anyone in his senses would have begun a quarry at the outcrop of the strata he was proposing to work.

On the whole matter my opinion is that the pursuers are entitled to succeed in their action, on the ground that sandstone is not a mineral within the meaning of the 70th section, and even should it be held that it is, I still am of opinion that the pursuers are entitled to succeed, on the ground that the defenders were not entitled, under the pretence of seeking for sandstone, to carry on a system of mining in the mixed material under the subsoil and to remove it, with the result of injuring the surface of the land belonging to the pursuers. I therefore am of opinion that the interlocutor of the Lord Ordinary ought to be recalled and decree granted in terms of the conclusions of the summons.

LORD JUSTICE-CLERK—It is plain that the term mineral has reference, not to the nature of the substance, but to the place from which it is taken. In ordinary language "mineral" has for a long time signified material of some value, other than ordinary earthy matter, taken out of the ground by underground working as distinguished from quarrying against an exposed face. To my mind two questions only arise here—(1) Is the work in question of a mining character; and (2), Is what is being taken out an ordinary substance—a well-known mineral in the sense in which that term has been used hitherto? These two questions, as it seems to me, must be answered in the affirmative. That the pursuers were recovering the material by means of a mine is not disputed; it is only alleged that this was done in bad faith. I agree with what Lord Low has said on that matter. As regards the second question, we have so complete and valuable a digest of the decisions in the Lord Ordinary's opinion, that I consider it quite unnecessary to do more than to say that his opinion has my entire concurrence. I could add nothing to it which would, as I think, be useful. I only wish to add this, that I cannot concur in the view that mineral includes what may come to be valuable as a mercantile product although it was not of value when the reservation was made. It would, as I think, be strange, if a substance which was not intended to be included in a reservation should be held to be included because at some later date it was found to have increased in value in consequence of some scientific discovery or industrial invention. Such a view might, I think, lead to very anomalous results.

The Court (Lord Ardwall dissenting) adhered.

Counsel for Pursuers and Reclaimers—Cooper, K.C.—Macmillan. Agent—James Watson, S.S.C.

Counsel for Defenders and Respondents—Dean of Faculty (Campbell, K.C.)—C. H. Brown. Agents—Smith & Watt, W.S.

Tuesday, November 24.

SECOND DIVISION.

[Sheriff Court at Kirkcaldy.

BLACK *v.* THE FIFE COAL COMPANY, LIMITED.

Reparation—Master and Servant—Negligence—Common Law—Failure to Provide Competent Servants—Coal Mine.

In an action against his employers by the widow and children of a miner, who was killed while at work in a coal mine by an outbreak of carbon monoxide gas, evidence was led that the mine was ventilated by an air current led past the seat of an old fire which, though it had been built up, was still smouldering; that such a fire might give off carbon monoxide gas, a comparatively rare gas, of which a small percentage in the atmosphere would prove fatal; that the defenders had experience in another colliery of carbon monoxide gas being generated by such a fire and resulting in the death of several workmen; that they had thereafter issued to the managers and officials in that colliery a pamphlet instructing them as to the methods to be employed in dealing with such fires, and in detecting the presence of carbon monoxide gas; that the manager, under-manager, and firemen in the mine where the deceased was killed, though they possessed the qualifications and experience usually required of persons holding such offices, had no experience of carbon monoxide gas; that though these officials were aware during two days preceding the accident of circumstances which might indicate the presence of gas in the mine, they did not withdraw the workmen or take any steps to avoid injury to them.

Held that the defenders were not bound to appoint officials with a knowledge of carbon monoxide gas; that they were not negligent in appointing the officials above mentioned; and that they were not liable at common law to make reparation to the pursuers.

Reparation—Master and Servant—Negligence—Statutory Duty—Breach by Servant—Liability of Master at Common Law for Consequent Death of Fellow-Servant—Common Employment—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 49, *Rules* 4 (1), 7; *sec.* 51, *Special Rule* 37.

The Coal Mines Regulation Act 1887, sec. 49, provides—Rule 4 (1)—that before the commencement of each shift inspection shall be made, by a competent person, appointed by the owner for the purpose, of every part of the mine in which workmen are to work or pass during the shift; (Rule 7) that if it is found by the person for the time being in charge of the mine that by reason of inflammable gases, or of any cause whatever,

the mine is dangerous, every workman shall be withdrawn from the mine. Rule No. 37 of Special Rules passed in pursuance of sec. 51 of the Act provide for the recording by the fireman in a book, kept for the purpose, of the existence of noxious or inflammable gas in the mine.

Held that the breach of the foregoing provisions by competent officials appointed by a mine owner did not render the mine owner liable at common law in reparation for the death of a miner due to such breach, the duties neglected being imposed not on the mine owners but on the officials connected with the working of the mine.

Bett v. *Dalmeny Oil Company*, June 17, 1905, 7 F. 787, 42 S.L.R. 638, *doubted* and *distinguished*.

Expenses—Tender—Action at Common Law and under Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)—*Tender of Sum Due under Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37)—*Absolvitor at Common Law—Decree under Employers' Liability Act* 1880 *for Sum Tendered.*

In an action by the widow and children of a miner against his employers for reparation at common law, and alternatively for a certain sum under the Employers' Liability Act 1880, the defenders repudiated liability but tendered the sum claimed under the Act as the amount to which the pursuers were entitled under the Workmen's Compensation Act 1897. The tender was refused. The defenders were assoilzied at common law and found liable under the Employers' Liability Act 1880 to the pursuers in the sum tendered. The Court *found* the pursuers liable in expenses.

The Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 49, enacts—". . . Rule 4. A station or stations shall be appointed at the entrance to the mine or to different parts of the mine, as the case may require, and the following provisions shall have effect—(1) As to inspection before commencing work, a competent person or competent persons appointed by the owner, agent, or manager for the purpose, . . . shall, within such time immediately before the commencement of each shift as shall be fixed by special rules made under this Act, inspect every part of the mine situate beyond the station or each of the stations, and in which workmen are to work or pass during that shift, and shall ascertain the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are concerned. No workman shall pass beyond any such station until the part of the mine beyond that station has been so examined and stated by such competent person to be safe. . . . Rule 7. If at any time it is found by the person for the time being in charge of the mine or any part thereof that by reason of inflammable gases prevailing in the mine or that part thereof, or of any cause whatever, the mine or that part is dangerous, every workman shall be withdrawn from the mine or part so found dangerous. . . ." Rule 37 of Special Rules passed in pursuance of sec. 51 of the Act provide—"He [the fireman] shall record without delay in a book to be kept at the mine for the purpose, and accessible to the workmen before commencing work, where noxious or inflammable gas (if any) was found present . . . and what (if any) other source of danger . . . was observed in his inspection before commencing work. . . ."

On 27th April 1906 Alexander Hynd Black, who was employed as an oncost worker by the Fife Coal Company, Limited, while at work in their No. 11 pit, Lumphinnans, died from the effects of an outbreak of carbon monoxide gas. His widow and children raised an action in the Sheriff Court at Kirkcaldy against the company, concluding for £750 in name of damages and solatium, and alternatively for £282, 17s. 6d. under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42). The grounds of the action so far as laid at common law were (1) a defective system of ventilation (this ground was not established by the evidence); (2) failure to provide competent officials for the work of the mine; and (3) breach of statutory obligations imposed by the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 49, rules 4 (1) and 7, and No. 37 of the Special Rules passed in pursuance of sec. 51 of the Act.

The defenders repudiated liability both at common law and under the Employers' Liability Act 1880.

[Prior to the raising of the action the sum claimed by the pursuers under the Employers' Liability Act 1880 was tendered by the defenders as the amount payable by them under the Workmen's Compensation Act 1897, but it was refused. On record the defenders repeated the offer.]

On 30th July 1907 the Sheriff-Substitute (HAY SHENNAN), after a proof, the import of which sufficiently appears from their Lordships' opinions (*infra*), found the defenders liable at common law, on the ground that they had failed to appoint competent officials, and awarded damages.

[In his note the Sheriff-Substitute stated that, in his opinion, the defenders were also liable under the Employers' Liability Act.]

The defenders appealed, and argued—It was not enough to render the defenders liable at common law to show that the officials appointed by them were, in point of fact, incompetent; it must be shown that the defenders had not exercised reasonable care in the selection of these officials—*Tarrant* v. *Webb*, 1856, 25 L.J. (C.P.) 261; *Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R. 568. It had not been proved here that the defenders were negligent, or that they had not exercised reasonable care in the selection of the officials in charge of the mine. The manager and the under manager were both duly certificated, and they—as well as the fireman—were men of considerable experience in the working of coal mines. It was out of the question

that mine-owners in engaging such officials could consider anything but their past record. Even though the officials in this case were incompetent and guilty of negligence, and were in breach of certain statutory regulations, that did not necessarily infer negligence on the part of the defenders in their selection and appointment. But the facts would not support a charge of negligence or incompetence on the part of the officials. The only ground advanced for such a charge was their ignorance of the properties of carbon monoxide gas. That subject was, as appeared from the evidence, a very obscure and little known one, and it was impossible to demand a knowledge of it on the part of mine managers or firemen. Though the officials had failed to observe certain statutory provisions, that could not involve the defenders in common law liability—*per* Lord Chelmsford in *Wilson* v. *Merry & Cuninghame* (*cit.*). These provisions imposed no obligation on the mine-owners, but only on the officials. Any obligation which could be held to attach to the mine-owner in respect of Rules 4 (1) and 7 of section 49 of the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58) was discharged as soon as a competent official was appointed; while No. 37 of the Special Rules, passed in pursuance of section 51 of that Act, laid an obligation only on the fireman. That distinguished the case from *Groves* v. *Lord Wimborne*, L.R. [1898], 2 Q.B. 402, and *Bett* v. *Dalmeny Oil Company*, June 17, 1905, 7 F. 787, 42 S.L.R. 638, where the owner or employer was subjected by statute to an absolute obligation. The failure to appoint the under-manager in writing, as required by section 21 of the Coal Mines Regulation Act 1887, could not possibly subject the defenders in liability. That had nothing to do with the accident, and the purpose of the provision was merely to secure a record being kept and a return made. [Liability under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42) was not disputed.]

Argued for the respondents—While it was true that the defenders were not liable except for negligence in the selection of the officials in charge of the mine, where it was proved, as here, that the officials were in point of fact incompetent, the *onus* lay on the defenders to show that they had exercised due care and were not negligent in the selection of the officials—*Murphy* v. *Pollock*, 1864, 15 Irish Common Law Reports (N.S.) 224; *Skerritt* v. *Scallan*, 1877, I.R., 11 C.L. 389, *per* Palles, C.B. at p. 401. Here on the evidence it was clear that the manager, under-manager, and fireman were incompetent. And not only had the defenders failed to discharge the *onus* thus laid upon them, but it was established positively that they were guilty of negligence in the selection of these officials. It was not open to the defenders to plead that carbon monoxide gas was an obscure and little known subject. They had previous experience of its generation by an underground fire in another of their mines in 1901, and on that occasion, by issuing a pamphlet dealing with the matter, they recognised the obligation the pursuers were now contending for. When the present method of ventilating No. 11 pit was introduced in 1905, whereby the air was carried near the seat of the old fire in No. 1 Pit, the defenders, who knew, or ought to have known, the danger thereby created of an outbreak of carbon monoxide gas in No. 11, ought either to have instructed all the officials in charge on the subject, or to have appointed officials who possessed the requisite knowledge. It was not disputed that at the time of the accident the manager, under-manager, and fireman, though they might have been competent for similar posts in a mine where there was no such special danger as in No. 11, knew nothing of carbon monoxide, and though they were aware during two or three days before the accident of circumstances which ought to have warned them of the existence of this gas, they took no steps to secure the safety of the workmen. It was no answer for the defenders to say that the manager and under-manager were duly certificated—*Wright* v. *Dunlop & Company, Limited*, February 14, 1893, 20 R. 363, 30 S.L.R. 417; *Macdonald* v. *Udston Coal Company Limited*, February 8, 1896, 23 R. 504, 33 S.L.R. 351; *M'Killop* v. *North British Railway Company*, May 29, 1896, 23 R. 768, 33 S.L.R. 586. Further, where accident to a servant had resulted from the breach of a statutory obligation, the employer was liable at common law, whether the breach was actually committed by the employer personally or by a servant appointed by him—*Groves* v. *Lord Wimborne*, *Bett* v. *Dalmeny Oil Company* (*cit.*). The fact that the duties were imposed on an official instead of on his employer made no difference. The employer was liable in the statutory penalty in either case. Here the evidence established that the provisions of Rule 4 (1), as to inspection, and of Rule 7, as to withdrawal of the men, enacted by section 49 of the Coal Mines Regulation Act 1887, and of Special Rule No. 37, had not been complied with. Further, the defenders had failed to appoint the under-manager in writing, as was required by section 21 of the Act, and as they were in breach there, it was not open to them to say that this breach had not caused the accident.

At advising—

LORD JUSTICE-CLERK—I have found this case to be not unattended with difficulty, particularly in view of the fact that the Sheriff-Substitute, who evidently gave the case great attention, has held that the defenders are liable in damages at common law, on the ground that they did not exercise due care in appointing persons of sufficient skill to take charge of the works in their mine, in which the loss of life occurred which has led to the present litigation

The circumstances are shortly these—that the ventilation of the pit in which the loss of life occurred was carried for a long distance along a course from another part of the workings called No. 1, which was at that

time stopped in consequence of a fire being present, which had led to the workings in No. 1 being closed up; that it being practically impossible to close up all the openings so securely that no vapours should escape into the air course, special precautions were necessary lest carbon monoxide gas, which was likely to be generated and given off at the site of such a fire, should penetrate by the air course to pit No. 11, where the deceased was working.

The case of the pursuer is that those in charge—Gray, the manager, Hunter, the under manager, and Gibbons, the fireman—were incompetent to take charge of their respective departments in this mine; that the defenders must be held to have failed to provide competent persons, and so fell under common law liability for the deceased's death.

On a consideration of the evidence in this case I am not satisfied that the defenders have been proved to have been negligent in making the appointments. It must be kept in view that the danger from carbon monoxide is one which till lately had not made itself prominent in pit management. The advance of science has recently brought it into the region of known things, but so little was known in regard to it that as one of the witnesses says, if mine-owners were looking for managers who had a full knowledge in regard to carbon monoxide they would find a very minute percentage of persons who had ever had any informing experience in regard to it. Plainly an employer of labour is not required to be ahead of the knowledge and experience of his time. If he consults those who from their position may be expected to advise him as to what is technically necessary to be found in those to whom he entrusts the working of his property, he cannot do more, and is only liable where it can be shown that he has not selected men for his superior posts who have the certificates of knowledge from those who train such men, and certificates of character from those they have served. He is not expected to know, and in most cases cannot know, what their state of knowledge and skill is. He can only exercise his care by making sure that they have, with those who do know, the reputation of knowledge and of skill, and that there is nothing against them to indicate that they are careless or untrustworthy in their conduct. In this case it is not even suggested that the defenders failed before engaging the men to inform themselves as to their skill and experience. As it happens, upon the question of the dangers of carbon monoxide, they knew that the managers they employed had had their attention called to the danger by what had happened in another pit of their own—an experience such as they probably could not have found present had they searched for other men. Hunter, the under-manager, has been in the pit where the previous accident happened. And they had themselves, doubtless with skilled aid of scientific men, issued a pamphlet to their employees calling their attention to the subject of carbon monoxide, and making suggestions in regard to the avoidance of danger from it.

On this part of the case I come to the conclusion that the defenders have not been proved to have been in fault in having in their pit the superior officials that they employed, and therefore that there is no case against them on a common law ground.

Upon the question of system, a word freely used in modern times to get over the decisions formerly pronounced both here and in the House of Lords, so as to make masters liable although they have used all diligence to find the best men to organise their system for them, I will only say that I am not satisfied that apart from careless working there was anything blameable in the system in use, provided due care was exercised in inspection and supervision.

Upon the question whether there was conduct on the part of the responsible persons in charge involving liability under the Employers' Liability Act, I have no doubt whatever. I cannot hold that either Hunter, the under manager, or Gibbons, the fireman, fulfilled their duty of due inspection, and of moving the men out of danger in the circumstances. The account given of the exceptional state of things that was found on the day in question convinces me that there was sufficiently strong ground for not allowing the ordinary work to go on until it was made clear by proper means being taken that there was no danger. I think that both Hunter and Gibbons neglected their duty. They rashly took a risk in keeping the men at work that ought not to have been taken, and there was thus negligence for which under the Employers' Liability Act there would be liability against the defenders.

However that is in this case of little consequence, seeing that the defenders have all along been willing to pay, and have tendered a sum under the Workmen's Compensation Act, that sum being of as great amount as the pursuer could obtain under the Employers' Liability Act.

LORD LOW—In the ordinary case the duty of a coal owner in regard to the management of his pits is fulfilled if he uses all reasonable care to secure that the persons whom he appoints for that purpose shall be thoroughly fit and competent for the duties entrusted to them. In this case, unless there was something in the circumstances which made it an exception to the general rule, I think that it is plain that the defenders discharged that duty, and that they had every reason to believe that the manager, under-manager, and fireman, whose qualifications are called in question in this case, were entirely competent and well qualified.

But it was contended for the pursuers that this was an exceptional case, because an exceptional danger was present in No. 11 pit at Lumphinnans Colliery, which imposed upon the defenders the duty of seeing that those to whom they entrusted the management of the pit were aware of that danger, and possessed the experience and

knowledge necessary to enable them to cope with it. The exceptional danger alleged was this—No. 11 pit is ventilated by means of a long passage coming from another pit, namely No. 1 pit, in which some years ago an underground fire occurred. The place where the fire broke out was at the time built up, with the view of extinguishing it by excluding the air, but at the time when the managers and fireman, whom the Sheriff-Substitute has found not to have been properly qualified, were appointed, it was possible that the fire was still smouldering, and events which have occurred since their appointment show that it was, in fact, still smouldering. It appears that when an underground fire is in that condition, it may give off a gas which is called carbon monoxide, which is so poisonous that the presence of a very small quantity of it in the atmosphere will cause death. It is also proved that the death of the miner Black was caused by carbon monoxide having found its way into No. 11 pit along the air passage from the old fire, and that the managers and fireman were not alive to the danger, having had no previous experience of carbon monoxide. If they had had any precise knowledge in regard to carbon monoxide, either by experience or theoretically, I think that the haze or smoke which appeared in the workings prior to the accident would have warned them of the danger, and that it would have been their plain duty to have kept the men out of the pit until the leakage from the fire had been discovered and stopped. Even as it was, I do not think that they can be acquitted of negligence, but it does not follow that the defenders were guilty of failure of duty or negligence in appointing them.

I accept the general proposition for which the pursuers contend, that if a coal owner is aware that a special and unusual danger exists in his pit of which the ordinary manager or fireman is unlikely to have either experience or knowledge, he is bound to see that the persons whom he appoints to those positions are made aware that the danger exists, and either know, or are instructed, what are the proper precautions to take. I am of opinion, however, that such a case has not been proved against the defenders.

What the pursuers chiefly founded upon was the fact that in 1901 there was an underground fire in another colliery—the Hill of Beath—belonging to the defenders, which generated carbon monoxide gas, by which several men lost their lives. In consequence, the defenders at that time issued a pamphlet to their employees—in the Hill of Beath Colliery, I understand—giving instructions as to the treatment of underground fires, and the methods which might be employed to discover the presence of carbon monoxide. The pursuers founded upon that incident as showing that the defenders were aware, from practical experience, of the danger arising from underground fires and the consequent production of carbon monoxide gas; and it was argued that, being aware of that danger, it was their duty, in appointing persons in authority in their pits, to see that these persons had the experience or knowledge requisite to enable them to guard against the fatal consequences of an accumulation of the poisonous gas in the workings. Now I think that it may be assumed that the directors of the defenders' company who were in office when the manager, under-manager, and fireman who were in charge when Black was killed, were appointed, knew of what had occurred in the Hill of Beath Colliery in 1901, because the manager, Gray, was appointed in November 1902, and the under-manager, Hunter, and Gibbons, the fireman, in 1904.

I recognise the weight of these considerations, but so far as I can judge, there was no reason to suppose, at the time when Gray, Hunter, and Gibbons were appointed, that there was any danger of carbon monoxide gas appearing in No. 11 pit, Lumphinnans, because there was not, and never had been, an underground fire in that pit; and, what is even more important, the connection between it and No. 1 pit, where the fire had occurred in 1901, was not made until early in 1905, a considerable time after the appointment of these men. Further, I think that it is clear upon the evidence that when the connection was made between No. 1 pit and No. 11 pit there was nothing to suggest that there was any danger of poisonous gas finding its way from the old fire into No. 11 pit. It was not maintained before us that the system of ventilation adopted in 1905 was in itself defective, and there is a very strong body of skilled evidence to the effect that it was as good a system as could have been adopted. Further, it is plain that it never occurred to anyone, either at the time when the connection between the two pits was made, or afterwards until the accident happened, that any danger was caused to workmen in No. 11 pit by reason of the airway passing near the site of the old fire.

I therefore cannot agree with the Sheriff-Substitute in holding that the defenders were guilty of negligence in employing, in No. 11 pit, managers and firemen who had not special experience and knowledge in regard to carbon monoxide gas.

The pursuers further maintain that the defenders are responsible in respect that they failed to observe certain statutory rules but for the breach of which the accident would not have happened. In the first place, it is enacted by the 49th section of the Coal Mines Regulation Act 1887, that a competent person, appointed by the owner for the purpose, shall, before the commencement of each shift, inspect the workings, and shall ascertain the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are concerned. The pursuers argued that the defenders had not carried out that rule, the fireman Gibbons having, on the occasion of the accident, proved himself to be incompetent. Now, for reasons which I shall state presently, I think that the fireman was negligent on that occasion, but it does not at all follow that the defenders had broken

the rule. As I have already indicated, when the fireman was appointed, he, so far as experience and antecedents were concerned, was perfectly qualified to act in that capacity, and there is nothing to suggest that between the time of his appointment and the accident he had been found to be either incapable or negligent.

The next rule upon which the pursuers found is that which requires the withdrawal of workmen from the mine when it is found by reason of inflammable gas or other cause to be dangerous. In regard to that rule it is enough to say that the duty of withdrawing the workmen is laid, not on the owner, but on "the person for the time being in charge of the mine."

Finally, the pursuers found upon rule 37 of the special rules made pursuant on the Act of Parliament. That rule provides for the recording by the fireman, in a book kept for the purpose, and accessible to the workmen, the presence of noxious or inflammable gas, or defects in roads or sides, or other source of danger. The rule is said to have been broken by Gibbons, because he made no record in the book of the haze and smell which he observed in the workings prior to the accident. I think that Gibbons ought to have made an entry in the book on that occasion, but his failure to do so did not constitute fault on the part of the defenders, rule 37 being one of the group of rules which prescribes the duties of a fireman.

In regard to all these rules the pursuers founded upon the case of *Bett* v. *Dalmeny Oil Company*, 7 F. 787. I humbly think that that case merits reconsideration should the same question again arise, but however that may be, the judgment has no application to the present case.

I am therefore of opinion that the pursuers have failed to establish a case against the defenders at common law, and that being so, it is perhaps unnecessary to consider whether the defenders are or are not liable under the Employers' Liability Act, because they have tendered a sum which, although it is tendered as compensation under the Workmen's Compensation Act, is also, we were informed, the maximum amount which the pursuers could claim under the Employers' Liability Act. I may say, however, that I am unable to hold that there was not, immediately before the accident, negligence on the part, at all events, of Hunter and Gibbons.

For more than two days prior to the accident a haze or smoke (it is sometimes described as the one and sometimes as the other), with a very peculiar smell, appeared in the workings, and some of the men were afflicted with sickness and headache. Gibbons himself appears to have been affected to a slight extent, and it is evident that both he and Hunter were puzzled to account for the haze and smell, which were of a kind of which they had had no previous experience. These were circumstances which called for the greatest care on the part of those entrusted with the superintendence of the work in the pit, and I do not think that Hunter and Gibbons displayed the care which they ought to have done. In the first place, no entry was made by Gibbons in the book required to be kept by the 37th special rule. Gibbons says that he made no entry in the book, because he found no dangerous gas in the pit. I do not think that that excuse will serve, seeing that he had found a haze in the pit with a peculiar smell which he had never met with before, and for which he could not account, and that he was aware that some of the men had suffered from sickness and headache. It is to be remembered that this book must be accessible to the workmen, and if an entry had been made in the book they might very well have refused to go to the working places until the haze had been got rid of, because it is evident that although Gibbons reported that there was no danger, many of the men were nervous on account of the condition of matters.

I think that Hunter was also negligent. He observed the mysterious haze and smell in the workings, but because he was not himself affected he assumed that no injurious gas was present. He was, however, informed by the fireman that some of the men had been vomiting, but according to his own account he accepted the fireman's explanation that they had been too late at the public-house the previous night. I think that when Hunter observed a haze and smell of a kind of which he had had no previous experience, and heard that men had been attacked by sickness, he should have inquired further into the matter. If he had done so, he would have found (if the evidence of the pursuers' witnesses is to be believed—and I see no reason for not believing it) that several workmen had been attacked by illness of a kind which pointed to the presence of some poisonous gas, and in that case I think that his duty would have been to withdraw the men until the cause was ascertained and cured.

In regard to Gray, I am not prepared to affirm that negligence has been proved against him. He was unwell at the time, and unable to go down the pit, and all that he knew about the condition of matters was what was verbally reported to him by Hunter. All that the latter appears to have reported was that there was a strange smell, which he could not very well describe, at a particular part of the workings. Gray says that he also saw the report book, signed by Gibbons, the report being "everything in order." Upon receiving Hunter's report Gray suspected that the smell must be coming from the neighbourhood of the old fire, and accordingly he gave instructions that the air passage to No. 1 pit should be examined. That was done, and a leakage was discovered near the old fire, and by Gray's instructions men were at once put on to close it up. If Gray had had any experience of carbon monoxide being generated by an underground fire, he would probably have apprehended the danger and had the men withdrawn from the workings; but as he had no such

experience, I am not prepared to say that upon the information given to him he was bound to do more than he in fact did.

LORD ARDWALL—The Court in this case has had the benefit of a very able and exhaustive argument on both sides, and I have perused the interlocutor and note of the Sheriff-Substitute with the care which they deserved; but after the best consideration I have been able to give to the case I am unable to agree with the result at which the learned Sheriff-Substitute has arrived. He has found in law that the defenders are liable to the pursuers in reparation for the death of Alexander Hynd Black, in respect that his death was due to their negligence in failing to appoint competent officials in No. 11 pit at Lumphinnans.

In the first place, I would observe that, as I understand the law, the duty of the employer is to use all reasonable care in selecting proper and competent servants to do the work in which they are engaged, and the master will not be liable to his servants if he does his best to select competent workmen. He does not warrant the competency of his servants—see *Tarrant* v. *Webb*, 25 L.J., C.P. 261.

Now the officials whom the Sheriff-Substitute found were not competent for their posts were, first, John Gray, the manager, who is forty-nine years of age, who has worked in mines since he was ten years of age—that is, for thirty-nine years—who worked as a miner till he was twenty-one and obtained a first-class certificate from Government in 1884, and who accordingly has been a certificated mine manager for twenty-four years, and who has had very large practical experience in mines. It is true that he has had himself no personal experience of carbon monoxide, the gas which caused the death of the said Alexander Hynd Black. He apparently knew of the poisonous properties of carbon monoxide, and does not think that there are any mine managers ignorant of its properties.

The next official who is said not to have been competent for his place was John Hunter, the under-manager. He is forty-two years of age and holds a second-class certificate. He has worked in mines since he was twelve years of age and has been an oversman for twenty years. He has had extensive experience in connection with mining. He has had personal experience of the effects of carbon monoxide at Hill of Beath and knows how it affects persons inhaling it, but he said that before the accident there was no sign of carbon monoxide coming off in such quantities as to affect him at the time.

The third official who is said to have been incompetent was John Gibbons, the fireman in the section of the pit where the accident happened. He is forty-three years of age and has been a miner practically all his life. He was engaged by Hunter, who made a full and careful investigation of his qualifications. He had been five years fireman at a place called Glencraig and had given satisfaction there, and he is still in the employment of the defenders and doing his work satisfactorily. He had no knowledge of carbon monoxide before the accident under consideration and did not know anything about it, but he says he would know it now.

Having regard to the qualifications of these three officials as I have detailed them, it appears to me that it cannot be said that they were not competent men for the places they were appointed respectively to fill in any pit, including the one in question. But the Sheriff-Substitute holds that because Gray, the manager, did not know that there was danger of a discharge of carbon monoxide from what he heard, and did not know the symptoms of carbon monoxide poisoning, he was not competent to take the necessary precautions in view of a possible outbreak of carbon monoxide gas. He thinks that Hunter was not qualified to act as under-manager or oversman because he was not aware of the liability of the Lochgelly Splint and Parrot Seam to spontaneous combustion, and did not know of the danger of carbon monoxide being thrown off from the concealed fire, and he holds that the defenders were negligent in appointing Hunter in a pit in which there was risk of the air being contaminated by carbon monoxide gas; and similarly with regard to John Gibbons, he holds that he should not have been appointed fireman without being instructed as to the risk of carbon monoxide gas.

The Sheriff-Substitute thus seems to hold that the defenders were guilty of negligence because they did not procure a manager and under-manager and fireman for the pit in question who had each and all of them had experience of carbon monoxide gas. Now it has to be noticed in the first place that an outbreak of carbon monoxide gas is a matter of very rare occurrence. With the exception of the outbreak of it at Hill of Beath, with which by the way Hunter was acquainted, and certain cases mentioned by Mr Borland, I think hardly a single miner or mining witness who is called in the case ever experienced an outbreak of carbon monoxide gas. But further, carbon monoxide is exceedingly difficult to detect. Mr Borland, who is examined on this matter, says —"There is no means of detecting carbon monoxide further than the effect on the system"; and from other evidence in the case and the books on chemistry that have been produced, it would appear that carbon monoxide has no colour, taste, or smell and cannot be detected by any of the senses. The smell that was spoken of at various places in the proof seems to have been caused by a watery vapour or smoke produced by the imperfect combustion of coal in the mine which also produced carbon monoxide. Further, it is a gas which is very little known, and there seem to have been differences even in the books of chemistry read in Court as to some of its qualities. One encyclopædia stated that it gave off an odour, whereas the bulk of authority is that it has no smell, and it

would thus appear that in point of fact it would be next to impossible for any colliery owner to procure persons for the posts referred to who had a practical experience of this gas and of its effects, and could therefore be supposed to be able to cope with such an outburst as occurred in the present case. It would appear that although some mines are more subject to it than others, a great number of coal mines are liable to have underground fires caused by spontaneous combustion, and it would certainly impose a very serious obligation, if indeed one that is possible of fulfilment at all, upon coalmasters to procure for all such pits throughout the country officials who have had practical experience and knowledge regarding carbon monoxide. All that they can be expected to do was to get men who knew, as indeed both Hunter and Gray did, that there was a possibility of carbon monoxide being generated by underground fires, and that it was a gas of a very deadly nature. Having done this, the fact that unfortunately, as I think, Hunter failed to take sufficient precautions for the safety of the men in the pit will not render them liable otherwise than under the Employers' Liability Act. The fault which in my opinion was committed by Hunter was this, that knowing as he did that carbon monoxide might be generated by underground fires in a pit, he did not, when he saw or heard that smoke or watery vapour was escaping from the waste into the air-ways of the pit, take greater precautions than he did to ascertain whether the carbon monoxide was sufficiently diluted by the current of air passing along the main roadway of the pit, amounting to 11,400 cubic feet a minute. He seems to have assumed that the quantity of carbon monoxide present would be sufficiently diluted by the quantity of air to obviate the risk of injury to persons inhaling it. I think it should have been tested more carefully by the introduction of birds, mice, or other small animals. But it is to be remembered that even if they had shown no signs of distress in the air that was ordinarily coming through the pit, yet there may have been such an outburst at one particular place as to render the whole air in the pit deadly poisonous for some time, remembering that a very small percentage of this gas is sufficient to do so.

The pursuers further maintain that the defenders have been guilty of negligence at common law in respect of the breach of certain rules. The first of these is rule 4 (1) of section 49 of the Coal Mines Regulation Act 1887 (50 and 51 Vict. c. 58). That rule provides for the inspection by a competent person before the commencement of each working shift of all the mine, and it further provides for a report being lodged specifying where noxious or imflammable gas, if any, was present, and for recording such report without delay in a book to be kept at the mine for the purpose, and accessible to the workmen; and it is further provided that the report, so far as not consisting of printed matter, shall be in the handwriting of the person who made the inspection. It is complained that Gibbons did not make such report or record it. Next, it is said that there was a breach of rule 7 of the same section of the same Act providing for the withdrawal of workmen from any part of the mine found dangerous until it had been specially inspected; and finally, that there was a breach of rule 37 of the special rules under the said Act, which provides for the fireman recording without delay, in a book to be kept at the mine for the purpose, where noxious or inflammable gas, if any, was found present, and what, if any, other source of danger was observed in his inspection before the commencement of a shift.

All these rules impose duties either upon the fireman or other person inspecting the mine before the commencement of a shift, or upon the manager or other person in charge of the mine. They impose no duty directly upon the mine-owners, who are the defenders in this case,

It was argued, on the authority of the case of *Bett* v. *Dalmeny Oil Co., Ltd.*, 7 F. 787, that as these duties were imposed by statute the owners of the mine were liable for a breach of them by whomsoever committed. The present, however, is very clearly distinguishable from *Bett's* case, where the duty imposed was in general terms, and was not laid upon particular individuals connected with the working of the mine; but I agree with the remark which has been made upon that case by my brother Lord Low. It is enough for the present to observe that in my opinion it has no application to the present case. I accordingly am of opinion that the interlocutor of the Sheriff-Substitute ought to be recalled.

LORD DUNDAS was sitting in the Extra Division.

The Court found that the pursuer had no claim against the defenders at common law, but only under the Employers' Liability Act, assoilzied the defenders from the first conclusion of the summons, and ordained them to make payment to the pursuers—in certain proportions—of £282, 17s. 6d.

The defenders moved for expenses, and argued—They had from the beginning been willing to pay the sum to which the pursuers had now been found entitled. They had tendered that sum extra-judicially, and maintained that position on record. It was therefore not necessary for them to have tendered with expenses on record—*Gunn, &c.* v. *Hunter, &c.*, February 17, 1886, 13 R. 573, 23 S.L.R. 395. It made no difference that the sum was tendered as the amount due under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37). The same parties were in this case entitled to the money due under that or the Employers' Liability Act 1880.

Argued for the pursuers—The pursuers should be found entitled to expenses. (1) There was no tender at all, because a tender under the Workmen's Compensation Act 1897 was only a tender of what the defenders were liable to pay in any event. (2) The tender could not be regarded as liquid,

because (*a*) in regard to money due under the Workmen's Compensation Act 1897 it would be necessary for the pursuers to go to the Sheriff, who as arbiter must allocate any sum due under that Act among the pursuers, while the Court could immediately fix the division of the sum due under the Employers' Liability Act, and (*b*) compensation under the Workmen's Compensation Act 1897 might, at the direction of the Sheriff, be invested for behoof of the parties entitled—First Schedule (6)—while any sum due under the Employers' Liability Act 1880 must be paid over to the party to whom it was due. (3) Different parties were entitled to the sums due under the two Acts. Under the Workmen's Compensation Act 1897, compensation was due only to dependents, while under the Employers' Liability Act 1880 representatives, whether dependants or not, had a claim. In this case the eldest son, who was seventeen years old, was not likely to be a dependant.

LORD JUSTICE-CLERK—After giving consideration to this case, I am satisfied that we must hold that before the initiation of this action a sum of £282, 17s. 6d. was tendered to the pursuers—a tender which was repeated on record—and that being the whole sum which the pursuers could recover under the branch of the action in which they were successful, I am of opinion that they are liable in expenses. It is true that the answer on record containing the offer refers to the Workmen's Compensation Act, but, the fact being that the defenders tendered a sum equal to the amount which the pursuers have recovered, and that the tender was not accepted, I think that under the ordinary rules the pursuers must be found liable in expenses.

LORD ARDWALL—In the special circumstances of this case I do not dissent from the judgment which your Lordship has proposed. The circumstances are that the persons entitled to compensation for the death of the late Alexander H. Black, under the Workmen's Compensation Act, are the same persons as the pursuers in the present action. If that had not been so, I should have doubted if the tender was a valid tender which would carry expenses.

LORD LOW concurred.

LORD DUNDAS was absent.

The Court found the defenders entitled to expenses in both Courts.

Counsel for the Pursuers (Respondents)—Watt, K.C.—Mair. Agent—D. R. Tullo, S.S.C.

Counsel for the Defenders (Appellants)—Dean of Faculty (Dickson, K.C.)—Hunter, K.C.—Horne. Agents—W. & J. Burness, W.S.

Friday, November 27.

SECOND DIVISION.

[Sheriff Court at Glasgow.

PERCY *v.* DONALDSON BROTHERS.

Reparation—Master and Servant—Employment—Duration—Common Employment—Relevancy.

A workman was employed as a casual labourer, paid by the hour, upon a ship in dock, his work ending at 6 p.m. Shortly after that hour, while proceeding along the quay to receive his wages at his employers' pay-box, which was situated about fifty yards from the ship, and off the employers' premises, he was injured by the fall of a stanchion owing to the alleged negligence of the employers' servants on board the ship. The employers pleaded common employment to an action for damages.

Held that the relation of master and servant terminated when the workman finished his work and left the employers' premises, that it was not prolonged until the wages were paid, and proof *allowed*.

David Percy, labourer, Kinning Park, Glasgow, raised an action in the Sheriff Court at Glasgow against Donaldson Brothers, steamship owners, 58 Bothwell Street, Glasgow, for £250 damages for personal injuries caused by the alleged negligence of the defenders' servants.

The pursuer averred—"(Cond. 2) On or about 13th August 1907 the s.s. 'Almora,' of which the defenders are the owners and managers, was berthed at Princes Dock, Glasgow Harbour, and the defenders' servants, for whom defenders are responsible, were engaged removing the wooden superstructure from the upper decks of said ship. Pursuer had occasion on said date, about 6·10 p.m., to proceed along the breast of the quay adjacent to the said s.s. 'Almora,' and while proceeding in an easterly direction a heavy stanchion was negligently allowed by defenders' servants to fall from the deck of said ship, striking the pursuer upon the right foot, and severely injuring the great toe of said foot. Denied that pursuer at the time of said accident was in the defenders' employment. . . . Admitted that pursuer was employed on said date by defenders as a casual labourer engaged and paid by the hour, that at the time of said accident he was proceeding to the pay-box on the quay, about fifty yards from said ship, for his wages. Explained that at the time of the occurrence of the accident to him he had ceased doing any work for defenders, and that the relationship of master and servant did not then exist between pursuer and defenders, and had ceased to do so at 6 p.m. on that date."

The defenders pleaded, *inter alia*—"2. Common employment."

On 15th February 1908 the Sheriff-Substitute (BALFOUR) sustained the second plea-in-law for the defenders, and assoilzied them.