it becomes a matter of law, where there is no evidence upon which a reasonable man could find such facts as would give him jurisdiction—we can say, as a matter of law, that it was a thing that he had no right to find, because he had not the materials upon which to find it. But no one can say that that observation is applicable to this case." Now I say with reference to this case now before us that no one can say that there were no materials before the Sheriff from which he had a right to come to the conclusion that the accident was due to this man's serious and wilful misconduct. If that be so, then the question he puts, Was the pursuer entitled to compensation? must be answered in the negative. He was not.

The LORD PRESIDENT stated that LORD CULLEN, who was absent at the advising, concurred.

LORD JOHNSTON gave no opinion, not having heard the case.

LORD M'LAREN was absent.

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

Counsel for Appellant—M'Kechnie, K.C. —Kirkland. Agents—Sturrock & Sturrock, S.S.C.

Counsel for Respondents—Horne—Strain. Agents—W. & J. Burness, W.S.

Thursday, February 10.

FIRST DIVISION.

[Sheriff Court at Airdrie.

DONNACHIE *v.* UNITED COLLIERIES LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (2) *c*—"*Serious and Wilful Misconduct*"—*Breach of Rule as Prima facie Evidence of Misconduct—Fact or Law.*

A miner was injured in consequence of his bringing a cartridge too near a naked light. A special rule of the pit provided that "a workman shall not permit a naked light to remain . . . in such a position that it could ignite the explosive." The arbiter held that the miner "having permitted his naked light to remain in such a position that it ignited the gunpowder, and having failed to establish any circumstances justifying his doing so committed a breach of said special rule, and that therefore his injuries were attributable to his serious and wilful misconduct." *Held*, on an appeal, that while the breach of a rule did not *per se* infer serious and wilful misconduct, it was yet such *prima facie* evidence of misconduct as, taken with the facts found proved, might justify the arbiter's finding of serious and wilful misconduct, which was a finding in fact and not in law, and appeal therefore *dismissed.*

In an arbitration in the Sheriff Court at Airdrie, under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between John Donnachie and the United Collieries Limited, the Sheriff-Substitute (GLEGG) refused compensation, and at the request of the claimant stated a case for appeal.

The following *facts* were admitted or found proved—"(1) The pursuer John Donnachie was a miner in the employment of the United Collieries Limited, and earned an average weekly wage of £1, 15s. 4d. (2) On 21st July 1909 Donnachie met with the after-mentioned injury, which incapacitated him for work until 13th October 1909, when he had fully recovered. (3) On said 21st July Donnachie had bored a shot-hole at his working-face, and filled in a charge of powder from the canister in which the charges were kept. (4) Donnachie then replaced the lid on the canister, lit the fuse with his naked light, and retired about 15 yards from the shot. (5) At this point he sat down on the road, placing the canister on his left, and his cap with his lamp in it on the right, on the side of a piece of building which was a few inches above the level of the roadway. (6) The distance between the lamp and canister was about five feet. (7) Donnachie then removed the lid from the canister, and took out all the charges in order to count them. (8) His reason was to ascertain whether the number of charges left was sufficient for the work of the shift. (9) Counting the cartridges was in itself a reasonable thing to do, and it could not be done without taking them out of the canister. (10) The counting could be done, but not so conveniently done, in the dark. (11) The charges are in the form of balls, and are done up in pairs in a paper covering. (12) Sometimes the paper covering is undone and one ball only used, and the canister may contain balls from which the paper wrapping has been removed. (13) It is not proved whether there were uncovered balls on this occasion, or what the density or inflammability of the wrapping was. (14) In counting the charges Donnachie brought them nearer the lamp than the canister was, and nearer to the lamp than was necessary. (15) While the cartridges were in Donnachie's hands they were ignited by a spark from his naked light. (16) The explosion caused the injuries which incapacitated him. (17) The air current was moving from the lamp towards Donnachie, but it was very feeble (18) Miners and the pit officials consider that a distance of five or six feet was a sufficient interval to place between the lamp and the cartridges. (19) Sparks from lamps sometimes travel to a distance of two or three feet, and in exceptional circumstances further. (20) Special rule No. 1, which applied to said pit, and with which Donnachie was acquainted, enacts '. . . a workman shall not permit a naked light to remain in his cap or in such a position that it could ignite the explosive.'"

On these facts the Sheriff-Substitute found "that Donnachie having permitted his naked light to remain in such a position that it ignited the gunpowder, and having failed to establish any circumstances justifying his doing so, committed a breach of said special rule, and that therefore his injuries were attributable to his serious and wilful misconduct."

The *question of law* for the opinion of the Court was—"On the above facts was [the Sheriff-Substitute] right in holding that Donnachie's injuries were attributable to his serious and wilful misconduct?"

Argued for the appellant—At most the fault here was an error of judgment, not serious and wilful misconduct. Mere breach of a rule did not necessarily infer serious and wilful misconduct—*George* v. *Glasgow Coal Company, Limited*, 1909 S.C. (H.L.) 1, 46 S.L.R. 28. The facts here as found by the Sheriff did not disclose such a breach of the rule as to warrant such an inference.

Argued for the respondents—The case of *Dobson* v. *United Collieries, Limited*, December 16, 1905, 8 F. 241, 43 S.L.R. 260, showed that breach of a rule followed by an accident inferred serious and wilful misconduct. The standard for the interpretation of the rule was not the knowledge of the individual workman but the opinion of a reasonable man. The facts as found by the Sheriff showed that if the workman did not know his light was in a dangerous position he ought to have known it.

At advising—

LORD PRESIDENT—This case is a case also of the same class as the last just decided—*Leishman* v. *Wm. Dixon Limited*—and a matter in which the general remarks again apply.

The accident which happened was an explosion, and was caused by a workman having a naked lamp in his cap and having that too near to some cartridges which he was examining. In doing as he did he broke a special rule of the pit, which was that "a workman shall not permit a naked light to remain in his cap or in such a position as that it could ignite the explosive." But the Sheriff-Substitute has also found as an operative finding that in counting the charges Donnachie brought them nearer the lamp than the canister was and nearer to the lamp than was necessary. The Sheriff-Substitute sums up his conclusions by saying—"I found that Donnachie having permitted his naked light to remain in such a position that it ignited the gunpowder, and having failed to establish any circumstances justifying his doing so, committed a breach of said special rule, and that therefore his injuries were attributable to his serious and wilful misconduct."

Now I think there again that is really a question of fact, and really I think the Sheriff-Substitute's judgment would be absolutely invulnerable unless he had put in the word "therefore," upon which it might be argued that the Sheriff-Substitute had gone merely and solely upon the breaking of the rule. I think that is putting too great a strain on the word "therefore" as used. I think we must take it in accordance with his findings, and these findings are conclusive to this extent, that they are findings of such a kind that it cannot be said that it would be the act of an unreasonable judge to say that there was really serious and wilful misconduct. It seems to me that the fact that the breaking of a statutory rule has occurred has an effect on the question of whether there has been misconduct, and also as to whether there has been serious and wilful misconduct. I do not think I went so far as to say in *Dobson* v. *United Collieries, Limited*, 1905, 8 F. 241, 43 S.L.R. 260, that there may not be cases where there might be justification. I say that because I cannot ignore certain remarks made in the House of Lords in *George* v. *Glasgow Coal Company*, 1908 S.C. 846, 1909 S.C. (H.L.) 1, 45 S.L.R. 686, 46 S.L.R. 28. Of course these remarks are *obiter* and not binding on me, but they must be treated with respect; but, speaking respectfully, I must say I have nothing to quarrel with in the way the matter is expressed by Lord Robertson, but I humbly do not agree with the matter as expressed by the Lord Chancellor. I think the Lord Chancellor has put the matter too absolutely. I do not think that in commenting on what must be the effect of the breaking of a rule the Court is prescribing artificial presumptions. I agree that each case must be judged on its own circumstances, but inasmuch as the existence of special rules is known in every colliery, it seems to me if you are discussing the circumstances of one case where there has been a breach of special rules, you cannot help laying down certain inferences to be a guide in similar cases. It is very much the same thing as has often been said about questions of vesting. You cannot decide from one man's deed what is to be the effect upon another's. But you lay down certain canons of construction which will be applied in certain other cases, and it seems to me that where a special rule has been violated you are necessarily giving an indication of what you will say in another case if it comes up before you, but I think the matter is really quite fairly put by Lord Robertson in his remarks, and with them I am prepared to agree.

On the whole matter therefore, although the question is not properly put, I think we should answer it in the affirmative, because the question is not "On the above facts was I right?" but the question for us is really, Are we entitled to alter the Sheriff's judgment? I am of opinion that we are not.

LORD KINNEAR—I have had some difficulty in this case, arising from the form in which the question is put by the Sheriff-Substitute, whose conclusion that the man's injuries were attributable to his serious and wilful misconduct is rested solely on the ground that he had committed a breach of a certain special rule.

Now, if that were all—and I can find nothing in the case except that as a matter of fact something that the man had done involved a breach of a special rule—I should have been disposed to doubt whether the Sheriff was right in holding that that was enough. I take the rule to be as it was stated by Lord Robertson in the passage to which your Lordship has just referred, where he says, "Where you are dealing with the conduct of a man, what you are in search of is misconduct in regard to his business"; and it may be that when a man does something that a special rule has forbidden him to do, his disobedience may be *prima facie* evidence of misconduct. It is a very different question whether it is serious and wilful misconduct. That may depend upon various considerations. Therefore if I thought the Sheriff-Substitute had decided solely upon the mere fact of the man's conduct not being in accordance with the rules, I should have said he had gone wrong in taking what was at best *prima facie* evidence as conclusive evidence that what the man did was done knowingly and intentionally in defiance of the law; but then I quite agree that you must read the whole case and the whole question together, and not merely that part of it which has raised the difficulty, and so reading it I have come to the conclusion that the learned Sheriff's findings mean that the man knowing the law, as indeed he was bound to know it (and I do not know that there would have been much difference if he did not), he did this in such a way as to justify the inference that he was wilfully in breach. That is a question of fact, and I must concur in your Lordship's opinion that we cannot say that it is a conclusion in fact which the Sheriff had no materials before him to justify and at which no reasonable man could have arrived. I therefore have come to the same conclusion as your Lordship, that we have no jurisdiction to interfere with the Sheriff's judgment in this case.

LORD JOHNSTON—I concur with your Lordships and have nothing to add.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—G. Watt, K.C.—Carmont. Agents—W. & J. Burness, W.S.

VALUATION APPEAL COURT.

Saturday, March 12.

(Before Lord Low, Lord Dundas, and Lord Mackenzie.)

EDINBURGH CITY PARISH COUNCIL *v.* EDINBURGH ASSESSOR.

GLASGOW PARISH COUNCIL AND GOVAN COMBINATION PARISH COUNCIL *v.* GLASGOW ASSESSOR.

Valuation Cases—Public Parks—Dedication by Statute for Public Use—Lands Yielding no Profit—Hypothetical Tenant.

Held that the public parks in Edinburgh and in Glasgow ought to be entered in the valuation roll at a nominal figure in respect that they were all dedicated to the public use and that the expenses of management exceeded any payments which were or could, subject to such dedication, be obtained from them.

Lambeth Overseers v. *London County Council*, [1897] A.C. 625, and *Liverpool Corporation* v. *West Derby Assessment Committee*, [1908] 2 K.B. 647, *followed*. *Ferrier* v. *Assessor for Edinburgh*, July 20, 1892, 19 R. 1074, *distinguished*.

Edinburgh Case.

The Edinburgh Municipal and Police Extension Act 1890 (53 Vict. c. iv), enacts—Section 4—"The Cluny trustees may sell to the Magistrates and Council, and the Magistrates and Council may purchase from the Cluny trustees, at the price of eleven thousand pounds, the ground forming part of the lands and barony of Braid, described in Part I of the First Schedule to this Act, which shall be used in all time coming for the purposes of a public park and pleasure and recreation ground for the use of the inhabitants of Edinburgh. . . ." Section 5—"The Cluny trustees may, on the terms and conditions mentioned in the said agreement applicable thereto, let to the Magistrates and Council that additional portion of the said estate of Braid mentioned in Part II of the First Schedule, for the purposes aforesaid, and they may also (if and when they think fit) sell, feu, or let on long lease, or otherwise, to the Magistrates and Council, the said lands mentioned in Part II of the First Schedule, for the purposes aforesaid."

The Edinburgh Corporation Act 1900 (63 and 64 Vict. c. cxxxiii), section 57, enacts—"The Corporation may, subject to the provisions of this Act, purchase, take, and acquire compulsorily or by agreement, and may enter upon, hold, use, and appropriate the lands, houses, and property respectively shown on the deposited plans and described in the deposited books of reference or any part or parts of the same, for the respective purposes following (that is to say) (1) for the purposes of a public park for the city and for such other purposes as the Corporation may deem expedient, the lands and