which had been pronounced by him in open Court. The accused was seriously prejudiced here by what was done, as, if the original sentence had been allowed to stand, the period of imprisonment would, under the Act of 1908, have been automatically reduced to the period applicable to the fine.

Argued for the respondent—The correction of such an error was quite competent—*Stewart* v. *Appleby*, May 29, 1899, 3 Ad. 6, 1 F. (J.) 77, 36 S.L.R. 656. It would be unreasonable to hold that the correction by a magistrate of a mere slip of the tongue was fatal to a conviction, and the same would naturally apply to a slight lapse of memory such as occurred here.

LORD JUSTICE-CLERK—We have heard a very able argument from Mr M'Clure; but I am afraid that none of the points made much impression on my mind nor upon the minds of your Lordships. In this case the accused was charged with stealing an overcoat, and the Magistrate convicted him. The next thing was to pronounce sentence, and naturally the first thing that the Magistrate considered would be—"Is it a case for imposing a fine or for imprisonment without a fine." He made up his mind that it was a case for a fine, probably because it was a first offence. Next he had to consider what should be the amount of the fine, and having considered that, he fixes the fine at £5; and we must assume that he did that with deliberation, deciding what was the appropriate punishment if it was to take the form of a fine. He did that in open Court, and then added the option of 60 days' imprisonment. So far all is clear from the statement of facts.

The next thing that occurred was that, either in the Court or outside of it—for he left the Court after announcing the sentence—the Magistrate comes to be satisfied that the sentence of £5, which he had thought the proper sentence in the way of fine, would not cover the 60 days' imprisonment under the Act—that automatically the prisoner would be entitled to get out at the end of thirty days. In order to prevent that automatic operation of the statute he goes back into the Court and says—"I made a mistake and I now fine you £5, 5s."

It has been urged that it would be absurd to hold that because of this, which is said to be an extremely technical ground of objection, the conviction should be quashed. I do not think it is technical. I think it is an essential and substantial part of the case that the Magistrate, having deliberately and without any slip of the tongue on his part fixed £5 as the proper fine with an alternative of imprisonment, then altered the fine to £5, 5s., in order to change the alternative of imprisonment.

I think that is a totally illegitimate proceeding on the part of the Magistrate. He is bound before he pronounces sentence to consider the law and to know the law. He may have considered the law, and yet in speaking he may make a slip by putting one word for another, or by using one expression for another. That of course can be instantly corrected, being a mere slip of the tongue, and does not express what the person intends to say. It is a different thing altogether where the words are no slip of the tongue, but do express what the Magistrate intended at the time to say, although he was ignorant, or at the moment forgetful, of the terms of the law he had to administer. Here he pronounced in open Court a sentence which was competent for him to pronounce and which he intended to pronounce; and that sentence was a fine of £5. As regards imprisonment, the only effect of that sentence was that automatically the alternative was 30 days, and could not justify a sentence of 60 days' imprisonment. I cannot hold that that is anything but a substantial objection, and I am clearly of opinion that the conviction should be quashed.

LORD ARDWALL—I agree. This is a very clear case. What occurred here was not a mere *lapsus linguæ* on the part of the Magistrate. If a case of that sort should ever arise we shall consider it. What was done by the Magistrate here was a thing of quite a different nature, viz., after pronouncing sentence he deliberately came back to the bench and increased that sentence. That is a thing which he was not entitled to do, and it is, in my view, a sufficient ground for quashing the conviction.

LORD SALVESEN—Mr M'Clure has fought this case to the last ditch, but the position which he had to defend was obviously untenable. For the reasons stated by your Lordship I agree that the conviction should be quashed.

The Court quashed the conviction.

Counsel for the Complainer—Macdonald. Agents—Rainy & Cameron, W.S.

Counsel for the Respondent—M'Clure, K.C.—A. A. Fraser. Agent—Alexander Young, Solicitor.

COURT OF SESSION.

Thursday, January 26.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'DOUGALL *v.* M'DOUGALL.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 13—"*Workman*"—*Member of Employer's Family Dwelling in His House.*

The Workmen's Compensation Act 1906, section 13, enacts—"In this Act, unless the context otherwise requires, . . . 'workman' does not include . . . a member of the employer's family dwelling in his house. . . . 'Member of a family' means wife or husband, father, mother, grandfather, grandmother,

stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister."

A major son, employed by his father, lived with him and paid him board and lodging. He was injured while absent for several weeks on his employer's business. *Held* that he was a "member" of his employer's family, "dwelling in his house," and was not a workman entitled to compensation in the sense of the Act.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) between Ronald M'Dougall and Norman Macleod M'Dougall, his father, the Sheriff-Substitute at Glasgow (CRAIGIE), acting as arbiter, refused compensation, and at the request of Ronald M'Dougall stated a case for appeal.

The parties lodged a joint statement of facts and renounced probation.

The statement of *facts* was as follows:—"1. The pursuer is twenty-six years of age and a glazier in the employment of his father, the defender Norman Macleod M'Dougall, who carries on a business as a glazier and glass stainer at 144 Bath Street, Glasgow. Defender resides at 8 West Graham Street, Glasgow. 2. The pursuer has been in his father's employment for a considerable time, and at the date of the accident after mentioned was employed by him as a journeyman glazier. During the whole period in which he was in his father's employment he was treated in every respect as an ordinary employee. 3. Pursuer's average weekly earnings for the twelve months preceding the accident were £1, 8s. 6d. per week. 4. On or about 22nd June 1910 the defender, who had a contract in Oban for work upon a church there, ordered the pursuer to go there along with other employees to do said work. 5. Pursuer in obedience to this order went to Oban and worked there till 19th July 1910, with the exception of the period after stated. 6. On going to Oban as aforesaid on said 22nd June 1910, pursuer took lodgings there, and resided in said lodgings till 29th June 1910. On that date he returned to Glasgow to execute certain work in defender's workshop. This work occupied him until 6th July 1910. He then returned to Oban and resided there till 21st July 1910. 7. On said 19th July 1910 pursuer sustained personal injury by accident arising out of and in the course of his employment with the defender, his right hand between the thumb and first finger being injured through a piece of glass with which he was working breaking and cutting his hand. 8. As a result of the accident pursuer was totally incapacitated from work for a period of six weeks from 19th July 1910. 9. Prior to pursuer's going to Oban he lived with his father, the defender, at 8 West Graham Street aforesaid. During the period from 29th June till 6th July, when not in Oban, he lived with his father, the defender, and after the date of the accident he returned and lived in his father's house. While living with his father pursuer paid to him 17s. 6d. per week for board and lodgings. 10. During the period in which the pursuer was residing in Oban he did not pay anything to his father to have his apartments reserved for him. He was under no obligation to return to his father's house, nor was his father bound to receive him or to keep open door for him on his return. During his absence his personal belongings and effects so far as not required by him in Oban remained in his father's house. 11. It is a very general practice when a lodger leaves his lodgings, if he intends to return to them and wishes them reserved for him until his return that he should pay a sum to the proprietor thereof to reserve them for him."

The arbiter found in law that the appellant was not a workman entitled to compensation in the sense of the Workmen's Compensation Act 1906, and therefore assoilzied the respondent with expenses.

The *questions of law* for the opinion of the Court were—"(1) Was the appellant a member of the respondent's family dwelling in his house within the meaning of the Workmen's Compensation Act 1906, section 13, at the time when he was injured; or (2) Was the appellant a workman entitled to compensation within the meaning of said Act?"

Argued for the appellant—The appellant was not a member of the respondent's family in the sense of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 13. The words applied only where the whole family lived and worked together in the house. The Act was not to be construed as depriving the appellant of compensation because he acted the part of a good son and chose to reside in his father's house instead of living elsewhere, as he was entitled to do. The facts showed that he was really a lodger paying for his board out of his own pocket. In law a son was forisfamiliated when he attained majority—Erskine's Inst., i, 6, 55. Further, at the time of the accident he was away from home, and therefore could not be regarded as "dwelling" in his father's house. Supposing the appellant had had a number of contracts of this sort and had been absent several months, could he be held to be constructively "dwelling" in his father's house?

Argued for the respondent—The appellant's definition of the phrase was too narrow. "Members of family" meant wife, father, &c., *son*, and had nothing to do with forisfamiliation. To satisfy the definition it was not necessary that the workman should be working or dwelling in his father's house at the time of the accident—*Marks* v. *Carne*, [1909] 2 K.B. 516. In the present case the appellant had the intention of coming back, and actually did come back, to his father's house. Further, the question as to whether the appellant was "dwelling" in his father's house at the time of the accident was one of fact, and on the evidence the arbiter's finding was reasonable and should not be disturbed—*Sneddon* v. *Greenfield Coal and Brick Co., Limited*, 1910 S.C. 362, 47 S.L.R. 337.

At advising—

LORD ARDWALL—I am of opinion that the Sheriff has decided this case rightly.

The question is whether the pursuer is excepted from the category of a "workman" by reason of his being, in terms of section 13 of 6 Edward VII, c. 58, a member of the employer's family dwelling in his house. Now it is stated in the case that the pursuer is the son of the defender, who is the employer in this case, and by said section 13 "member of a family" includes a son. There is therefore no doubt that the pursuer was a member of the employer's family.

The question remains whether in the circumstances he is properly described as a member of the employer's family "dwelling in his house." I can imagine cases in which the question whether this provision of the statute was satisfied or not might be one of some difficulty, but in the present case I see really no difficulty, nor any room for refinements as to the precise meaning of the words under consideration. I think the question simply is, whether when the accident happened the pursuer could correctly be described as a dweller in his father's house. Now I think he could. It was true that at the date of the accident he had gone to Oban temporarily on a particular piece of work, but according to no ordinary meaning of language could he be said to have his dwelling in Oban, or to have been other than a mere sojourner there. His dwelling place, according to the facts stated, was in my opinion his father's house, and no other place; indeed there is no suggestion that he dwelt anywhere else except in Oban, with which matter I have already dealt. No other house than his father's either in Oban or Glasgow is mentioned in the case as the house where he dwelt. A man's dwelling-place or dwelling in ordinary language is his habitation, his place of residence, or his abode, which when he leaves he is considered to be on a journey, and to which he returns when his journey is finished; and in the pursuer's case the only house that answers to this description is his father's house in Glasgow. I have therefore no doubt on the facts stated that the pursuer was dwelling in his father's house at the time of the accident in the sense of the Act, although temporarily absent from it on a particular piece of business. I therefore think that he must be held to fall within the exception in the Act, and was not a workman in the sense of the Act, nor entitled to compensation under it.

LORD SALVESEN—This is a claim under the Workmen's Compensation Act 1906, at the instance of a son against his father, in whose employment the appellant was at the date of the accident referred to. So far as appears, the appellant was employed by the respondent on the ordinary terms applicable to a working glazier. Had he lived outside of his father's house there would have been no doubt of the validity of his claim; but the Act provides (section 13) that the term "workman" does not include "a member of the employer's family dwelling in his house," and the Sheriff-Substitute has held that the appellant's claim is thereby excluded. I have come, with some reluctance, to agree with him. At first I thought that the words "a member of the employer's family" might not be applicable to a son who was of full age and thus forisfamiliated, but the definition of this term in the same section precludes such a construction. The only other question then comes to be whether he was dwelling in his father's house at the time when the accident occurred. The facts are that he was then living in lodgings in Oban, where he had been for over a fortnight continuously, but this absence from his father's house was incidental to his employment with his father, who had sent him to Oban in connection with a job which he had there. Before he went to Oban he lived with his father, and after the accident he returned to his father's house, where his belongings have all along been. These facts, I think, justify the inference that his ordinary dwelling-place was in his father's house, and that therefore he was dwelling there within the meaning of the Act. It is plain that, except in the rare case of a member of the family working in the employer's house and being there injured, the construction of the Act contended for by the appellant would deprive this provision of all effect, and I cannot think that its application is to depend on such accidental circumstances as, for instance, that on the night before or the night after the accident the injured workman happened to be living at the hotel, or in lodgings, or in a friend's house, when his only home was in his father's house.

Another suggestion was made in the course of the debate that the words "as such" might be read into the latter clause. If these words had been in the Act I should have been prepared to hold, on the facts here, that the appellant, who paid his father an ample sum weekly for his board and lodging, might be described as living with his father, not as a member of the family but as a lodger. Such a construction would have obviated the necessity of discriminating in a matter of this kind between a son of full age who lodged with strangers and a son who preferred to live with his father and pay him a reasonable board. I can, however, see no warrant for implying words that are not expressed in the Act, although I confess that I have failed to understand why the Legislature should have imposed a disability upon persons in the position of the appellant merely by reason of their preferring their father's house to that of a stranger as their place of residence. For these reasons I have come to agree with your Lordships that we must answer the first question of law in the affirmative and the second in the negative.

LORD JUSTICE-CLERK—I have not myself had any serious difficulty in this case. With regard to the first point—whether the appellant was a member of the respon-

dent's family dwelling in his house—I had at first some doubt, but in the end I have come to agree with your Lordships on that point. As regards the second point—whether he was residing with his father during the time when he was on a visit to Oban—I have had no difficulty. There are many cases where a man has his residence at a particular house although he does not always sleep there. I may take the case of the conductor of a train who travels from London to Edinburgh every day for many weeks at a time. He must sleep in London on one night and in Edinburgh the next. Such a man has his residence in the house in which his wife and children reside, although he is away from home every second night. In this particular case the workman was just on a journey. He went to Oban, not to reside there, but because he had work to do which could not be done at home. I have no difficulty in holding that he was in the same position as if he had gone away from home for a holiday. I think he was still residing in his father's house, and therefore I hold that he was not a workman entitled to compensation under the Act.

LORD DUNDAS was absent.

The Court answered the first question of law in the affirmative and the second in the negative.

Counsel for the Appellant — Armit. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—MacRobert. Agents—Pairman, Easson, & Miller, S.S.C.

Thursday, January 26.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

M'ADAM *v.* CITY AND SUBURBAN DAIRIES, LIMITED.

Reparation—Slander—Issue—Innuendo.

A milkman brought an action of damages for slander against his employers. He averred that there had been a dispute between their manager and him as regards a balance alleged to be due by him, that in consequence thereof he did not return to his work the next day, and that a foreman, acting on the manager's instructions, came to his house and addressed him in the following words—"I'll give you a piece of advice. If you are wise you'll turn out to work, because I have been instructed by" the manager "to place the matter in the hands of the police." He maintained that these words were relevant to support an innuendo of embezzlement on his part.

The Court *refused* an issue, *holding* that the words complained of were not slanderous.

Reparation—Slander—Master and Servant—Liability of Master for Slander Uttered by Servant—Scope of Employment.

A milkman brought an action of damages for slander against his employers. He averred that there having been a dispute between their manager and him as regards a balance alleged to be due by him, a foreman, on the manager's instructions, had addressed him in the following words—"I'll give you a piece of advice. If you are wise you'll turn out to work, because I have been instructed by" the manager "to place the matter in the hands of the police." There was no averment as to what the manager's powers and duties were, but the pursuer averred that the foreman in making the statement, on the manager's instructions, was acting as the defender's servant for the purpose of intimidating him into remaining at his work, and thereby preventing him from disclosing their system of trading which was unfair to their customers.

The Court, assuming that the words complained of were slanderous, *held* that the foreman in uttering them, upon the instructions of the manager, was not acting within the scope of his employment, and that accordingly the action against his employers was irrelevant.

Samuel M'Adam, milk salesman, residing at No. 66 Bain Street, Calton, Glasgow, brought an action of damages for slander against the City and Suburban Dairies, Limited, Glasgow.

He averred, *inter alia*—"(Cond. 1) . . . The defenders carry on a large dairy business in Glasgow and suburbs. They employ a number of men whose duty it is to go round the streets with milk barrows and push the sale of defenders' milk, and also collect the accounts due to defenders therefor. The pursuer entered the defenders' service in this capacity on 12th May 1910. Under the agreement of service he lodged £1 as a security deposit, and his wages were fixed at 18s. a-week and commission. (Cond. 2) Each day after completing his rounds the pursuer returned to the defenders' dairy at Napiershall Street, Glasgow, and accounted for the milk not sold. The returned milk was measured by one of the defenders' foremen. Thereafter pursuer called on customers indebted to defenders to collect moneys due, and each day's receipts were handed over by him to defenders. There was no daily check and no receipts were given either to the customers or to pursuer. On Saturday afternoons the pursuer went to the clerkess in charge at said dairy to get his wages, and any balance on the week's transactions either due to or by pursuer was adjusted and settled. . . . (Cond. 3) The pursuer had frequent disputes with defenders' foremen as to the measuring of the returned milk, and he took exception to and complained frequently to them of the loose and haphazard system in which the business was conducted. In particular, defenders' milkmen, including pursuer, were charged for the milk delivered to them each day at the rate of 1s. 1d. per