12 (*c*) the association disclaims all concern with any assignation made by a nominee, but I do not find anywhere in these rules any indication that a member himself cannot validly assign his own beneficial right to a third party. On the contrary, I think the language of the instructions, to which your Lordship has alluded—and I may say that I think we must consider these instructions to be part of the rules we are bound to examine—seems to show plainly that a will may validly be made by a member so as to dispose of his money in favour of someone other than the nominee, though even in that case the society naturally enough provides that they are to pay the money to the nominee, whom alone they recognise. On the whole matter I think the learned Sheriff-Substitute was right and that we ought to revert to his judgment.

LORD GUTHRIE—I agree. The case must be decided on the terms of the particular rules of this society, which is not a registered friendly society, and I think that that is enough to distinguish the case from the English case of *Bennett* v. *Slater*, [1899] 1 Q.B. 45, supposing that case to be still law in England. There the special provisions of the Friendly Society Acts may well justify the result. In the case of marriage, for instance, the nomination would be revoked, and section 15 (4) of the Friendly Societies Act 1896 seems to point in the same direction. But here we have got a nomination which on the face of it seems merely to be a warrant to receive the money. We have also got the rules of the society, and I agree that the instructions must be taken as part of these rules. On the rules of the society it seems to me clear that the view adopted by your Lordships is correct. While the nominee cannot assign, there is nothing to prevent the member assigning to anyone he pleases.

We were referred to the case of *Campbell* v. *Campbell*, 1917, 1 S.L.T. 339, at present under reclaiming note. If the rules here had contained the rule, which seems to have been assumed in that case, the result might have been different. Lord Anderson says that "by contract the member obliged himself not to deal with the said sum by will or to allow it to form part of his moveable succession *ab intestato*." But in the rules submitted to us there is no such provision.

The Court recalled the interlocutor of the Sheriff and reverted to the interlocutor of the Sheriff-Substitute.

Counsel for Pursuer—Scott. Agent—W. K. Lyon, W.S.

Counsel for Defender—E. O. Inglis. Agent—W. M. Ross, S.S.C.

Friday, October 26.

FIRST DIVISION.

[Sheriff Court at Paisley.

GAUNT *v.* BABCOCK & WILCOX, LIMITED.

Workmen's Compensation — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of the Employment*"—*Disobedience to Instructions.*

A moulder was supplied by his employers with a wooden scraper to remove loose sand from the top of a moulding box which was pressed by a hydraulic press against a stationary plate. It was his duty to remove the loose sand with the scraper, and he was instructed so to do by his employers. It was, however, quicker to remove the loose sand by the hand and the moulders were paid by the piece. Using his hand and not the scraper one day, his hand was caught in the press and crushed. The scraper was known to the workman to be available and at hand. *Held* that the accident did not arise out of the employment.

George Gaunt, *appellant*, being dissatisfied with an award of the Sheriff-Substitute (BLAIR) at Paisley in an arbitration by him against Babcock & Wilcox, *respondents*, for compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), appealed by Stated Case.

The Case stated—"I found the following *facts* proved or admitted—1. That George Gaunt, the appellant, aged thirty-eight, is a moulder, and for ten years prior to 29th November 1916 (with an interval of about twelve months, during which he worked elsewhere, and which interval ended when he returned nine months before the accident) he worked as a moulder in the employment of Babcock & Wilcox, Limited, the respondents. 2. That on 29th November 1916 he was working at a hydraulic moulding machine in respondents' employment along with Alan M'Swan, another employee. 3. That part of the process consists in pressing hydraulically the moulding box containing the moulding sand against a stationary plate. 4. That in connection with this operation it is the duty of the machine moulder (in this case the appellant) to remove loose sand from the top of the moulding box. 5. That a wooden scraper is provided for the purpose of removing the sand, which it was the duty of the appellant to use, and which he failed to do. 6. That M'Swan's duties, on the other side of the moulding machine, and from which place he cannot see his mate the appellant, are to work the hydraulic levers so as to open and close the hydraulic press in which the moulding box is placed, and that this operation frequently requires a double application of the hydraulic press to be given. 7. That on the occasion in question a first ramming had been given, which in M'Swan's judgment was unsatisfactory. 8. That while the press had been lifted after the first ramming, Gaunt, the appellant, proceeded to clear away the loose

sand from the top of the moulding box with his left hand, inserting his hand for that purpose between the moulding box and the top plate of the hydraulic press. 9. That M'Swan, without giving warning to the appellant, applied the levers a second time to give a second ramming, with the result that the appellant's left hand was caught in the hydraulic press and severely crushed and injured. 10. That the accident was caused by the appellant not using the scraper supplied and instructed to be used for that express purpose by the respondents. 11. That a scraper supplied to that machine was lying on a ledge within an arm's length of said machine, close to a tallow can and other articles used daily by the operators of that machine. 12. That its presence in that particular and accessible spot was known to both M'Swan and the appellant before the accident. 13. That some time previous to the accident M'Swan had told the appellant to use the said scraper according to the instructions of the respondents. 14. That scrapers had first been supplied and their use made compulsory by the respondents some six years ago, in consequence of a serious accident to a man named Dunn. 15. That the appellant, at the time of Dunn's accident and for some years afterwards, was in the respondents' employment and knew that scrapers had been provided, and that to work with the hand instead was directly contrary to the respondents' express instructions. 16. That at the time of the accident, notwithstanding that he had been away for a year, ending nine months before the accident, the appellant knew that this regulation as regards the use of a scraper had not been relaxed, and that the express object of this regulation was to secure the safety of the workmen in the dangerous operation of clearing the loose sand. 17. That if the scraper had been used on this occasion the operation was a safe one involving no danger, and the accident would not have happened. 18. That the accident happened through the appellant's direct and wilful disobedience of this regulation. 19. That he deliberately and knowingly disregarded and disobeyed this regulation for his own safety in order to save time and earn more money for his own purposes, his work being piece-work, paid according to the quantity he could turn out. 20. That by using his hand instead of the scraper the appellant admitted that he was able to earn and did earn at least 15s. more a-week. 21. That since the accident to the appellant, and notwithstanding renewed and repeated instructions to the moulders by the respondents to use the scrapers, the (four) moulders in respondents' employment called for the appellant as witnesses refuse to obey said regulation to use the scraper, on the ground that, being piece-work, the use of it interferes with their earning capacity. 22. That the accident to the appellant was caused by his having knowingly added an additional risk to his employment—a risk which he knew to be dangerous and contrary to express regulations. 23. That it is not proved that the respondents winked at the practice of the moulders using their hands instead of the scraper. 24. That, on the contrary, it is proved that they checked contraventions of the rule whenever they were seen or discovered by them. 25. That it is not proved that the valves of the hydraulic press were leaking, or that the machine was out of order. 26. That, on the contrary, it is proved that the machine, at the time of the accident to appellant, was in good working order. 27. That the accident to appellant on 29th November 1916 arose in the course of his employment, but not out of his employment, with the respondents.

"On the foregoing facts I *held* that the appellant was not entitled to compensation, in respect that the accident, although it arose in the course of his employment, did not arise out of his employment with the respondents. I assoilzied the respondents, and found the appellant liable in expenses. It was further agreed by the parties that if my decision was wrong and it was found that the appellant is entitled to compensation, such compensation should be at the rate of £1 per week from date of accident, 29th November 1916, till further orders of Court."

The *question of law* was—"Whether there was evidence upon which I could competently find that appellant's injuries were not the result of an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906?"

To his award the arbitrator appended the following *note*—"This case is not free from doubt, and I may say it has given me a good deal of anxious thought, not so much with regard to the facts, which I think are clear enough, but with regard to the decided cases quoted at the debate, both numerous and perplexing. The pursuer was quite a candid witness. He admits he knew the rule, and that he knew the risk of disregarding it, and took it. But his agent strongly contended that, on the law as laid down by the very important cases of *M'William*, 1914 S.C. 453, 51 S.L.R. 414, *Blair*, 1915, L.J., K.B. 1147, 53 S.L.R. 503, and *Plumb*, 1914 A.C. 62, 51 S.L.R. 861, the grossest disobedience by a workman to any rule or regulation specifically provided for his own safety will not disentitle him to compensation. Some of the opinions quoted look very like it; but surely it cannot be contended that any decision lays down a universal principle that rules and regulations are to count absolutely for nothing in a question of injury to a workman.

"There is, I admit, a clear enough principle to follow when a workman does something away from his particular job which he is not entitled to do, such as going to his work riding on a buffer or on a truck, but there is no case that goes so far as this one, where a workman working at his own machine, which he knows is a dangerous one, deliberately does something contrary to a known regulation for his own safety for the purpose of saving time and earning more money for himself. This is surely an incidental risk added by himself, and for which he must take full responsibility. If he is injured when full provision has been made for his protection, and he deliberately

decides for himself whether he shall be protected or not, injury in such circumstances cannot, in my opinion, be held to have arisen out of his employment—*Fitzgerald*, [1908] 2 K.B. 796; *Pope*, 1912, 5 Butterworth, 175; *Barnes*, 1912 A.C. 44, 49 S.L.R. 688; *Powell*, 1911, 5 Butterworth, 124; *Herbert*, 1916, 9 Butterworth, 164; *Palmer*, 1916, 9 Butterworth, 291."

Counsel for the appellant referred to the following cases—*Plumb* v. *Cobden Flour Mills Company, Limited*, [1914] A.C. 62, 51 S.L.R. 861; *Conway* v. *Pumpherston Oil Company*, 1911 S.C. 660, 48 S.L.R. 632; *Whitehead* v. *Reader*, [1901] 2 K.B. 48; *O'Brien* v. *Star Line Limited*, 1908 S.C. 1258, 45 S.L.R. 935; *M'William* v. *Great North of Scotland Railway Company*, 1914 S.C. 453, 51 S.L.R. 414; *Blair & Company, Limited* v. *Chilton*, 1915, 84 L.J., K.B. 1147, 53 S.L.R. 503; *Harding* v. *The Brynddu Colliery Company, Limited*, [1911] 2 K.B. 747.

Counsel for the respondents were not called upon.

LORD PRESIDENT — If authority were wanted in support of the decision of the learned arbiter in this case we find it in the case of *Plumb*, [1914] A.C. 62. But no authority is requisite, for we have before us in my opinion a pure question of fact, not of law—a question on which therefore the learned arbiter is final.

In his examination of the authorities the appellant's counsel drew our attention to the distinction which is to be found running through all the cases in this branch of the law, between violation of contract by doing a thing in the wrong way on the one hand, and trespass beyond the sphere of employment on the other hand. The line is faint and delicate, and sometimes very difficult to draw. In this case that is not so, for the learned arbiter has found—I think explicitly—that the appellant was employed, *inter alia*, to remove loose sand from the top of the moulding box by means of a scraper and not by means of his hand. He has further found that not acting upon the impulse of the moment and not from forgetfulness, but deliberately and of set purpose in order to earn a larger wage, the workman trespassed beyond the sphere of his employment. If that is so, obviously his claim to compensation under the statute is barred, and accordingly we need have no difficulty in finding that the learned arbiter had before him evidence adequate to support his conclusion that at the time when this accident befell him, this man, though acting in the course of his employment, was not injured by an accident arising out of his employment.

I propose to your Lordships therefore that we should answer the question put to us in the affirmative.

LORD JOHNSTON—There is no doubt that in the case of *Plumb*, ([1914] A.C. 62) Lord Dunedin has indicated a valuable guide for the determination of cases such as the present. But I do not think that he intended to lay down an absolute and comprehensive rule. On the other hand we have a very valuable hint in the case of *Whitehead* ([1901] 2 K.B. 48) that the Court is bound to read and apply all such rules with due regard to the special circumstances of the case before them. In point of fact Lord Dunedin himself, in the case of *Plumb*, makes that quite clear.

I accept the distinction that has been so frequently drawn between that which is outwith the scope of the employment and that which is only a piece of misconduct within the scope of the employment. But these are general terms, and circumstances will occur, as I think they do here, which oblige one to weigh in the light of these circumstances what is really the scope and what is mere misconduct, and which may justify the conclusion that the quality of the misconduct takes the occurrence out of the scope of the employment.

On consideration of much that has been said on this subject I find myself unable, where the crucial point in the case is disobedience to orders, to go much further than the proposition that disobedience to the master's orders does not in itself put the workman's act outside the scope of his employment—*Whitehead* v. *Reader* (*cit.*). I cannot jettison all other circumstances. In the last-mentioned case the order was a prohibition against touching the machinery which operated or rotated a grindstone which the workman, a joiner, had to use in the course of his employment. He did interfere to replace the driving-band, which had slipped, instead of calling up the employee responsible for the running machinery. This was disobedience, but it was casual, not habitual, and it may fairly be said to have been done not from any selfish or personal motive but to further the master's business by avoiding delay. In *Conway's* case, 1911 S.C. 660, 48 S.L.R. 632, the circumstances were different—the disobedience was much more marked, and the danger which the master's order or rule was directed to prevent more patent and serious than in *Whitehead* v. *Reader* (*cit.*). But again the act was casual and there was no thread of other motive crossing that of getting on with the master's business. In *Plumb's* case (*cit.*) on the other hand there was no express order, but the act was clearly one outside what Lord Dunedin has called the territory of the workman's employment. Yet so narrow may distinctions run that the same element appears in both *Conway's* and *Whitehead's* cases (*cit.*), though in different degrees.

In the present case the circumstance which I cannot ignore and which appears to me conclusive in qualifying the general rule that mere disobedience to orders will not bar the employee's claim is this—the act which was the cause of the injury was not a casual act done on the spur of the moment—it was part of a course of forbidden action adopted of set purpose by the workman in defiance of rule. I do not found on this matter alone, as it might require consideration of the question of the employer's insistence or abandonment of their rule. But what in itself is a sufficient ground for distinction is that the course of action was

not adopted in the interest, or even assumed interest, of the employer, but to further the selfish and personal end of the employee, which in the case in question could be measured in pounds, shillings, and pence.

If it is necessary to revert to the term "scope of the employment" I should be prepared to say that an act peculiarly directed to the personal end of the employee, in direct disobedience to the order of the employer, is not within the scope of the employment.

LORD MACKENZIE—I agree with your Lordships. I think the question in this case arises upon the proper construction to be put upon the findings in fact by the learned arbiter. As I read those findings, if a written contract of employment had been made with the workman what it would have contained would have been this, that the appellant was employed as a machine moulder to remove loose sand from the top of the moulding box by means of a wooden scraper provided for the purpose, and by no other means. I think that is the fair construction to put upon paragraphs 4 and 5 coupled with paragraph 14. The use of the scraper was compulsory, and consequently there must be inserted into any written contract of employment a limitation to that method, and that method alone, of removing sand.

What the appellant did was deliberately to insert his hand between the moulding box and the top plate in a hydraulic press. In so doing he was doing something that he was not employed to do. It was not a case of his doing what he was employed to do but doing it in an improper manner. Accordingly, on the authorities, I think the result at which the learned arbiter arrives is inevitable. But I wish to guard myself from being supposed to hold that if the insertion of the hand had been by mere inadvertence the same result would have followed. The facts found in the case exclude the idea that his hand got in by accident or by inadvertence. It was put in deliberately.

LORD SKERRINGTON—I agree with your Lordships and upon this ground, that the claim of the appellant is barred by the authorities which have been cited to us.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Moncrieff, K.C.—Mitchell. Agent—D. MacLean, Solicitor.

Counsel for the Respondents—Macmillan, K.C.—W. T. Watson. Agent—Robert Miller, S.S.C.

Saturday, October 27.

FIRST DIVISION.

[Lord Anderson, Ordinary.

A B *v.* C B.

Expenses—Taxation—Husband and Wife—Divorce—Successful Action of Divorce by Husband against Wife with Separate Estate—Principle of Taxing Expenses.

The husband of a woman who had considerable separate estate obtained decree of divorce against her and was found entitled to expenses. *Held* (*sus.* Lord Anderson) that the husband's account of expenses fell to be taxed as between party and party, and not upon the consistorial or matrimonial scale.

A B, *pursuer*, brought an action of divorce for adultery against his wife, C B., *defender*.

On 28th March 1917 the Lord Ordinary (ANDERSON) pronounced this interlocutor—"The Lord Ordinary . . . finds facts, circumstances, and qualifications proved relevant to infer that the defender has committed adultery: Finds her guilty of adultery accordingly: Therefore divorces and separates the defender from the pursuer, his society, fellowship, and company in all time coming. . . . Finds the pursuer entitled to expenses against the defender," &c

The pursuer lodged a *note of objections* to the Auditor's report in the following terms:—". . . That under said interlocutor [of 28th March 1917] the business accounts incurred by the pursuer to (1) Messrs Warden & Grant, S.S.C., and (2) Mr C. A. M'Grady, solicitor, Dundee, amounting together to £160, 5s. 8d. were lodged with the Auditor for taxation. That the Auditor in his report proposes to tax off the sum of £87, 1s. 8d. Leaving the sum of £73, 4s. That the pursuer's agent, who attended the audit, contended that the taxation as between spouses ought to proceed upon what is known as the consistorial or matrimonial scale, and that after asking for authority for the application of that scale as between a successful husband and an unsuccessful wife, the Auditor sustained the contention of defender's agent, who appeared at the diet, to the effect that the matrimonial scale is limited in its application to cases of wives, whether guilty or innocent, obtaining decree for expenses against their husbands, and is inapplicable to husbands' accounts against wives, and he accordingly taxed the account on a strict party and party basis. That the major part if not the whole of said allowances, amounting to £87, 1s. 8d., are due to said decision on principle. That the pursuer humbly conceives that the said decision is erroneous in principle, and that no distinction can properly be drawn between the rights of a wife against a husband in such a matter, and those of a husband against a wife. He accordingly craves the Lord Ordinary to remit the account back to the Auditor with a suitable instruction or instructions that the mat-