The Sheriff has found that the injuries of which this man complains were attributable to his serious and wilful misconduct. That is a finding in fact, and we have no jurisdiction to review the Sheriff's judgment upon a mere question of fact. But it has been held, and I do not myself doubt, that the question whether the facts found by the Sheriff will support his decision as to the liability of the employer for compensation is within the jurisdiction of the Court of Appeal. But then, I think, considering the statement that the Sheriff has given us here, there is no fault in point of law in his decision.

I concede that in order to bring the case within the statutory disability it is not enough to show that a workman has been negligent or that he has done something thoughtlessly that he ought not to have done. It is necessary to show that the misconduct was wilful, which implies, in my opinion, that the thing was done, not by mere inadvertence, but with intention to do it. Now in this case the special rules of the mine laid upon the bottomer at the mid-working the duty of keeping the gate which fenced the working from the shaft closed until the cage had been brought to the level of the working, so that it might be safely entered from the working. It is plain upon the Sheriff's statement that this man deliberately broke that rule, because he opened the gate without ascertaining that the cage had stopped.

Now as to the element of wilfulness in that, I do not see that there can be any doubt upon the statement that what the man did was wilful. It is not suggested that the gate fell open by accident. He opened it on purpose without performing the duty of ascertaining in the first place that the cage was stopped. I agree with the Sheriff that that justified a finding that there was a deliberate breach of the duty laid upon the man by the special rules of the mine. I think it was misconduct and serious misconduct, because it was a breach of a rule intended for the safety of life and limb. The seriousness is obvious enough from the accident which followed, because he opened the gate and drove a hutch into the shaft, so that the hutch and he following it fell down the shaft instead of entering the cage. The consequences to himself unfortunately are serious, and they might have been serious to others in the shaft below. But to the question whether it was or was not a wilful act in the sense of the statute the answer is plain. It was, because it was a deliberate breach of a rule which he knew and which he ought to have observed.

LORD MACKENZIE—I agree with your Lordships. I think that the facts found, and especially the facts contained in the 13th paragraph of the case, were amply sufficient to justify the learned Sheriff-Substitute in reaching the conclusions that he did.

At the close of the advising—

LORD M'LAREN—I may add that, if it is necessary that we should consider whether the Sheriff's finding is correct, I should agree with what Lord Kinnear has said. I think that the act of the man George was serious and wilful misconduct; but I think it is sufficient for me to say that there were materials from which the arbitrator could draw that conclusion.

The LORD PRESIDENT and LORD PEARSON were absent.

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

Counsel for Pursuer (Appellant)—Scott Dickson, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Defenders (Respondents)—Hunter, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Friday, May 29.

FIRST DIVISION.

BORLAND AND OTHERS, PETITIONERS.

Charitable and Educational Trusts — Bursary — Alteration of Scheme — Extension — Nobile Officium.

A testator left a sum to trustees to found a bursary for young men, being natives of Dunbar, attending college with a view to becoming ministers of the Church of Scotland or missionaries. The trustees, on the narrative that although full publicity had been given to the bursary for a number of years no applications for it had ever been received, petitioned the Court for approval of a scheme under which the bursary might, failing candidates born in Dunbar, be conferred on applicants born within the Presbytery of Dunbar, who should in other respects fulfil the conditions of the bequest, and, failing such applicants, to any applicant of whom they might approve without condition as to nativity so long as he was otherwise qualified.

The Court *granted* the petition.

James Simson, accountant, Edinburgh, died leaving a trust disposition and settlement, dated 2nd November 1869, which contained the following bequest:—"To the minister and kirk session of the Parish Church of Dunbar the sum of Five hundred and sixty pounds sterling, which shall be laid out by them on heritable security at interest, and the annual rent or interest thereof applied as a bursary, to be called the 'Simson Bursary,' to be granted by said minister and kirk session to any deserving young man, being a native of Dunbar, attending college in the prospect of becoming a minister of the Established Church of Scotland or as a missionary going abroad, said bursary to be continued to each recipient for a period not exceeding

three years. And I further declare that it shall be in the power of said minister and kirk session, if they shall see good cause, to withhold or withdraw the grant of said bursary to any young man that they may have selected if his conduct does not meet their approbation."

The trustees of the bursary received payment of the bequest in 1888. The annual value of the bursary was about £21.

On 20th November 1907 the Rev. William Borland and others, being the minister and kirk session of Dunbar, brought the present petition for alteration of the conditions under which they administered the bursary.

The petition stated—"3. Full publicity has been given to the bursary for some years past. In particular, since 1901 it has been repeatedly intimated in the public schools of the parish, either by notice posted up on the walls thereof or by the schoolmasters, who have informed their scholars of the bursary; and it has also been intimated in the local newspapers and in the calendars of all the Scottish Universities. No application for it, however, has ever been made. 4. It is now the unanimous feeling of the petitioners that the wish of the testator, as expressed in his will, would be better given effect to by enlarging the conditions of the bursary, while providing that in no case should the application of a person duly qualified in the terms of the will be affected by the provisions of any such enlargement of the existing conditions. The change which the petitioners desire to see made in the conditions of the bursary is to add to the present terms of the scheme the following provisions, viz.—'In the event of no applicant fully qualified in terms of the will claiming the bursary after due advertisement on or before the 1st day of September in any year, the minister and kirk session shall be empowered to grant the free income of that year, or any portion thereof, to any applicant born within the bounds of the Presbytery of Dunbar who shall in other respects fulfil the conditions of the testator's settlement, and, failing such an applicant, to any applicant of whom they may approve without condition as to nativity so long as he is otherwise qualified in terms of the will.'"

On 17th December 1907 the Court remitted to Lord Kinross, advocate, to inquire into the facts stated in the petition and to report.

In his report Lord Kinross stated:—"During the whole period since 1888 no applicant has presented himself as a candidate for the bursary. It appears, from the facts elicited by the reporter as the result of inquiry, that since the year 1888 the managers of the bursary have been on the outlook for possible applicants, and in particular, since about the year 1898, the headmaster of the Burgh Schools, Dunbar, has called the attention of eligible pupils under his charge to the existence of the bursary. In 1903 a notice appeared in the news portion of the *Dunbar Parish Magazine*, giving complete information as to its terms. It has been advertised once in the *Haddingtonshire Advertiser*, and also in the *Haddingtonshire Courier* during each year of the years 1905, 1906, 1907. It has also been intimated in the calendars of the Scotch Universities from time to time.

"The reporter has been informed that the managers of another bequest, viz., The Clark Bursary, for the 'purpose of founding a bursary in the College of Edinburgh to assist in the education of a student who is a native of Dunbar parish, and intends to become a minister of the gospel,' have no record between 1875 (the date of commencement of the bursary) and the present date of any application at any time from a qualified candidate, and that since 1892, in spite of regular advertisement, there has been no such application.

"The petitioners' proposal is that they should be permitted, failing any application by a native of Dunbar, to elect to the bursary any candidate born within the Presbytery of Dunbar, who otherwise was qualified. The reporter can see no objection to the reasonableness of such a proposal, but considers it to be a matter for the determination of the Court whether in the circumstances it is competent. The reporter begs to remind the Court of the case of *The Grigor Medical Bursary Fund Trustees*, 5 Fr. 1143.

"This case seems to the reporter to establish that before the Court, in the exercise of its *nobile officium*, will consider the advisability of introducing a substantial variation upon the bequest of a testator, it must be convinced that such bequest is unworkable in its original form. The reporter thinks it is for the Court to consider whether, upon the averments of the petitioners, the onus of showing the scheme to be impracticable has been discharged. The reporter thinks it right to point out that in the case of *The Grigor Medical Bursary Trustees* the Court was asked to extend the scheme upon an averment 'that there was a difficulty' in obtaining candidates on existing conditions, and that the petitioners here being able to aver that during the whole period of twenty years no candidate has ever come forward as a claimant, may be in a more favourable position.

"In view of the case of *Mailler's Trustees* v. *Allan*, 7 F. 326, where the Court refused to extend the benefits of a bequest, destined to those born in two named counties, to persons born outside those counties, the reporter is doubtful whether an extension of the present scheme to those born within the wider area of the Presbytery of Dunbar can be said to properly fall within the expressed wishes of the testator. The reporter accordingly has thought it right to raise this point also."

Argued for petitioners—The reporter was satisfied that in spite of every effort to find suitable candidates no application for the bursary had ever been made. In both of the cases cited by the reporter there was only a "difficulty" in finding candidates, while here there was an "impossibility."

On 26th May 1908 the Court (LORD M'LAREN, LORD KINNEAR, and LORD MACKENZIE), without delivering opinions, ordained the petitioners to lodge in process a copy of the scheme as proposed in the petition, and on this being done pronounced, on 29th May 1908, the following interlocutor:—

"Approve of said report and of the said scheme: Authorise and empower the petitioners to administer the bequest under their charge in accordance with the provisions contained in the scheme."

Counsel for Petitioners—R. S. Horne. Agent—R. Ainslie Brown, S.S.C.

Friday, May 29.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

THE HORSLEY LINE, LIMITED *v.* ROECHLING BROTHERS.

Ship—Charter-Party—Lay Days—Commencement—Arrival of Vessel at Port.

A charter-party provided that a steamship should "proceed to Middlesborough and there load a . . . cargo and proceed to Savona . . . and there deliver the same . . . The reckoning for loading to commence when the steamer is berthed at the respective wharves and notice given that she is ready to receive cargo. Time for discharging to commence on being reported at the Custom House."

The steamship anchored in the roads at Savona at 8·40 a.m. on a Tuesday, was reported at the Custom House at 3 p.m. of the same day, lay in the roads until 3·25 p.m. on Saturday, when she entered the harbour and was moored to a quay. The roads were the ordinary place of anchorage for vessels waiting room in the harbour, where alone discharging and loading took place, and were outside the geographical limits of what was ordinarily known as the port of Savona.

In an action for demurrage at the instance of the owners of the vessel, in which they further averred that, according to the custom of the port, vessels on arrival in the roads were reported at the Custom House, and were allotted berths in the harbour according to the order of reporting—*held*, subject to the pursuers proving their averment as to the custom of the port, that the lay days commenced to run at 3 p.m. on Tuesday, that being the time when she was reported at the Custom House.

Ship—Charter-Party—Lay Days—Demurrage—Calculation—Whole Days or Fractions of Days.

A charter-party provided "cargo to be received at the port of discharge at the rate of 400 tons per weather working day. . . . Demurrage at the rate of £25 per running day . . . ." The cargo consisted of 2850 tons.

Held (1) that the charterers were entitled only to lay days amounting to seven days and three hours, and not, as they contended, to eight complete days; (2) the vessel having been on demurrage for six days and one and a half hours of a seventh day, that the owners were entitled to be paid demurrage for six days and one and a half hours, and not, as they contended, for seven complete days.

Ship—Charter-Party—Exception—Hands Striking Work.

A charter-party, entered into in January 1907, provided that the charterers were to receive the cargo at the port of discharge at a certain rate per day, "except in cases of riot, or any hands striking work, or accidents to machinery which may impede the ordinary loading and discharging of the steamer."

The vessel on arriving at the port of discharge was moored end on to the quay for a number of days, and no cargo was discharged until she obtained a berth alongside of a quay. This was due to the fact that the presidents of the two co-operative societies of labour at the port had published in November 1906 a declaration, regularly acted upon and widely known, that steamers were not to be discharged while lying end on to a quay.

Held that the charterers were under an obligation to receive cargo during the days in which the vessel was lying end on to the quay, as the clause of exception did not apply to the circumstances of the case.

The Horsley Line, Limited (owners of the s.s. "Dalmally"), in January 1907 chartered the s.s. "Dalmally" to Roechling Brothers.

The charter-party bore—"That the said steamship . . . shall, after discharging present cargo, with all convenient speed proceed to Middlesbrough and there load . . . a full and complete cargo . . . and being so loaded, shall with all convenient speed proceed to Savona or Genoa, as ordered on signing bills of lading, and there deliver the same to the order of the said freighters or their assigns. . . . .

"Steamer not to be responsible for any loss, damage, or delay to cargo, caused by strikes, lockouts, and / or combinations of officers, engineers, crew, dock labourers, stevedores, lightermen, or any other hands or agencies connected with the loading or discharging of the steamer. . . . .

"The cargo to be supplied at the port of loading as fast as the steamer can stow same, and received at the port of discharge at the rate of 400 tons per weather working day (Sundays and holidays excepted) except in cases of riot, or any hands striking work, or accidents to machinery which may impede the ordinary loading and discharging of the steamer. The reckoning for loading