. 119), which by section 20 was not to apply to Scotland, but was subsequently applied by the Betting Act 1874, sec. 4, in section 1, enacts — "No house, office, room, or other place shall be opened, kept, or