kenzie with reference to the form of the question of law in the Stated Case, and I suggest that in answer to the question we should state that upon the facts which were proved or admitted the arbitrator was entitled to find that Jane Sinnerton was only partially dependent upon her father. I prefer to express no approval of the basis on which the arbitrator has assessed the compensation, because I do not understand it.

LORD CULLEN—I agree.

LORD PRESIDENT—With regard to the form in which we should answer the question—instead of giving a bare affirmative, we shall affirm that the arbitrator was entitled to assess the compensation on the basis of partial dependency.

The Court found in answer to the question of law that upon the facts proved or admitted the arbitrator was entitled to assess the compensation found due to the appellant Jane Sinnerton on the basis of partial dependency.

Counsel for the Appellants—MacRobert, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Lord Advocate (Morison, K.C.)—Carmont. Agents—W. & J. Burness, W.S.

Tuesday, June 22.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

FRASER *v.* LOCHGELLY IRON AND COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation — Arising out of — Workman Sitting on Cover of Pulley — Workmen's Compensation Act 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1).

In a heading in a mine a bogie, carrying a horizontal pulley, round which a haulage rope passed, was so placed that it would take up the slack in the haulage rope. A workman at the end of his shift, and while waiting for the cage to take him to the surface, entered the heading and sat upon the cover of the pulley. The rope was then stationary, but was afterwards put in motion, and the workman's leg was drawn into the pulley by the rope and was injured. The heading was not fenced off, and it was the regular practice, known to the oversman, for workmen waiting to ascend to collect in the heading for the sake of shelter. The workman knew of the rope being at times stationary and at times in motion. *Held* that while the permitted practice allowed the workman to wait in the heading, he had exceeded the privilege in sitting upon the pulley cover, thereby exposing himself to a peril not incidental to mere presence in the heading, and consequently that the accident did not arise out of the employment.

John Fraser, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Kirkcaldy (Stuart) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII. cap. 58) against the Lochgelly Iron and Coal Company, Ltd., *respondents*, appealed by Stated Case.

The Case stated—"The following *facts* were admitted or found proved, viz.—1. That the appellant was on said 4th December 1918 a hanger-on and pony driver in the employment of the respondents at said Dora Pit. 2. That his average weekly wages were £2, 14s. 2d. 3. That the section of the said pit in which appellant worked was the 14 feet seam in the Duddy level, situated to the west side of the pit bottom in said level; that the men working in said Duddy level are raised and lowered by a cage working in the shaft, and enter and leave said cage on the east side of said pit bottom, and that in order to reach his work the appellant had accordingly to pass from the east to the west side round the side of the shaft, and on leaving his work to return to the east side in order to re-enter the cage. 4. That in said level on the west side of said pit there was no mechanical haulage; that on the east side of said pit there was a mechanical haulage operated by an engine on the surface, which also drove mechanical haulages on the other levels in said pit. Said mechanical haulage consisted of an endless wire rope passing down said pit or shaft, thence east by the main roadway to the entry to the heading after referred to in finding 6, thence up said heading and round the tension pulley situated in said heading, thence back to the main roadway, and thence eastward into said level, returning by said main roadway to said pit or shaft, up which it ran to said surface engine; and that on the east side of the shaft, where the appellant came off and re-entered the cage, the said mechanical haulage ran under a wooden platform to a point further from the pit bottom than the heading above referred to. 5. That appellant's duties consisted in hanging-on at Nos. 1 and 2 headings in said 14 feet seam and driving the hutches out from thence to a siding situated at a point at least 400 yards from and on the west side of said pit bottom. The points to which appellant was required to travel during his shift are shewn on plan No. 6 of process. 6. That on said 4th December 1918 the appellant, along with other workmen, was waiting at the end of his shift for the cage which would take him to the surface. 7. That the shaft by which the appellant would ascend the pit was the down-cast shaft, and in order to escape the cold draught which came down the shaft the appellant, with the others, although there was plenty of room to wait in the pit bottom, was waiting in an adjacent heading, situated 10 to 15 yards from and on the east side of the shaft. The appellant entered said heading a few minutes before three o'clock, at which hour his shift ended. 8. That said heading was not fenced off in any way, nor was there any notice prohibiting workmen from waiting

there. Certain workmen had duties to perform in said heading, but appellant had not. It was a regular practice for years before said 4th December 1918 for workmen waiting to ascend the shaft to gather in said heading. This was known to the oversman of the section, and he never raised any objection to their doing so, but the practice was unknown to the manager and agent. There was a seat in the heading at the entrance thereto, where it was the custom for the fireman to sit and pass the workmen into their places, under Section 63 of the Coal Mines Act 1911; and it was also the custom for workmen to sit in the heading at breakfast time. 9. That in said heading was a tension pulley fixed horizontally upon a wheeled bogie, mounted on rails, and attached to a back balance bogie, round which pulley ran the endless haulage rope, as narrated in finding 4. The object of this contrivance was to take up any slack in the haulage rope and keep it taut. There was a flat wooden cover on the top of the pulley. 10. That when appellant entered the heading the haulage rope was stopped, and appellant believed that it would not start again. 11. That the haulage-rope usually stops for the day punctually at three o'clock, but sometimes stops at times varying between 2·45 and 3 o'clock. It also may stop for intervals throughout the shift, and does stop from time to time, as it is necessary to stop the engine on the surface when starting or stopping any of the other haulages, and this was known to the appellant. On the occasion of the accident to the appellant the stoppage was in order to disconnect the haulage in the low bottom, but this was not known to the appellant. 12. That appellant seated himself upon the wooden cover of the pulley with his left leg close to the point where the rope entered the pulley. 13. That while he was so seated the rope started again and the appellant's leg was dragged into the pulley, and he was seriously and permanently injured. 14. That appellant's duties did not require him at any time to enter said heading, or to come in contact with the mechanical haulage of the pit. There was room to accommodate a reasonable number of men in said heading without coming into dangerous proximity to said rope, pulley, or bogie, but those who entered the heading were exposed to risk of injury from the mechanical haulage if they did not keep clear of the rope. 15. That the Coal Mines Act 1911 and the General Regulations, dated 10th July 1913, made by the Secretary of State, under section 86 thereof, apply to said pit. No. 4 of said General Regulations provides—'Subject to any directions that may be given by any official of the mine no workman shall, except so far as may be necessary for the purpose of getting to and from his work, or in case of emergency or other justifiable cause necessarily connected with his employment, go into any part of the mine other than that part in which he works, or travel to or from his work by any road other than the proper travelling road.' No. 28 of said General Regulations provides—'No person employed in or about the mine shall negligently or wilfully do anything likely to endanger life or limb in the mine or negligently or wilfully omit to do anything necessary for the safety of the mine or of the persons employed therein.' 16. That appellant in entering said heading was in breach of No. 4 of said General Regulations, and that in sitting on said wooden cover of the pulley he was in breach of No. 28 of said General Regulations, in respect that he was negligently endangering his own life or limbs. 17. That at the date of the proof appellant was totally incapacitated for work.

"On 29th November 1919 I *found* that said accident, while it arose in course of appellant's employment, did not arise out of it in respect (1) that the appellant, by his actings as above described, had exposed himself to a risk which he was not required to incur, and which was outwith the sphere of his employment; (2) that he was in breach of rules 4 and 28 of the General Regulations above quoted. I held therefore that the respondents were not liable in compensation to the appellant in respect of his injuries, and dismissed the application."

The *question of law* was—"Was there evidence on which I could competently find that the injury by accident to the appellant did not arise out of his employment."

The arbitrator's *note* was—"The accident to the pursuer occurred while he was waiting, a few minutes before 'lowsing time,' for the cage to take him to the surface. The shift ended at three o'clock, and it was not said, I think, that he was not entitled to be in waiting for the cage a few minutes before the hour if he had finished his work. It appears that he had done so, and I take it therefore that he was still in the course of his employment when the accident happened. The question is, whether the accident arose out of his employment. It is proved that the division of the pit bottom in which he worked was what is called the west side, and in that area there is no mechanical haulage of any kind. The haulage system, including the pulley and rope in the heading, is situated in the east side of the bottom. The shaft by which the men are raised and lowered is in the east side, and in order to reach his work the pursuer had to pass from the east to the west side, and on leaving his work to return to the east side, and there wait for the cage. It is proved that it was the custom of the men to wait in the heading in order to be out of the draught from the down-cast shaft. This practice was known to the oversman, but not to any other official in authority in the pit. Those who waited in the heading, including the pursuer, had no duty, nor indeed any right to do so. They went there solely for their own convenience and comfort. On the day in question the pursuer entered the heading, and, the haulage-rope being at rest, he sat down upon the wooden cover of the pulley, with his left leg close to the rope at the side where it entered the pulley. He believed that the haulage had stopped for that shift, and would not start again. Unfortunately

it did start, and his leg was dragged in by the rope and seriously injured. It seems to me to be clear—apart from the question of breach of rules—that it cannot be said that the accident arose out of the pursuer's employment. He had, as I have said, no duty which took him into the heading, nor had he any right to enter it. It was, territorially, outside the sphere of his employment. (L.P. Dunedin in *Conway* v. *Pumpherston Oil Company*, 1911 S.C. 660.) His duties, moreover, did not require him at any time to come in contact with the mechanical haulage of the pit. Still less did his duty require him to incur the risk of sitting in dangerous proximity to part of the haulage system. In short he exposed himself quite needlessly to a danger which should have been obvious to any pit worker, and which had nothing to do with the work he was required to perform. My conclusion therefore is that the pursuer's accident did not arise out of his employment. I was favoured at the debate with a copious citation of authority. I refer only to a few of the cases which seem to be closely in point—*O'Brien*, 1908 S.C. 1258; *Miller*, 1909 S.C. 698; *Thomson*, 1911 S.C. 823; and *Brice*, 1909, 2 K.B. 804. The last-named seems to be in its essential features not distinguishable from the present. If my opinion is well founded the pursuer's case fails. But the defence is further fortified by the argument arising out of the pursuer's breach of the General Regulations. Rule 4 provides that 'no workman shall, except so far as may be necessary for the purpose of getting to and from his work, or in case of emergency or other justifiable cause necessarily connected with his employment, go into any part of the mine other than that part in which he works.' I think the pursuer in entering the heading was in breach of this rule. I am unable to hold that his reason for doing so, viz., to avoid the draught, was a justifiable cause necessarily connected with his employment. But be that as it may, it seems clear that the pursuer contravened rule 28, which forbids the doing of anything likely to endanger life or limb, whether negligently or wilfully. The pursuer's act was certainly negligent, and not less certainly dangerous. It is none the less a breach of the rule that the danger involved only his own safety, and not the safety of others. But a breach of the General Regulations which have the force of statute has this result, that the act committed in breach is excluded from the sphere of employment of the party in fault—*Maydew*, 1917, 2 K.B. 742, p. Bankes, L.J. Upon this ground also I think the defence falls to be sustained."

Argued for the appellant—The appellant was within the sphere of his employment in being where he was when the accident took place. He was following a long-established practice whereby workmen were allowed to expose themselves to the dangers that were to be found in the place in question. He had added no risk. The breach of statutory rules might be serious and wilful misconduct, but where, as here, the statutory rule did not limit the sphere of the employment mere breach of it did not deprive the workman of compensation. Statutory rules were like rules emanating from the master, divisible into those which limited the sphere of the employment and those which did not. The following cases were referred to—*Simpson* v. *Sinclair*, 1917 S.C. (H.L.) 35, 54 S.L.R. 267; *M'Graw* v. *William Baird & Company*, 1920, 57 S.L.R. 114 and (H.L.) 491; *Foulkes* v. *Roberts*, 1919, 12 B.W.C.C. 370; *Brice* v. *Edward Lloyd, Limited*, [1909] 2 K.B. 804; *Moore* v. *Donnelly*, 1920, 57 S.L.R. 380; *M'Kenna* v. *Niddrie and Benhar Coal Company*, 1916 S.C. 1, 53 S.L.R. 1; *Gibbins* v. *British Dyes, Limited*, 1918, 11 B.W.C.C. 180; *Conway* v. *Pumpherston Oil Company*, 1911 S.C. 660, 48 S.L.R. 632; *Harding* v. *Brynddu Colliery Company* [1911] 2 K.B. 747; *Robertson* v. *Woodilee Coal and Coke Company, Limited*, 1919 S.C. 539, 56 S.L.R. 498, 57 S.L.R. 343; *O'Brien* v. *Star Line, Limited*, 1908 S.C. 1258, 45 S.L.R. 935; *Maydew* v. *Chatterley-Whitfield Collieries*, [1917] 2 K.B. 742.

Argued for the respondents—The appellant was territorially outwith the scope of his employment; he was not doing anything for his master's purposes, and he added a risk. Further, he was acting in breach of a statutory rule, which necessarily took him outwith the scope of his employment, or, if not, the statutory rule limited the sphere of his employment and in breaking it he travelled outwith the sphere of his employment. The following authorities were referred to—*Plumb* v. *Cobden Flour Mills*, [1914] A.C. 62, 57 S.L.R. 861; *Barnes* v. *Nunnery Colliery Company*, [1912] A.C. 44, 49 S.L.R. 688; *Highley* v. *Lancashire and Yorkshire Railway Company*, [1917] A.C. 351, 55 S.L.R. 509; *Bourton* v. *Beauchamp & Beauchamp*, [1920] W.N. (H.L.) 214, 1920, 13 B.W.C.C. 90.

At advising—

LORD PRESIDENT (CLYDE)—There was, I think, evidence on which the learned arbitrator was entitled to find that the appellant's accident did not arise out of his employment. But I reach this conclusion in respect of the first, and not the second, of the two grounds upon which the arbitrator arrived at his verdict. The facts found proved in finding (8) with regard to the permitted use of the heading by men who were waiting for an ascending cage, and those found proved in finding (7) with regard to the cause which explained the workman's presence in the heading at the time of the accident, make it, in my opinion, impossible to treat the workman's conduct in entering the heading as being in breach of Rule 4 of the General Regulations made under the Coal Mines Act 1911. That rule is subject to "directions that may be given by any official of the mine," and does not apply to any case where a "justifiable cause" requires an exception to be made. The use of the heading as a temporary resting-place was permitted, though not expressly directed, by the management, and the workman's use of it as a shelter from the draught down the shaft was in those circumstances justifiable. Again, Rule 28 is,

in my opinion, too vague and general in its terms to afford a safe ground of decision. But the findings establish that the workman after entering the heading chose to seat himself on the cover of a horizontal pulley which was mounted on a bogie some little distance inwards from the mouth of the heading. The bogie was on rails, laid on a gradient rising from the floor of the entrance of the heading, and was moveably or elastically retained in position by counter-weights. The object of the device was to take up slack from a continuous haulage-rope which was worked from the surface, and which was passed round the pulley. This rope was carried into and out of the heading under the woodwork which formed its floor; but in the near neighbourhood of the pulley the rope ran through openings in the floor and was carried above the floor level to and round the pulley. According to the 12th finding, the workman seated himself on the cover in such a position that his left leg was "close to the point where the rope entered the pulley." The rope, which did not work continuously, was, according to the usual practice at the mine, in intermittent use up to three o'clock. It was a few minutes before three when the workman first entered the heading. While the workman was so seated the rope was put into motion from the surface, the workman's left leg was drawn into the pulley and injury resulted. The rope and pulley and the circumstance of its working were well known to the workman. Assuming that he was permitted to take shelter in the heading, he went far beyond any implied permission in seating himself in a position of such obvious peril on the pulley cover. He was certainly not required to sit on the cover by any duty he owed to his employer, nor was his so seating himself in any way incident to the discharge of any such duty. It was an act of extraordinary danger performed entirely for his own comfort during a few minutes of spare time on his way out of the mine. The consequences of such an act cannot, in my opinion, be held to arise out of his employment, and I am for answering the question put to us in the case in the affirmative.

LORD MACKENZIE—In this case I agree with the conclusion reached by the arbitrator.

I do so on the ground that the workman did what cannot be held reasonably incidental to his employment. For a purpose of his own he needlessly exposed himself to danger by sitting on the wooden cover of the pulley round which the endless haulage-rope ran.

I do not think there is evidence upon which the arbitrator was entitled to hold that the workman put himself outside the sphere of his employment by going into the heading. This is one of those cases in which the line is narrow. But it is quite intelligible. If the workman had been injured by the haulage-rope when standing in the heading he might have been entitled to compensation. It is quite a different case when he was injured by what was clearly an added peril.

LORD SKERRINGTON—My difficulty in this case has arisen from the fact that the arbitrator bases his decision primarily upon a ground which is untenable and which counsel for the respondents refused to argue. The facts which he found proven in his eighth finding make it clear that he ought to have held that the appellant was entitled to wait in the heading until a cage arrived which would take him to the surface. In so acting the appellant followed the usual practice of the pit. The real question for the arbitrator was whether it was in any way incidental to the appellant's presence in the heading, and therefore to his employment, that he should use as a seat the cover of a pulley which contained a rope that was liable at any moment to be set in motion. Now it cannot be said that the arbitrator had not that question in view. Indeed, it forms his second and alternative ground of judgment. But I am bound to say that I do not like the way in which he states the question both in his findings and in his note. He states that the appellant's duty did not require him to incur the risk of sitting in dangerous proximity to part of the haulage system. The real question is whether the appellant's conduct in acting as he did can be regarded as reasonably incidental to his use of the heading as a place in which to wait until he could be taken up the shaft. In spite, however, of this verbal criticism I think that it appears from the Stated Case that the arbitrator appreciated the question which he had to decide, that his award was based upon a view of the evidence which he was entitled to take, and that he did not fall into any mistake in law.

The question for the arbitrator was whether the efficient cause of the accident was the appellant's presence in the heading, or whether the efficient cause was his voluntary and deliberate action in using as a seat a piece of mechanism which had not been provided for that purpose, and which could not be so used without imminent peril of mutilation or death if the machinery should suddenly come into motion. It was, I think, conceded in argument that if the appellant had inadvertently brought his clothing into contact with a rope which afterwards began to move the arbitrator might have been entitled to award compensation, taking the view that although the immediate cause of the accident was the appellant's negligence, his negligence would have been harmless to him but for the dangerous surroundings in which he found himself in the course of his employment. Possibly the arbitrator might have legitimately taken the same view if he had held it proved that the appellant being weary with his day's work had thoughtlessly sat down upon the pulley cover without adverting to the fact that his position would become one of extreme peril if the machinery should be set in motion. There is no such finding in the Stated Case, and I think that it sufficiently appears that in the opinion of the arbitrator the appellant sat down upon the pulley cover because he believed, errone-

ously as it unhappily turned out, that the machinery had come to a final stop. In my judgment the arbitrator was well entitled to hold that a workman who with his eyes open uses a dangerous piece of mechanism as a seat trusting that it will remain inert does not suffer from an accident arising out of his employment if his expectations prove erroneous. There is a real difference between an accident arising in this way and one which is due to casual negligence. In the former case the voluntary and deliberate act of the workman whereby he exposes himself to a wholly unnecessary risk is the sole cause of the accident, though the dangerous surroundings are of course a necessary condition for its occurrence.

For these reasons I am of opinion that upon the facts which were admitted or proved the award was one which the arbitrator could competently pronounce.

LORD CULLEN—Assuming that the appellant was justified by an implied authority in being in the heading in question while he awaited the cage, it is clear that such authority did not extend to his sitting on the pulley. He was entitled *ex hypothesi* to resort to the heading as a shelter from the draught coming down the shaft, and he could have waited there safely by standing in the adequate space if he had chosen to do so. But for his personal convenience he chose while waiting to expose himself gratuitously to a risk which was an obvious one. In so doing he exceeded his permission to use the heading as a place of waiting. His act in seating himself on the pulley was not incidental in any way to his work, or connected in any way with his employers' interests. It was simply an abuse of his leisure while waiting, which he committed for a personal end of his own. In these circumstances I am unable to hold that the accident which he so brought on himself was one which arose out of his employment, and I agree with your Lordships in thinking that the question in the case ought to be answered in the affirmative.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—The Dean of Faculty (Constable, K.C.)—Scott. Agents—Alexander Macbeth & Company, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Wallace. Agents—Wallace & Begg, W.S.

Tuesday, June 22.

FIRST DIVISION.

CALDWELL'S TRUSTEES *v.* CALDWELL AND OTHERS.

Succession — Charitable and Educational Bequests and Trusts — Construction — Uncertainty—Charitable and Benevolent Institutions.

Held that a residuary bequest in favour of "charitable and benevolent institutions" was not void for uncertainty.

James Caldwell and others, the testamentary trustees of the deceased James Caldwell and the deceased Margaret Telfer or Caldwell, his wife, *first parties*, and Walter Caldwell and others, the brothers and children of a deceased sister of James Caldwell, *second parties*, brought a Special Case to determine questions relating to a residuary bequest in the mutual settlement of James Caldwell and his wife.

The *mutual trust-disposition and settlement*, after conveying the whole estate to the first parties for a variety of purposes, provided—"*And in the last place*, should there be any further funds available we direct the trustees to divide the whole of the residue and remainder among such charitable and benevolent institutions in Glasgow and Paisley and in such sums not exceeding the sum of Three hundred pounds sterling to any institution as in their discretion may seem best, and the trustees shall be the sole judges as to charitable and benevolent institutions which may participate in such residue and as to the sum or sums which may be so paid to each."

James Caldwell died on 23rd December 1917, Mrs Caldwell having predeceased him on 9th August 1917. All their children predeceased them without leaving issue.

The first parties *contended* that the residuary bequest was valid and effective.

The second parties contended that the residuary bequest was void on the ground of uncertainty.

The *question of law* was—"Is the bequest of residue void?"

Argued for the first parties — The residuary bequest was void. The object of the gift might be a charitable but not a benevolent institution, or a benevolent but not a charitable institution, and on a just construction of the deed need not be an institution both benevolent and charitable. As the objects of the bequest might be benevolent institutions the bequest was void for uncertainty—*James* v. *Allen*, 1817, 3 Mer. 17; *In re M'Duff*, [1896], 2 Ch. 451, *per* Lindley, L.-J., at p. 464 and Lopes, L.-J., at p. 468; *Paterson's Trustees* v. *Paterson*, 1909 S.C. 485, 46 S.L.R. 406; *Campbell's Trustees* v. *Campbell*, 1920, 57 S.L.R. 243.

Argued for the second parties — The objects of the gift were institutions which were both charitable and benevolent; and such a bequest was valid—*Hill* v. *Burns*, 1826, 2 W. & S. 80; *Miller* v. *Black's Trustees*, 1837, 2 S. & M. 866; *Cobb* v. *Cobb's Trustees*, 1894, 21 R. 638, 31 S.L.R. 506; *Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212; *Hay's Trustees* v. *Baillie*, 1908 S.C. 1224, 45 S.L.R. 908; *Mackinnon's Trustees* v. *Mackinnon*, 1909 S.C. 1041, 46 S.L.R. 792. *In re Best, Jarvis* v. *Corporation of Birmingham*, [1904], 2 Ch. 354; *In re Sutton*, 1885, L.R., 28 Ch. D. 464, were referred to.

At advising—

LORD MACKENZIE—The question in this case appears to me to admit of only one answer. The bequest of residue is not void.

In every case two questions have to be considered—(1) What is the meaning of the particular will; and (2) What rule of law is