only after getting his consent that this man was enrolled as one of the squad. And we see that that consent was necessary simply because they required an efficient man to do the work—because the reason for his being brought into the yard was that there were only three of them originally, and four platers were required to do the work as required. And then we are told that the squad worked with their own hands as they thought fit. Therefore the very beginning of this man there shows that he was there as a workman to work with his own hands, and he would not have been there unless he had been in the position of a workman. Then if we go on a little further into what the Sheriff has found, we come upon this, which your lordship has already adverted to, that the four members were bound to work continuously during the working-hours recognised in the yard, so as to finish the job without delay. That would be rather an unusual arrangement to put upon an independent contractor. Then, again, we have got this somewhat startling proposition in the case of a contractor, that "When the working-hours were exceeded, the defenders paid the four members of the squad 6d. per each extra hour, and the helpers half-time extra." That is to say, as I said in the course of the argument, that this man is a contractor up to six o'clock, and the moment six o'clock strikes he becomes nothing else than a paid servant; and so with all the helpers. I do not believe they are called contractors, but up to that time I suppose they are in the service of the squad, and at five minutes past six they immediately become the direct paid servants — I am using the word "servant" in the qualified sense your Lordship does—of the appellants. That is a very curious state for a true and independent contractor to be in—to be a paid servant in the actual work he has contracted for. That does not look like an independent contractor. Then we come down to the next thing which the Sheriff finds. He finds that there are printed rules and regulations which form part of the bargain between the parties—"It being expressly declared that every person employed at piece-work would in all respects be subject to them, except in so far as they might be modified by special agreement." And then he goes on to tell us—"In the present case there was no special agreement." Therefore it was found by the Sheriff that all these rules and regulations are part of the case, and were agreed to by this independent contractor. Now, as your Lordship has pointed out, these are not rules and regulations to be observed by independent contractors. That is not what it says; it is—"Rules and regulations to be observed by workmen employed by David J. Dunlop & Co." And according to the statement in this case, every one of these rules and regulations applies to the present case. Your Lordship has pointed out several of the most prominent of them, and I do not propose to go over them again. Your Lordship pointed out section 6, where —"Any workman," including this gentleman, if he is found interfering with other workmen, is to be turned out. But there is another to the same effect, which says "Any workman absenting himself from his work for a whole day without permission will not be at liberty again to resume without leave." That is to say, that if this independent contractor happens to have a day away without leave, this binding contract of this contractor comes instantly to an end. I think these are rather curious rules and regulations with which to bind an independent contractor. And so, through the whole case, we see, up to the very last, because the very last point taken by the Sheriff was, that the appellants' foreman "supervised the work of both time-workers and piece-workers. He required to be satisfied before any skilled man was taken into a squad, but he never interfered with platers who were doing their work in the recognised way, unless it were badly done." That is to say, these workers are to work in a recognised way, but any ingenious contractor who might think he had invented a shorter or cheaper way of doing his work was not to be allowed to use it just because it would not be the recognised way. And so we see that from first to last, from the initiation of this contract or arrangement, these four men were workmen, and nothing but workmen; and to call them independent contractors is, as I agree with your Lordship, a mere playing with words. And therefore I have no hesitation in saying that the Sheriff in this case has directed himself rightly in the conclusion at which he has arrived.

LORD KINNEAR concurred

LORD M'LAREN was absent.

The Court answered the question in the affirmative.

Counsel for the Appellants—W. Campbell, Q.C. — Wilson. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Shaw, Q.C. —Findlay. Agents—J. & J. Galletly, S.S.C.

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*Tuesday, June* 19.

## SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

## DAILY *v.* JOHN WATSON LIMITED.

*Reparation — Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* (2) (*c*) — "*Serious and Wilful Misconduct*"—*Stated Case—Competency —Fact or Law—Schedule II., sec.* 14, (*c*).

A special rule for the safety of workmen in a mine provided as follows:—"While charging shot-holes or handling any explosive not contained in a securely closed case or canister, a workman should not smoke or permit a

naked light to remain on his cap, or in such a position that it could ignite the explosive."

A workman in the mine committed a breach of this rule by wearing a lighted naked lamp in his cap while carrying cartridges which were not inclosed in a case or canister. A spark from the lamp ignited the cartridges, which exploded, causing injuries which resulted in his death.

*Held* (1) that the question whether the workman's breach of the special rule was "serious and wilful misconduct" was a question of law, which the Court had jurisdiction to decide on a case stated for appeal under sec. 14 (c) of Schedule II. of the Act; (2) that the accident was attributable to the workman's "serious and wilful misconduct" within the meaning of sec. 1, sub-sec. (2) (c); and that consequently his representatives were not entitled to recover compensation.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897, between James Daily, Clyde Place, Motherwell, claimant and respondent, and John Watson, Limited, coalmasters, carrying on business at Watsonville Colliery, Motherwell, appellants.

The claimant and respondent claimed compensation under the Workmen's Compensation Act 1897 from the appellants in respect of the death of his son Joseph Daily.

The Sheriff-Substitute (DAVIDSON) found the following facts to be admitted or proved: "(1) That the said Joseph Daily was in the employment of the appellants on 25th October 1899 as a miner at No. 2 Pit, Watsonville Colliery aforesaid, when he met with an accident, from the effects of which he died on 3rd November 1899 in the Royal Infirmary, Glasgow; (2) that at the time of the accident the said Joseph Daily was carrying several cartridges of gunpowder in his hand for firing shots, and had at the same time a lighted naked lamp in his cap; (3) that a spark from said lamp ignited the cartridges and caused an explosion which resulted in the accident; (4) that he was not directly told not to carry the cartridges in the manner he did, but that the officials did not know that the deceased and those working with him carried cartridges in this way; (5) that a special canister was provided to carry cartridges from the place where the principal supply was kept to the coal face, but the men, outside of the officials' knowledge, did not always make use of it, and this practice was common among miners; and (6) that the management of the pit did not consider it necessary to place such a canister in any other part of the section."

The Sheriff-Substitute decided that the said Joseph Daily "in so acting had infringed Additional Special Rule No. 1 in force at said colliery, which rule is to the following effect:—'While charging shotholes or handling any explosive not contained in a securely closed case or canister, a workman should not smoke or permit a naked light to remain on his cap, or in such a position that it could ignite the explosive;' that it must be assumed he knew the special rules; that he was thus guilty of a contravention of said Special Rule No. 1; that such a breach of the rule referred to, however, was not serious and wilful misconduct in the sense of the Workmen's Compensation Act, and that therefore the respondent was entitled to £49, 8s. as compensation."

The question of law for the opinion of the Court was as follows:—"The injury to the said Joseph Daily, from which he died, being due to the explosion before referred to, by his having permitted a naked light to remain in his cap while carrying in his hand several cartridges of gunpowder for firing shots, not enclosed in a securely closed case or canister, in breach of No. 1 Additional Special Rules, of which he must be presumed to have known — Whether said injury was attributable to serious and wilful misconduct on the part of the deceased within the meaning of section 1, sub-section (2) (c) of the Workmen's Compensation Act 1897?"

Argued for the appellants—The facts disclosed a case of "serious and wilful misconduct"—*Callaghan* v. *Maxwell*, Jan. 23, 1900, 37 S.L.R. 313. The special rule infringed by the deceased was such as any man of prudence would observe. The neglect of it might endanger the lives of others, and was thus clearly "serious" misconduct. It was also "wilful." *In re Young* (1885), 31 Ch. D. 168, *per* Bowen, L.J.; *Lewis* v. *Great Western Railway Company* (1877), 3 Q.B.D. 195, *per* Bramwell, L.J.; *M'Nicol* v. *Speirs & Gibb*, February 24, 1899, 1 F. 604.

Argued for the respondent—The question determined by the Sheriff-Substitute was a question of fact, not of law, and appeal under the Act was competent only on a question of law. But if it was a question of law the Sheriff had rightly decided it. It was not disputed that the deceased's violation of the special rule amounted to negligence; but it was not necessarily serious and wilful misconduct. The rule was merely a recommendation that a workman "should not carry a naked light;" not an imperative prohibition. As to whether it was "wilful," the deceased was not directly told of the rule; and in any case, it was neglected by the other workmen in the mine—See *Rumball* v. *Nunnery Colliery Company* (1899), 80 L.T. 42.

LORD JUSTICE-CLERK—The decision of the Sheriff-Substitute in this case is certainly at first sight somewhat startling. It is difficult to imagine anything that could be more truly described as serious and wilful misconduct in a mine than that a man, while going along the mine carrying explosives, should at the same time carry a naked light in his cap. That is, upon the face of it, a most dangerous proceeding. A mine is a place where it is not always possible to walk upright, and it is easy to see how the lamp, being brought low by the man having to stoop, a spark might fall on the explo-

sives. The lamp falling off through the miner's cap coming in contact with the roof might fall on the explosives and thus cause an explosion, involving frightful calamity to the pit, and the life of the man himself and of others in the pit. Accordingly, as one would expect, there is a rule in this pit that a canister with a cover should be provided, and that no workman should permit a naked light to remain in his cap while handling any explosive which is not contained in such a closed canister. The Sheriff-Substitute has found that the deceased must be assumed to have known of this special rule; and I think that miners must be assumed to know the rules of the mine. Whether in a case where the rules, although properly posted in the pit, were not in fact known to a person coming into the pit, it might not be held in these circumstances that such a person was not guilty of serious and wilful misconduct is another question, and a question which would depend for its decision on the particular facts. No such case is made here. It is not suggested by the Sheriff that any such practice was sanctioned or even winked at in this pit. I am unable to come to any other conclusion than that this was serious and wilful misconduct, and I therefore think that the determination of the Sheriff-Substitute must be set aside.

LORD YOUNG—The question of law put to us is, whether the injuries received by the deceased were attributable to serious and wilful misconduct within the meaning of the Act. The Sheriff-Substitute has determined that his conduct, which was the cause of the injuries, was not serious and wilful misconduct, and we have to say whether we agree in that opinion. We must take the case on the facts stated by the Sheriff-Substitute, and so taking it, it is argued on behalf of the respondent that the question whether these facts amount to serious and wilful misconduct is itself a question of fact; and *prima facie* there may be some difficulty about that. I am disposed to think, however, that it is a question of law. The language "serious and wilful misconduct" is language characterising conduct. The circumstances are matter of fact. Whether his conduct is to be characterised as serious and wilful misconduct in the sense of the statute is not necessarily a question of fact. Suppose in addition to his findings in fact the Sheriff-Substitute had added a finding in fact that it was proved that the deceased was warned on this occasion that he was violating the rule and incurring danger, and that he had said that he would take the risk. That would have been matter of fact. The present case is not so strong as that. But the question is, is it not strong enough to lead us to say that this misconduct ought to be characterised as serious and wilful. I am of opinion that it is.

LORD TRAYNER—I agree. The question to be decided is a question of law; we can decide no other kind of question under this stated case. We are asked to decide whether the injury to the deceased was attributable to "serious and wilful misconduct on his part" within the meaning of the Act. That puts upon the Court the duty of construing the words of the statute, and the construction of a statute is always a question of law. I think the question put to us should be answered in the affirmative.

LORD MONCREIFF — I agree that this appeal raises a question of law; the Sheriff-Substitute rightly so states it. There is here no doubtful question of fact. The whole material facts are stated by the Sheriff-Substitute—the immediate cause of the accident, the existence of the rule which prohibits the handling of explosives while carrying a naked light, and the deceased's knowledge of the rule. On these facts I think the only legitimate inference is that there was "serious and wilful misconduct" on the part of the deceased which led to his death. It is no answer that other workmen were in the habit of breaking the rule. Therefore I am of opinion that the judgment of the Sheriff-Substitute is erroneous.

The Court answered the question in the affirmative, recalled the award, and remitted to the Sheriff-Substitute to dismiss the application.

Counsel for the Claimant and Respondent — Jameson, Q.C. — Orr. Agents — George Inglis & Orr, S.S.C.

Counsel for the Appellants — Chree. Agents—W. & J. Burness, W.S.

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*Tuesday, June* 19.

## FIRST DIVISION.

[Lord Pearson, Ordinary.

## WHYTE'S JUDICIAL FACTOR *v.* WHYTE.

*Process — Reclaiming-Note — Reclaiming-Note Signed by Party only—Competency.*

The rule of practice under which a reclaiming-note requires to be signed by counsel was not established by any statute or Act of Sederunt or positive decision, but rests solely upon practice, and accordingly the Court will depart from it in special circumstances.

Objection was taken to the competency of a reclaiming-note on the ground that it was signed by the party reclaiming and not by counsel. It appeared that there had been previous reclaiming-notes in the process which had been signed by the party only, and which had been entertained by the Court without objection having been taken to their competency. The party also stated that he had endeavoured, though unsuccessfully, to obtain the signature of counsel.

The Court in the circumstances *repelled* the objection.