course of his employment. The deceased was a brusher in the mine, and it was no part of his duty to touch the detonator.

Argued for the pursuer and respondent—(1) In this case there had been no serious or wilful misconduct. The deceased had acted neither in breach of special rule No. 12 nor in breach of an order given by a superior. All the cases in which there had been held to be serious or wilful misconduct on the part of the workman fell within one of these two categories. The deceased had not been attempting to pull out the wires in order to take out or unram the explosive. His intention was to render the explosive harmless by removing the wires. The false statement was too remote to be taken into account as a cause of the accident. (2) The accident arose out of and in the course of the employment. The deceased was performing what he considered his duty in the service of his employers when the accident happened.

LORD YOUNG—I have carefully considered the Sheriff's findings of fact, and I think that upon these findings he has come to a correct conclusion in law. The most serious question presented for his consideration was whether or not the deceased workman committed a contravention of rule 12 (*e*) of the Coal Mines Act, for if so we should certainly have characterised such contravention as "serious and wilful misconduct." I agree with the Sheriff that the behaviour of the workman did not amount to a violation of the rule, for assuming the facts to be as found by the Sheriff, I agree with him that they do not show that at the time of the accident the workman was attempting to "unram" the charge. I have also no doubt that the accident arose out of and in the course of the man's employment, and I therefore see no reason for interfering with the Sheriff's judgment, and think it should be affirmed.

LORD TRAYNER—I have come to the same conclusion. I have no doubt that the accident arose out of and in the course of the deceased's employment. But the serious question is whether the deceased violated rule 12 (*e*) of the Coal Mines Regulation Act, which provides (1) that no explosive is to be pressed into a hole of insufficient size, and (2) that after the hole has been charged the explosive shall not be unrammed. Now, on the facts as stated by the Sheriff-Substitute (and we are bound to take these facts as correct) there is no evidence that the deceased attempted to remove the charge. He attempted to pull out the wires. For what purpose? The impression produced on my mind from the Sheriff's statement of the facts is that being ignorant of the mechanism of the detonator he thought that the charge might go off if anything came in violent contact with the wires, and he therefore attempted to take out the wires and render the detonator harmless. The mishap in my opinion was caused by the ignorance of the deceased and not by his serious and wilful misconduct.

LORD JUSTICE-CLERK—I confess that while hearing the debate I have had from time to time some misgivings as to whether the conclusion arrived at by the Sheriff-Substitute is right. But when these misgivings are analysed I find that they all turn on the question whether the findings in fact of the Sheriff-Substitute are correct. Thus on finding (9) my impression would rather have been that the deceased was attempting to remove the charge by pulling at the wires, and if that had been the case he would of course have been breaking rule 12 (*e*) of the Coal Mines Act.

But I am bound to take as correct the findings of fact of the Sheriff-Substitute on these points, and that being so I do not see my way to differ from your Lordships.

LORD MONCREIFF was absent.

The Court answered the first and second questions of law in the negative and the third question of law in the affirmative, and therefore dismissed the appeal.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Appellants—Campbell, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Saturday, January 16.

SECOND DIVISION.

[Sheriff Court at Glasgow.

WILSON *v.* BENNETT.

Res Judicata—Conviction for Assault on Policeman not Bar to Action of Damages against Policeman for Assault Prior to Offence.

A person who had been convicted in the police court of assault upon a policeman brought an action of damages against the policeman in respect of an assault which he alleged the defender had made on him on the occasion of, but prior to, the assault of which he had been convicted.

Held that the conviction did not bar the pursuer proceeding with his action.

Gilchrist v. *Anderson*, November 17, 1838, 1 D. 37, *commented on.*

Process—Issue—Form of Issue—Action of Damages Against Policeman for Assault—"Wrongously."

Where an action of damages for assault against a policeman was sent to jury trial the Court *refused* the motion of the defender that the word "wrongously" should be inserted in the issue.

George Albert Wilson, engineer, Glasgow, raised an action in the Sheriff Court at Glasgow against Alexander Bennett, constable in the Eastern Divison of the Glasgow Police Force, for £100 in name of damages for assault.

The pursuer averred that about 12·30 p.m. on 9th December 1902 he left his employment at Messrs J. & F. Bell, tobacco manufacturers, Glasgow, and was proceeding towards his home in Gallowgate; that at Claythorn Street he called the attention of the defender, who was on duty there, to a vent which was on fire, that the defender swore at the pursuer and the pursuer threatened to report him; that the defender kicked the pursuer, struck him on the head with his baton, and seized him by the throat; that the pursuer in his endeavours to protect himself caught the defender's helmet by the strap and the helmet fell off; that the pursuer was then arrested by the defender and two other constables and taken to the Eastern Police Office, where he was charged by the defender with having assaulted him; that on the following morning the pursuer was brought before the magistrate officiating in the Eastern Police Court, and after evidence was led by defender and his associates was convicted and sentenced to imprisonment for fourteen days failing payment of a fine of £1, 1s.; and that since the date when the assault was committed on him the pursuer had had medical attention, and that he would permanently suffer in consequence of the defender's brutality.

No action had ever been taken by the pursuer to get his conviction suspended.

The defender pleaded, *inter alia*—"(2) The pursuer having been convicted in a competent Court is until that conviction has been set aside barred from suing this action."

On 27th May 1903 the Sheriff (BOYD) allowed a proof.

The pursuer appealed for jury trial, and submitted the following issue for the trial of the cause—"Whether on or about the 9th day of December 1902, at or near Claythorn Street, Glasgow, the defender assaulted the pursuer, to the loss, injury, and damage of the pursuer? Damages laid at £100 sterling."

The respondent in support of his second plea-in-law argued—This action was barred by reason of the fact that the pursuer had been convicted, and that the conviction had not been set aside. The Court should refuse to allow him to proceed if they were satisfied that the evidence which was proposed to be tendered might have been tendered in the Police Court. If he had proved his present statements he would never have been convicted. He might have sought a remedy by suspension if he thought that his conviction was unjust. Not having sought that remedy the conviction was *res judicata*, and the present action was incompetent — *Gilchrist* v. *Anderson*, November 17, 1838, 1 D. 37. The case of *Wood* v. *North British Railway Company*, February 14, 1899, 1 F. 562, 36 S.L.R. 407, was distinguishable from the present, as in that case there had not been any conviction for assault on the police.

Counsel for the appellant was not called upon.

LORD JUSTICE-CLERK—I can see no ground upon which the pursuer's case can be dismissed as incompetent. The averments made by him on record are such that if they were proved he would be entitled to a verdict. It is admitted that there is here a perfectly relevant case, but it is nevertheless argued, on the authority of *Gilchrist* v. *Anderson*, that the action must be dismissed. Now, the case of *Gilchrist* (on whatever grounds it may have been decided) cannot be upheld on the ground suggested by the defender, that where a person has been convicted of an assault upon the police, and has not appealed against his sentence, he is thereby barred under any circumstances from bringing an action of damages for assault against one of the policemen who made the arrest.

LORD YOUNG—I am of the same opinion, and I do not think the objection to the relevancy taken by the defender is arguable. In the case of *Gilchrist* cited for the defender the assault complained of consisted in arresting the pursuer, taking him to the police office, and there procuring his conviction on a charge of rioting—a very different set of circumstances from those in the present case. Here the action is brought in respect of an assault alleged to have been committed on the pursuer before he was arrested, and the case of *Gilchrist* is certainly no authority for the proposition that the conviction of the pursuer before the magistrate, even though he has made no attempt to suspend that conviction, in any way bars him from bringing an action for assault committed before he was arrested. I think it is a relevant and a very fit case to go before a jury.

LORD TRAYNER—I am of the same opinion. It is plain that there is no objection here to relevancy. The question is whether the pursuer, having been convicted in the police court of an assault on the defender, is barred by that conviction from suing the defender in a civil court for damages in respect of an assault alleged to have been committed on him by the defender prior to the assault of which the pursuer was convicted. I can see no ground for thinking so, and I may add that in my opinion a conviction or judgment in a criminal court is not a *res judicata* effectual to bar an action or claim in a civil action arising or alleged to arise out of the same circumstances.

LORD MONCREIFF was absent.

The respondent moved that the word "wrongously" be inserted in the issue.

The appellant objected.

The Court approved of the issue as proposed by the appellant and appointed it to be the issue for the trial of the cause.

Counsel for the Pursuer and Appellant—Spens. Agent—James G. Bryson, Solicitor.

Counsel for the Defender and Respondent—Shaw, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.