those powers involve the taking of land, or whether they involve merely the injuriously affecting the property or the trade of another person, I should hold that in the absence of directions to the contrary it is the person whose property or trade is interfered with who is to receive the compensation, and the person who is empowered to interfere with it who is to pay. It might be otherwise provided. A statute might empower Peter to do the damage and Paul to pay for it, but in the absence of express declaration I should not attribute such an illogical, not to say inequitable, intention to the Legislature. It would therefore follow in the ordinary case that it is the local authority in whose name the order is issued, whether by itself or by the Sheriff, who must make payment—in this case the County Council of Renfrewshire. I should only wish to reserve my opinion upon a question that might possibly arise, and that would be, if at the instance of the burgh authority the County District made an order prohibiting the sale, and on appeal to the Sheriff that order was recalled, and then the 16th section provides that pending the appeal to the Sheriff the original order shall remain in force. It is quite conceivable that an argument in such a case might be maintained to enforce liability against the burgh authority for having obtained an order which was ultimately found to be improper, on the same ground as a party applying for interim interdict, afterwards recalled, may be made responsible for the damages caused by the interdict obtained on his representation. I am not expressing any opinion as to the soundness of such a contention, but a case might arise in which, upon grounds different from those of the present case, the criterion of responsibility might also be different.

LORD KINNEAR—I agree with your Lordship in the chair. The pursuer brings this action for compensation for loss which he says he has suffered by reason of the exercise of the powers of the Act. It is conceded on record that he has suffered loss and damage in consequence of a certain order which was pronounced in the exercise of the powers contained in the Act, and the only question is whether the authority liable to make good that compensation is the local authority of Greenock or the local authority of a county district in Renfrewshire. It must be conceded that the case is in exactly the same position as if the order complained of had been pronounced by the local authority of the county. In point of fact the local authority of the county declined to pronounce the order, but an appeal was presented to the Sheriff of Renfrewshire, and he, differing from the local authority, pronounced the order which they ought to have given at first. It is conceded that they are in exactly the same position now as if they had done from the first what the Sheriff found they ought to have done. Therefore the order of which the pursuer complains was an order of the local authority of Renfrewshire in the exercise of the powers conferred upon them by the Act and conferred upon nobody else. It appears to me to follow that if there is compensation for the exercise of that power payable by any local authority, it must be by the local authority which in fact executed the power, because that was the only authority which proceeded directly against the present pursuer, and it is no concern of his whether they are moved to proceed by their own medical officer or by some medical officer of some other local authority. Therefore it appears to me to follow that if compensation is due it must be paid by them. Whether compensation is due or not, or how much is due, is not a question for this Court, because that must be determined, as your Lordship has pointed out, by an arbiter to be appointed by the Local Government Board. In the meantime what we decide is—and all that we can decide is—whether, assuming the claim for compensation to be good, the liability lies against the one or the other of the two local authorities. I agree with your Lordship and the Lord Ordinary.

LORD PEARSON concurred.

The Court adhered.

Counsel for the Respondent and Pursuer—Guthrie, K.C.—Munro. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Reclaimers and Defenders—M'Clure, K.C.—Macmillan. Agent—J. Gordon Mason, S.S.C.

Tuesday, February 6.

FIRST DIVISION.

[Sheriff Court at Perth.

VAUGHAN *v.* NICOLL.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* 2 (*c*)—"*Serious and Wilful Misconduct*"—*Question of Fact or Law—Competency of Appeal.*

A farm servant was driving a lorry into town. Shortly after his setting out the servant was discovered lying injured on the road, the lorry being upset. There was no direct evidence as to the cause of the accident other than the servant's evidence, but the reins were found tied to a drag wheel on the front of the lorry. The Sheriff-Substitute found that the cause of the accident was the servant's tying the reins to the wheel and the horse's head having been pulled round so as to make it run back and upset the lorry, and he was of opinion that the servant's conduct amounted to serious and wilful misconduct in the sense of the Act, and held that he was therefore not entitled to compensation.

In an appeal *held* that the Sheriff-Substitute's decision was not subject to review, in respect that his finding that the applicant had been guilty of serious

and wilful misconduct was a finding as to fact and was not insupportable in view of the facts proved.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, sub-section 2 (*c*) enacts—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

This was a case stated on appeal from a determination of the Sheriff-Substitute (SYM) at Perth in an arbitration under the Workmen's Compensation Acts 1897 and 1900 between James Vaughan, 40 Pomarium, Perth, claimant and appellant, and David Nicoll, respondent. The respondent was tenant of the farm of Charlestown in the Carse of Gowrie, and the applicant was in his employment and was at the time of the accident engaged in driving up a lorry from the farm to Perth. Shortly after his leaving the farm and while he was still in the farm access road, he was found with the lorry upset.

The case, *inter alia*, stated—"With reference to the cause of the accident, it appeared to be the fact that when the applicant started he was sitting in the proper position upon the front of lorry, with the reins in his hand; that the horse, which was the same he had driven down with the lorry (though the applicant alleged it was a different horse) was a quiet horse, a little short in wind; that the route by which he would have to go to Perth was, first, along the said farm access road, on which there is a rather steep incline upwards from the farm, and afterwards along the main road, through the Carse of Gowrie, from Dundee to Perth, on which there is considerable traffic, both by motors and by horse-drawn vehicles, and alongside which for a considerable distance runs the railway line from Glasgow to Dundee; that no one saw the accident happen, but judging from what was found when the applicant was picked up and the lorry was righted, the cause of the accident was that the applicant had tied the reins to a little wheel which works a brake on the front of the lorry instead of keeping them in his hand, and that although the horse was going uphill on a straight piece of road its head had been pulled round so as to make it run back and upset the lorry; that this opinion is chiefly derived from the fact that when the respondent's sons and their farm servant came to the spot, attracted by the applicant's cries, they found the reins tied to the said small wheel, and had to release the horse by loosing them at the horse's bit; that, taking together such facts as there are, no other natural and intelligible account of the accident occurred to me, for I could not in the circumstances accept the applicant's own, which was that when he was driving up the slope the horse stopped, ran back, and upset the lorry. . . . It was then contended that what the applicant was doing when the accident happened to him was not driving a horse and lorry at all, as was his duty, but that his action, as inferred from the facts, amounted to serious and wilful misconduct. I was of that opinion in fact and in law. I thought the case distinguished from a case cited in which a man was accidentally killed, no one seeing the accident, and in which it appeared most likely that he had taken a dangerous instead of the only safe and proper way of reaching the point at which he was hurt. It was held that he was killed 'in the course of his employment,' and that a rash and dangerous way of going about his employment was not 'serious and wilful misconduct.' I refused compensation, and, as such a question is in certain aspects a question of law, I have stated this case."

The question of law for the opinion of the Court was—"On the facts proved, was I right in holding that the appellant was guilty of serious and wilful misconduct within the meaning of section 1, sub-section 2 (*c*), of the Workmen's Compensation Act 1897?"

Argued for the appellant—The applicant in tying the reins to the wheel was not aware of the risk he incurred, and therefore the element of wilfulness was absent. In all the previous cases in which compensation had been refused on the ground of serious and wilful misconduct the injury was received by the applicant either while he was acting in disobedience of a rule of a mine or factory or of the orders of a person to whose orders he was bound to conform—*M'Nicol* v. *Speirs, Gibb & Company*, February 24, 1899, 1 F. 604, 36 S.L.R. 428; *Todd* v. *Caledonian Railway Company*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784; *M'Nicholas* v. *Dawson & Son* [1899], 1 Q.B. 773.

Argued for the respondent—This was a question of fact on which the Sheriff's decision was final, and appeal was incompetent—*Condron* v. *Paul & Sons*, November 5, 1903, 6 F. 29, 41 S.L.R. 33. [The LORD PRESIDENT referred to *Dobson* v. *United Collieries*, December 16, 1905, 43 S.L.R. 260.] The act of the applicant here was serious and wilful misconduct—*United Collieries* v. *Dobson*, *supra*.

At advising—

LORD PRESIDENT—In this case under the Workmen's Compensation Acts the point raised is whether the Sheriff was right in finding that in the circumstances of the case there had been serious and wilful misconduct within the meaning of section 1, sub-section 2 (*c*). There have been a good many cases decided upon this section, and it has been said more than once that whether there is serious and wilful misconduct is in many circumstances a question of mixed fact and law—that is to say, there is always a question of fact underlying, and there is the further question of whether the true facts have in law a complexion which amounts to serious and wilful misconduct under the statute.

Under the Act it is quite certain that an appeal is given to this Court only upon matters of law, and not upon matters of fact. I confess that I do not feel equal to the extremely difficult task of defining exactly where facts end and where law

begins. I am somewhat sceptical if any definition could be framed that would meet the various circumstances to which that definition would fall to be applied. And yet in spite of the difficulty of definition, I do not think that in a concrete case there is generally very much difficulty in coming to a conclusion whether the question submitted to the Court depends upon a view of the facts or on a legal view. It is easier to illustrate than it is to define, and it is easiest to illustrate by taking a case at each end of the scale. The case that was recently sent to Seven Judges (*Dobson* v. *United Collieries*, 43 S.L.R. 260), in which the whole matter of the application of the colliery rules was considered, was a case where obviously the considerations which ruled were truly legal considerations. On the other hand it is very easy to fancy cases where the question is a pure question of fact and nothing else. When it is a pure question of fact there can be no appeal upon the consideration of whether the arbitrator has arrived at a perfectly just conclusion, although there may be always an appeal upon this ground, that the facts themselves as proved do not afford any foundation whatsoever on which to rest the arbitrator's decision. In a case like that there has always been review, and I think it is within the last few days that I had occasion to make that remark in the decision which we pronounced in the case between William Baird & Company and Mrs Savage (43 S.L.R. 300, at p. 302).

Now when I come to the present case I am bound to say that I do not think there is any question of a legal complexion in the matter. The only point is whether, from the facts proved, the learned Sheriff-Substitute as arbitrator has or has not drawn the right inference. Upon that matter I do not consider that I am entitled to review his decision. If he had drawn an inference which could not possibly, in any view of the proved facts, have been supported by them, I should have considered myself entitled to review his decision. But I find it impossible to say that the facts could not support the inference he has drawn. I might say that, sitting as an arbitrator, I should not have come to the same conclusion or drawn the same inference; but if I were to say that, I do not think I would have advanced the case, for I would only be saying that if I were arbitrator I would have come to the opposite conclusion. That being so, this seems to me a case in which we cannot interfere with the findings of the Sheriff, and that, accordingly, the question in law ought to be answered in that way.

LORD M'LAREN—I concur.

LORD KINNEAR—I am of the same opinion. It very often takes a good deal of law to determine whether a question is a question of law or of fact, and I do not think any general definition could be safely laid down for distinguishing between the two categories. I think, however, that if a Sheriff finds certain facts as to the conduct of a workman, and then proceeds to find that the conduct so specifically described was wilful misconduct in the sense of the Act, or was not wilful misconduct, the question whether the conduct described by the Sheriff answers the description of wilful misconduct in the statute is a very proper question for the consideration of this Court of Appeal. But that is assuming that the Sheriff has drawn the last inference of fact that could be drawn and has left no facts undescribed, and has then found that the facts so described inferred serious and wilful misconduct in the sense of the statute. I do not think that the case before us presents that kind of question at all. I confess that if I had only to deal with the specific facts as stated by the Sheriff, and from these facts and nothing more, was asked to draw for myself the inference that the man had been guilty of wilful misconduct, I might not be prepared to draw the same inference as the Sheriff did. But then I think it clear that in this case the Sheriff did draw, as an inference of fact, that there was really wilful misconduct; and I agree that that is a decision of a case on fact which we are not entitled to review.

LORD PEARSON—I take the same view as your Lordships.

The Court pronounced this interlocutor:—"In respect the case does not set forth a question of law: Dismiss the appeal, and discern. . . ."

Counsel for the Appellant—Maclennan, K.C.—Lippe. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Respondent—G. Watt, K.C.—A. M. Stuart. Agent—Alexander Ramsey, S.S.C.

Saturday, February 3.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WELSH & FORBES *v.* JOHNSTONS.

Agent and Client—Contract—Company—Law-agents' Claims against a New Company Charged against the Original Firm—Contract between Company and Firm—Law-agent not Named or Defined in Contract—"Jus quæsitum tertio"—Title to Sue.

A firm having resolved to turn their business into a limited company, instructed Messrs W. & F., law-agents, to act for them in the matter, and a preliminary agreement, declared only to be binding if adopted by the company, was thereafter entered into between the Firm and W. (of Messrs W. & F.) on behalf of the proposed company. This agreement, *inter alia*, provided that the Firm should pay all the expenses of the flotation up to the allotment of the shares, including a