that condition was satisfied, because, according to the case, the pursuer's father has not been heard of for eight years, has contributed nothing to her support all that time, and it is not known whether he is alive or dead. I accordingly think that in that state of matters, and nothing being known about the paternal grandparents, the deceased David MacLeod in default of nearer relatives was liable in the support of the pursuer, and that there were no nearer relatives available to afford support to the pursuer seems to be sufficiently established by the fact that David MacLeod undertook the burden of the pursuer's support for the last eight years.

But it was further argued for the appellants that as David MacLeod was survived by a son and daughter the pursuer's title to sue an action of solatium is excluded by the existence of these nearer relatives. I cannot assent to this proposition. The pursuer fulfils, as I have already explained, both the requirements set forth in the dictum above quoted from Lord President Inglis' opinion in *Eisten's* case, and has therefore a right to sue an action of solatium and damages in respect of the death of David MacLeod, and the fact that there are two persons nearer in degree of relationship who also are entitled to sue such an action has not the effect, in my opinion, of excluding the pursuer's title to sue, although her remoter degree of relationship might affect more or less the question of amount of damages if the matter had ever come to be submitted to the determination of a jury.

For these reasons I am of opinion that the decision of the Sheriff-Substitute is right, and that the Court ought to answer the question of law in the affirmative.

LORD JUSTICE-CLERK—I concur with your Lordships. Three questions arise in the case—1. Was there a claim? 2. Has the operation of that claim been put an end to by the accident? 3. Has the person who has the claim a right to compensation in respect of the death of the person upon whom the claim existed?

Here I have no doubt there was a claim. It was a claim for present sustenance. Such a claim may, I think, be directed against the nearest relative on whom at the time the claim can be made operative. In this case the questions are—1. Was the maternal grandfather responsible? and 2. was it a necessary condition that all other persons primarily liable should be discussed first, and that if this was not done must the support given by the deceased be held to be given *ex pietate* and not as of obligation? On the grounds stated by your Lordships I am of opinion that an ascendant on the mother's side is within the range of the obligation. If so, it is here ascertained that the claim was made during the life of the maternal grandfather, and was accepted by him in default of the father's residence or survival being known. I have no doubt on the question whether, had he resisted the claim, he could in the circumstances have been compelled to give the aliment. That being so, I have equally no doubt that the death of the grandfather by an accident while in the appellants' employment places them in the position under the Act of providing compensation for the loss of the support afforded by the deceased.

The LORD JUSTICE-CLERK stated that LORD LOW, who was absent at the advising, concurred in the judgment.

The Court answered the question in the affirmative.

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

Counsel for the Respondent—G. Watt, K.C.—Wilton. Agent—P. R. Tullo, S.S.C.

Tuesday, February 26.

FIRST DIVISION.

(SINGLE BILLS.)

SHERIDAN *v.* PEEL.

Process—Proof—Recovery of Documents—Diligence—Reparation—Slander—Malicious Charge of Theft—Documents in Hands of Crown Officials.

A mortgage broker's clerk, who had been summarily dismissed, brought an action against his employer to recover damages for an alleged malicious charge of theft made against him to the procurator-fiscal, upon which he had been arrested. The charge which was alleged to have been made was of the theft of certain letters from would-be clients of the employer. The employer admitted having complained to the procurator-fiscal of the conduct of the pursuer, who, he alleged, had improperly communicated to his competitors applications by would-be clients.

The pursuer sought a diligence to recover (1) all letters passing between the pursuer and the defender or his clients; (2) communications passing between the defender and the procurator-fiscal having relation to the complaint made by the defender; (3) the charge books and notes of the procurator-fiscal, that entries dealing with the complaint might be taken; and (4) the precognition taken of the defender by the procurator-fiscal.

Held that (1), (3), and (4) must be disallowed, but that (2), intimation having been given to the Lord Advocate, who had adjusted the article and did not object, was to be allowed. *Henderson* v. *Robertson*, January 20, 1853, 15 D. 292, *followed.*

Observations per the Lord President as to recovery of documents in custody of Crown officials. *Forbes* v. *Gracie*, October 29, 1901, 9 S.L.T. 217, *disapproved.*

On 9th July 1906 Thomas Patrick Sheridan, mortgage broker's clerk, 271 Camberwell

New Road, London, brought an action of damages for slander against Arthur Peel, money lender, carrying on business at 37 Castle Street, Edinburgh, in which the following issue for the trial of the cause was approved—"Whether, on or about December 1905 or January 1906, the defender falsely, maliciously, and without probable cause, informed or caused information to be given to George Somerville, Procurator-Fiscal of the City of Edinburgh, falsely accusing the pursuer of theft of documents, in consequence of which the pursuer was apprehended, searched, and imprisoned in the City Police Chambers and in the Calton Jail, to the loss, injury, and damage of the pursuer. Damages laid at £500 sterling."

The pursuer had been in the defender's service from 1st May to 8th December 1905, and was summarily dismissed. He averred —"(Cond. 8) In or about the said month of December 1905, or the month of January 1906, the defender lodged information with George Somerville, Procurator-Fiscal for the City of Edinburgh, that the pursuer had stolen from the defender's office at 37 Castle Street—(1) a letter from the said J. S. R. Baxter [*an applicant for a loan whose application the defender had averred the pursuer had not intimated to him but disclosed to competitors*] to the defender, dated 6th June 1905; (2) a statement of particulars with reference to a proposed mortgage for £2800 upon property in Musselburgh belonging to the said J. S. R. Baxter; (3) a letter from the said J. S. R. Baxter to the defender, dated 15th June 1905; (4) a letter from the said J. S. R. Baxter to the defender, dated 14th November 1905; and (5) document containing particulars of interest of the said Charles M. Horne [*another applicant like Baxter*] in heritable estate in Aberdeen under his mother's deed of settlement. . . ."

The pursuer sought a diligence for the recovery of documents.

The specification of documents sought to be recovered included the following articles—"1. All letters, telegrams, and other communications passing between the pursuer on the one hand and the defender or his clients on the other hand from 1st May 1905 to 8th December 1905. . . . 6. All letters and other communications passing between the defender or anyone on his behalf and the Procurator-Fiscal for the City of Edinburgh or anyone on his behalf having relation to the complaint made by the defender against the pursuer. 7. The charge books and other books kept by, and all records and other notes made by, the said Procurator-Fiscal or anyone on his behalf, that excerpts may be taken therefrom of all entries therein relative to said complaint. 8. The precognition taken from the defender by the said Procurator-Fiscal mentioned in answer 8." [Ans. 8, *inter alia*, stated that the defender after making a complaint as to the pursuer's disclosing business to competitors had at the request of the Procurator-Fiscal allowed himself to be precognosced.]

Counsel for the defender objected to the said articles of the specification, and referred to *Arthur* v. *Lindsay*, March 8, 1895, 22 R. 417, 32 S.L.R. 334; *Watson* v. *M'Ewan*, July 25, 1905, 7 F. (H.L.) 109, 42 S.L.R. 213.

Counsel for the pursuer cited *Henderson* v. *Robertson*, January 30, 1853, 15 D. 292, and *Forbes* v. *Gracie*, October 29, 1901, 9 S.L.T. 217.

LORD PRESIDENT—This is a diligence for the recovery of documents, and objections have been taken to certain articles of the specification. The action is one of damages for slander, the slander consisting in the defender having maliciously charged the pursuer with having committed theft. It is denied that any such malicious communication was made.

Article 1 is as follows—[*His Lordship quoted article* 1]. This call is clearly irrelevant. No amount of letters passing between the pursuer on the one hand and the defender or his clients on the other hand can prove that the communication, which was not made between the writers and receivers of those letters, was made maliciously or not. Accordingly this article must be disallowed.

Article 6 is in these terms—[*His Lordship read article* 6]. I think this is a proper call. Any letter passing between the defender and the procurator-fiscal of the city in which the charge was made, or any correspondence arising out of such charge, is fair evidence. This was just the class of evidence which was held to be recoverable in *Henderson* v. *Robertson*, January 20, 1853, 15 D. 292.

Articles 7 and 8 are in these terms—[*His Lordship read articles* 7 *and* 8]. These articles are both objectionable in any form in which they can be stated. It is out of the question to allow the recovery of a precognition which is not necessarily what the defender said, but is merely the procurator-fiscal's (or his clerk's) version of what he said. Such a precognition is clearly not evidence against the defender. It is equally out of the question to allow the recovery of the charge books and other books kept in the procurator-fiscal's office, for the defender has nothing to do with these books and they cannot be evidence against him. This would have been enough for the disposal of the case, if it had not been that a case has been quoted to us in the Outer House (*Forbes* v. *Gracie*, Oct. 29, 1901, 9 S.L.T. 217) in which Lord Kincairney is reported to have granted a diligence couched in similar terms to article 7. I can only say that that decision was, in my opinion, quite wrong. His Lordship is further reported to have observed, in granting the diligence, that "it would be open to the public official called on to produce under the diligence to plead to the commissioner confidentiality:" That is also quite wrong. It is contrary to the conclusion to which your Lordships have come in a recent case which is now at avizandum—*Dowgray* v. *Gilmour and Others*. It is quite clear that where documents sought to be recovered are in the custody of the Lord Advocate or of the Crown officials, the only proper course is to intimate to

the Lord Advocate. He may then consent to produce the documents or refuse to produce them on grounds of public interest. If he refuses to produce them the Court can be asked to ordain him to do so. There are probably very few instances in which the Court would ordain the Lord Advocate to produce documents which he thought it inexpedient to produce; but the power to do so has always been recognised as inherent in the Court. The matter is one for disposal by the Court and not one to be left to the Commissioner to deal with. It is not truly a question of confidentiality at all, but a question of public expediency.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court disallowed articles 1, 7, and 8 of the specification and continued article 6 in order that intimation might be made to the Lord Advocate.

On 26th February counsel for the Lord Advocate appeared at the bar and stated that he had adjusted article 6 with counsel for the pursuer, and that accordingly he did not oppose that article, as adjusted, being granted.

The article as adjusted was—"All letters and other communications passing between the defender or anyone on his behalf and the Procurator-Fiscal for the City of Edinburgh or anyone on his behalf having relation to the information mentioned in condescendence 8 made by the defender against the pursuer prior to 23rd January 1906."

The Court granted the specification as amended, and found the Lord Advocate entitled to two guineas of expenses.

Counsel for Pursuer—MacRobert. Agent—Walter M. Murray, S.S.C.

Counsel for Defender—W. T. Watson. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Lord Advocate—Adam, A.-D. Agent—Crown Agent.

Tuesday, February 26.

FIRST DIVISION.

[The Sheriff Court at Linithgow.

PRATIES *v.* THE BROXBURN OIL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37) *sec.* 1 (2) (*c*)—"*Serious and Wilful Misconduct*"—*Breach of Statutory Rule Prior to Accident.*

Under a statutory rule a miner was required when "holing," *i.e.*, the removing a lower strata preparatory to removing the upper one, was being done, to set props as soon as there was room. A miner omitted to do so. After the "holing" was completed he and his mate proceeded to bore a blasting hole to bring away the upper strata, and while his mate was stemming the hole, the miner went under the upper strata for the purpose of measuriug the length of prop required to support the roof in a place where both strata had already been removed. The upper strata came away, fell upon him, and killed him.

Held that the miner's death was not attributable to his serious and wilful misconduct. *Dobson* v. *The United Collieries, Limited*, December 16, 1905, 8 F. 441, 43 S.L.R. 260; and *Johnson* v. *Marshall, Sons, & Company, Limited*, L.R. [1906] A.C. 409, *commented on* and *distinguished.*

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1 (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."

Jane Praties, 245 Mid Street, Broxburn, as an individual and as representing her pupil children, claimed compensation under the Workmen's Compensation Act 1897 for the death through accident of her husband, a miner in the employment of the Broxburn Oil Company, Limited. In an arbitration in the Sheriff Court at Linlithgow the Sheriff-Substitute (MACLEOD) awarded compensation and at the request of the employers stated a case for appeal.

The Broxburn Oil Company, Limited, have duly posted in the mine where the deceased miner was employed the following additional special rule:—"(9) Where holing is being done, sprags or holing props shall be set as soon as there is room, and the distance between such sprags or holing props shall not exceed 6 feet, or such less distance as shall be ordered by the owner, agent, or manager."

The following were the *facts* as given in the stated case:—"I. Robert Praties (herein called the deceased) was employed as a shale miner by the appellants in their South Greendykes Mine. The deceased and another man, James Anderson, worked together (Anderson working to the orders of the deceased) at the removal of a stoop. Their method of operation in taking a cut off the stoop was (*a*) to remove, by Yankee or bursting shots, the 14-inch layer of blaes which was between an upper and lower seam of shale, each of the said seams of shale being about 2 feet 5 inches thick; (*b*) to take out the bottom or bench shale by blasting; and lastly (*c*) to take off the top shale also by blasting, or by pinching, if found practicable.

"II. In the course of taking a cut off a stoop in the said mine the deceased and James Anderson had not, at the close of 21st August 1905, carried the work of removal of either the blaes or the bench shale so far as to necessitate the setting of a sprag for the support of the top shale in terms of additional special rule No. 9 (*v. supra*) which, along with the other Special Rules