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

under the Coal Mines Regulation Act 1887 in force at the said mine, was duly posted up at the minehead. . . . The Special Rules under the Coal Mines Regulation Act 1887 contain no definition of the word 'holing,' and the nearest one can get (on the evidence led) to a definition is to say that 'holing is the undercutting or removing of a sufficient portion of the strata with the view of removing the whole.' This description of the operation is very ambiguous. It was proved that the word 'holing' is understood in different senses by those employed at the said mine. Some of them understand it to be limited to the operation of removing the blaes lying between the two seams of shale, while others understand it to include all the work which is necessary for the removal of the whole blaes and bench shale.

"III. Neither the deceased nor James Anderson had set any sprags or holing props while holing was being done (*i.e.*, either while the blaes or the bench shale was being removed), notwithstanding there was ample room for the setting of such a sprag or holing prop both while removing the blaes and while removing the bench shale. Such a sprag ought in terms of said additional special rule No. 9 to have been set between the bench shale and the top shale on the morning of the accident, 22nd August 1905, but if a sprag had been so set it would have been blown away in the course of the removal of the bench shale which preceded the accident. If the said sprag had been so set and blown away, the deceased was (if the word 'holing' is to be understood as including the removal of the bench shale under the top shale which subsequently fell on the deceased) guilty of a further contravention of the said additional Special Rule No. 9 in respect he did not, after a portion of the bench shale had been removed, erect a sprag from the pavement for the support of the said top shale while the remainder of the bench shale was being removed. A sprag so erected from the pavement to the said top shale would have continued in position notwithstanding the removal of the remainder of the bench shale, and if left standing after the whole of the bench shale had been removed would have prevented the fall of the top shale which killed the deceased.

"IV. Before 9 a.m. on the morning of the accident the work of 'holing,' even in its larger meaning, had been completed, and everything had been cleared out from below the top shale which subsequently fell upon the deceased. The 'holing' in deceased's working place being thus completed, it would have been consistent with good mining practice (according to the evidence led before me) to have removed the sprags or holing props had any such been erected for the support of the said top shale before proceeding to bore a hole in the top shale. As after stated, the matter of support for the overhanging tops after holing is finished was in this mine left to the judgment of the individual miner, but it was clear from the evidence led before me that had those in charge of this mine thought of issuing directions they would not have approved of what I have above stated to be good mining practice.

"V. When the deceased and James Anderson had completed the removal of everything under the said top shale, and the holing (in the largest possible meaning of the word) had been thus completed, they proceeded to make arrangements for bringing down the top shale, and thinking a shot necessary for that purpose they both proceeded to bore a hole in the top shale, and that having been done, James Anderson began to stem the shot while the deceased proceeded to measure the height from the roof in order to put in a tree for the support of the roof. In order to get to the proper spot for this measurement it was necessary for the deceased to walk under the said unsupported top shale, and while making the actual measurements it was necessary for him to have the whole of his body except the head and shoulders under the said unsupported top shale. While in the said last-mentioned position, the said top shale came away, and three tons of it falling on the deceased he was completely buried under it and killed on the spot, about 9·40 a.m. on the 22nd August 1905.

"VI. On examination after the accident it was found that the top shale had come away from a 'lipe' which had not been seen in the previous cut. The said top shale had been overhanging to a considerable extent (2½ feet in length, 4 to 5 feet inwards, and 2 feet 5 inches in thickness) all the previous night, but in view of the fact that on the morning of the accident (*a*) the length of the holing had been increased so as to be at least 9 feet, and the risk of going under unsupported top shale (which is never entirely absent) correspondingly increased; and (*b*) shots had been fired, the deceased, who had the reputation of being a capable and careful miner, before proceeding under the said top shale to make the said measurements, sounded the said top shale and satisfied himself it gave no indication of danger. No fault had been found with the condition of his working-place by anyone in authority over him (but the last inspection of the place prior to the accident had been made before the necessity for spragging had arisen), and having made the aforesaid examination of the overhanging tops he did not think that before proceeding under the said top shale it was necessary or prudent to put up a sprag to support it."

The Sheriff-Substitute's *finding in law* was—"On the foregoing facts I inclined in law to the view (additional special rule No. 9 being only applicable to cases where holing is still being done) that though, while holing on the morning of the accident, the deceased was guilty of a contravention of the additional special rule No. 9 by his said failure to set a sprag between the bench and top shales, and assuming, but not deciding, that he was guilty of a further contravention of the said rule by his said subsequent failure to set a sprag between the pavement and the top shale, yet his injury was not attributable to either of his said contraventions or to

any other serious and wilful misconduct on his part, but to an error of judgment on his part, after holing had been completed, in a matter left to his own individual judgment by (*a*) the special rules under the Coal Mines Regulation Act 1887, and (*b*) those in authority over him in the said mine; and having so decided, I awarded the respondent compensation to the amount of £300, being £120 to her as the deceased's widow, and £30 to each of their six children, with expenses."

The *question of law* for the opinion of the Court was—"Was the deceased's injury attributable to his own serious and wilful misconduct in the sense of section 1 (2) *c* of the Workmen's Compensation Act 1897?"

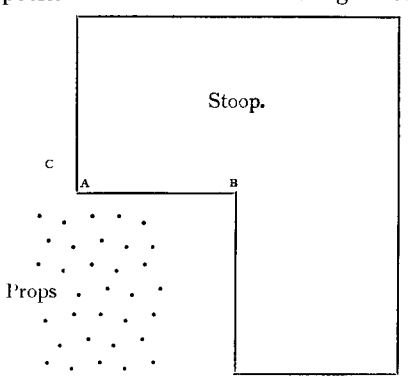
On May 31, 1906, the Division, of consent, remitted to David Rankine, M.E., Glasgow, to report on the method of working.

On February 2, 1907, Rankine reported—". . . I beg to report that I have met with agents for parties and in their presence examined plans relative to the method of working, and find that the method is that known as stoop and room with subsequent working of stoops.

"The stoops are formed about 60 feet square. Their working is accomplished by the removal of strips or cuts of from 12 to 14 feet in width from one side of the stoop. As the shale is removed from these cuts or strips the roof is supported by timber props. Having completed the working of one strip the men return to the end or side of the stoop from which they first started and take another slice or cut from off the stoop, more props being added as the working space increases. This second cut having been completed the miners recover some of the props from the area of working and by the withdrawal of these the roof is encouraged to fall so as to take the superincumbent weight off the portion of the stoop still standing.

"The miner then proceeds to take another cut or slice off the stoop, and so on until the whole stoop is worked.

"In the present case the stoop had been reduced in size by cuts taken off it, and the miners were following with another cut, the working being in something like the position shown on the following sketch:—



"The miner had completed the holing in the blaes and had also worked, or benched, or removed, the under bed of the shale, and at the place marked 'A B' on sketch to a breadth of about 9 feet and an inward distance of 4 to 5 feet.

"The top shale at 'A B' over that area was standing unsupported. A shot hole had been bored into the top shale so as to blast or blow it down, and while James Anderson began to stem the shot hole the deceased went under the top shale at 'A B' so as to measure the height of the roof at or about the place 'C' on sketch with the view of putting in a tree or prop for the support of the roof at that place. While taking the measurement the body of the deceased was under the unsupported shale, his head and shoulders being in the space at 'C' where the measurement was being taken (see Article 5).

"The setting of a prop at the place 'C' was a part of the process of working.

"I should add that the blaes mined in the holing was thrown into the space next the waste and among the props, the roadway and the face of the stoop being left clear thereof."

Argued for the appellants—The work in which the deceased was engaged at the time of the accident was the operation of removing the "stoop." That work was to be done in compliance with the additional special rule 9, and the cause of the accident was his non-compliance. Such non-compliance was serious and wilful misconduct in the sense of the statute—*Dobson* v. *United Collieries*, December 16, 1905, 8 F. 241, 43 S.L.R. 260. The breaking of a colliery rule, save under absolute necessity, was in every case serious and wilful misconduct—*Dobson, cit. sup.*, Lord President at 8 F. 247.

Argued for the respondent—The miner was killed by an accident arising out of and in the course of his employment. The accident was not attributable to the workman's serious and wilful misconduct. The fact that a rule had been violated before the accident happened did not, in the sense of the statute, constitute serious and wilful misconduct, to which the accident was attributable—*Johnson* v. *Marshall, Sons, & Co.*, [1906] A.C. 409, Lord Atkinson at p. 415. The Sheriff was right.

LORD PRESIDENT—This is a stated case under the Workmen's Compensation Act, and arises out of an accident which occurred in a shale mine, where the deceased man lost his life by being buried in a fall of shale. The mine proprietors, the Broxburn Oil Company, Limited, submit to your Lordships that the case is ruled by *Dobson* v. *United Collieries Company* (8 F. 241) in respect that that case settled that a breach of a special statutory rule amounts to "serious and wilful misconduct," and that the accident here was due to such a breach.

Your Lordships at the first hearing of the case thought that the matter was far from clear in the case stated by the Sheriff as to the manner of working, and remitted to Mr Rankine to inspect the mine, and give a report upon the manner of working.

That Mr Rankine has now done, and the

result of the report is that your Lordships see very clearly how the minerals are worked. The bed consisted of two seams of shale, separated by a small bed of blaes, which, from the mining point of view, was rubbish. I ought first of all to premise that the minerals having been worked by stoop and room, the rooms had long ago been worked out, and the operation going on was the removal of the stoops. The stoops were being cut off in slices, so to speak, along their faces, and what was done was first of all to take out the useless rubbish, consisting of blaes, then to remove the under or bed seam of the shale, and then to remove the upper seam. Necessarily, if that was done without anything more, the roof proper, that is, the strata above the lie of the minerals altogether, would be unsupported, and of course it was necessary, for the safety of the men who had to go further forward to get more minerals, that they should leave behind them a passage by which they might get the minerals out, and for that purpose it was necessary to support the roof with props. On the morning of the accident the operation had gone thus far—a considerable portion of a particular stoop had been removed altogether, and the roof in that portion was duly supported with pillars; but another portion in front had only got to the intermediate stage—that is, the bed seam had been removed but the upper seam had yet to come down. Alongside, and so to speak longitudinally, there was still a part of the roof belonging to spaces which had been previously worked out, and it was necessary of course in going forward to support that roof as they went on. The operation in which the man was concerned at the moment was to put sprags under the roof. While doing so, the overhanging shale came down.

Now, to go back to what is the law of the case, it is said by the company that this case is necessarily ruled by *Dobson*. It is said on the other side that *Dobson* was too absolute in its terms, and in support of that proposition the case of *Johnston* v *Marshall, Sons & Company* [1906], A.C. 409, decided in the House of Lords in the beginning of 1906, was quoted. The facts in *Johnston's* case in the House of Lords had nothing to do with special and statutory rules in a mine, and the mere statement of that fact shows that the one judgment cannot affect the other. Some of the observations of one of the learned Lords, Lord Atkinson, dealing with the case of *Rumboll* v. *Nunnery Colliery Company* (80 L.T. 42), were quoted. Now in the first place it is a trite observation that though a judgment of the House of Lords is always binding on this Court, the *obiter dicta* of a noble and learned Lord are not. But quite apart from that—however willing one would be to give great weight to the dicta of a learned judge in the House of Lords—any *obiter dicta* as applicable to a case in this Court loses a good deal of their weight if that case was not quoted. Now unfortunately the counsel who argued the case in the House of Lords do not seem to have been acquainted with the Court of Session judgment, and accordingly I do not look on Lord Atkinson's dicta as reviewing the law laid down in that case. And more than that, though I believe there might be dicta of a judge in *Johnston's* case which might be regarded as not in line with *Dobson*, so far as the judgment in the last-mentioned case is concerned I do not see any discrepancy, for this reason, that as I read *Johnston* it is a decision on the facts, and was not directly attributable to a rule. If that be so, *cadit quæstio*. I cannot help thinking a good deal of this misunderstanding has arisen from an inadequate conception of what was said in *Dobson* v. *United Collieries, Limited*, and especially of what was said by myself in that case when I said this "I do not hesitate to say that whenever a man breaks a colliery rule which has been properly posted, and an accident happens in consequence, that is 'serious and wilful misconduct,' unless he can show that there was some dominant reason for his breaking the rule on that particular occasion." I still entirely adhere to that opinion, but I point out that the words are "and an accident happens in consequence," and not "an accident happens thereafter," or, otherwise, if I were to expand the language, "and an accident happens in consequence and is directly attributable to the breaking of the rules." Whether the accident was directly attributable to the breaking of the rule depends on considerations of facts and not of law at all.

Now, coming to the present case, my view is that, upon the whole circumstances as they have been ascertained and elucidated by Mr Rankine's report, the accident here was not directly attributable to the deceased man breaking the rule, but was directly attributable to his having done something else which he need not have done, and which had nothing to do with the rule at all—in other words that the operation to which the rule was applicable was over, but that after that he did go and do a thing which was rash, and which in a civil case would have amounted to contributory negligence, but is not wilful misconduct. I put my decision on the facts and the facts alone, and holding that the accident was not attributable to a breach of the rule, *Dobson's* case is inapplicable to it, and that therefore the Sheriff's judgment should be affirmed.

LORD M'LAREN—Considering this case in the light of *Dobson*, 8 F. 241, it must be kept in view that these colliery rules which we are considering are rules made for the safety of the workmen in the mine, and that their obedience to these rules is a very serious and important duty on the part of the men who are engaged in carrying on the work. I cannot look upon the infraction of a rule which is intended for the protection of life as otherwise than a very unconscientious proceeding on the part of the workmen, and one that may well be described in the language of the statute as "serious and wilful misconduct"; and I see no reason to doubt the soundness of the

decision of *Dobson* that in the general case the infraction of a statutory rule by a miner comes within the category of serious and wilful misconduct, and disentitles the sufferer or his relatives to compensation.

But then there are rules of a different kind to which our decision is not directly applicable, perhaps not applicable at all. In the case of *Johnston* v. *Marshall*, [1906] A.C. 409, the sufferer was found fatally injured in a lift, and no one could tell when or how he died. The rule which was founded on in that case was a printed rule attached to the lift, stating that the lift was only to be used by persons in charge of a load—in other words, it was not to be used for the personal convenience of workmen wishing to go up and down. It is not stated in the report, and I do not know how it could be stated, that that was a rule intended for the protection of the lives and personal safety of the employees, for it is quite evident that whatever may be the risk in going up and down a lift, the risk is the same whether one is going on the lift with a load or without a load. The rule was evidently merely an indication by the employers that they did not wish the lift to be used for purposes for which it was not provided. A breach of such a rule as between master and servant would not necessarily, nor I think in any reasonable sense, be an act of serious and wilful misconduct. Such a breach of rules, as one of the Judges says, is an act for which a man might be reprimanded, but would not justify his immediate dismissal. Therefore I cannot look on the decision in *Johnston* v. *Marshall* as having any bearing on cases like the present.

I also concur with the observations of your Lordship in the chair in regard to Lord Atkinson's opinion, which, so far as I can see, was not intended to have any bearing on such a state of facts as we have here to deal with.

Now coming to this particular case, it appears to me that whether the rule about propping the strata while holing was in progress was or was not applicable, is of very little consequence in this case, because the operation of holing was completed, I cannot say without risk, but without any accident intervening; and this accident resulted from the second step, which was the propping of the roof as preparatory to bringing down the upper strata. Well, I think that the same considerations which led the framers of these mining rules to provide for propping during holing would also imply—at any rate the spirit of the rule would imply—that after the operation had been finished and the props withdrawn the miners should not go into the hole, as I may call it—the result of the operation of holing—not even for the laudable and necessary purpose of fixing the props that were necessary for safety in the next stage of the operation. But then, I am unable to say that in the cases to which the rule does not plainly and admittedly apply, a man is to be taken as guilty of serious and wilful misconduct because he does not find out for himself that this was a case where he ought to have avoided exposure to danger. I think that where the matter is not regulated by written rule everything is more elastic—more is left to the judgment of the workmen, and in endeavouring to ascertain the measurement I think the probability is that this unfortunate man took a look at the roof and seeing no appearance of it giving way, he thought for a mere momentary purpose there was no harm in resting his foot on this ledge while he took the measurement of the roof. Now, if the matter was left in his judgment, and he thought he was in safety to do the thing, I do not see where moral blame can be imputed to him, and certainly if there is no moral blame he does not come within the scope of the statutory exception.

I therefore concur in the judgment proposed, and agree that compensation be given in terms of the Sheriff's award.

LORD PEARSON—I am of the same opinion and have nothing to add.

LORD KINNEAR was absent.

The Court answered the question of law in the case in the negative.

Counsel for the Claimant and Respondent—Hunter, K.C.—William Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Respondents and Appellants — Clyde, K.C. — Horne. Agent — William C. Dudgeon, W.S.

Wednesday, February 27.

SECOND DIVISION.

DICK AND ANOTHER (CLELAND'S TRUSTEES) *v.* CLELANDS.

Succession — Trust — Charitable Trust — Uncertainty.

Held that a testator's direction to his trustees to divide and apportion the residue of his estate in such proportions as they might consider proper amongst "such charitable institutions connected with the county of Lanark as they may consider expedient" was not void from uncertainty.

This special case was brought for determining whether the directions of James Cleland, who died on 9th September 1900, for the disposal of the residue of his estate, were valid and effectual or whether they were void from uncertainty.

By trust-disposition and settlement dated 16th September 1898 and registered in the Books of Council and Session 15th September 1900, the testator, *inter alia*, after making provision for his wife Mrs Isabella Jackson or Cleland, in full of the whole claims, legal and conventional, competent to her against his estate in the event of her surviving him, and after granting certain specific legacies, directed and appointed his trustees as follows, viz.—"To divide and