She must, however, show a *prima facie* case before any award would be granted—Fraser, Husband and Wife (2nd ed.), vol. i, 851. There was no case in which an award had been granted in circumstances like the present. Counsel referred to *Petrie* v. *Petrie*, 1910 S.C. 136, 47 S.L.R. 151, and *Jaffray* v. *Jaffray*, 1909 S.C. 577, 46 S.L.R. 458.

Argued for pursuer (reclaimer)—A wife was clearly entitled to aliment when the question whether she was entitled to live apart from her husband was *in pendente*. If the pursuer was refused aliment in the present circumstances it meant that she must rest content with the judgment of the Lord Ordinary and return to her husband's house. Opportunity of reclaiming would be denied her. It was the practice to make such awards where the wife was defender and reclaimer—*Ritchie* v. *Ritchie*, March 11, 1874, 1 R. 826, 11 S.L.R. 569; *Montgomery* v. *Montgomery*, October 22, 1880, 8 R. 26, 18 S.L.R. 6. There was no difference in principle where the wife was pursuer.

LORD JUSTICE-CLERK—This is an action of separation and aliment on the ground of cruelty at the instance of a wife. Having been unsuccessful in the Outer House she has reclaimed, and she now makes an application to the Court for an award of interim aliment and expenses to enable her to prosecute her appeal. The circumstances are not uncommon, and if it were the practice of the Court to grant such applications one would expect to find the practice known and well settled. No case, however, has been quoted to us in which an application in similar circumstances has been granted. Without saying that a case might not arise in which the Court in the exercise of its discretion would make such an award, I am of opinion that there are no grounds for granting the present application. The reclaimer comes into Court with a case which has been investigated by a proof, with the result that so far as the Outer House is concerned she has been held to have no grounds entitling her to succeed. In such circumstances I see no reason for exercising our discretion to the effect of granting the reclaimer's application.

LORD SALVESEN — I am of the same opinion. Cases of this sort have frequently occurred in the past, and yet the pursuer's counsel was unable to point to a single one in which such a motion as he makes has ever been granted. I think there is nothing exceptional in the circumstances here as presented to us by counsel, and therefore we must adhere to what I have always understood to be the established practice.

LORD CULLEN—I concur in thinking that this is not a case in which an interim award of aliment or expenses should be granted.

LORD ARDWALL was absent, and LORD DUNDAS was sitting in the Extra Division.

The Court refused the prayer of the note.

Counsel for Pursuer (Reclaimer)—King Murray. Agent—James M'William, S.S.C.

Counsel for Defender (Respondent)—J. Stevenson. Agent—Campbell Faill, S.S.C.

Thursday, May 25.

EXTRA DIVISION.

[Sheriff Court at Paisley.

M'DAID *v.* STEEL.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (1) —"*Arising out of and in the Course of the Employment*"—*Disobedience to Orders by Using Hoist.*

A message boy who was employed in delivering fish at a kitchen situated on the third floor of an infirmary was injured while making his way from the ground floor to the third floor by means of a hoist which he had entered and caused to ascend. There was a notice at the side of the hoist to the effect that it was only to be used by servants of the institution, and worked only by those specially authorised by the directors, but it was not proved that the boy had read the notice, or had his attention directed to it, though it was proved that he had been cautioned against using the hoist. *Held* that the accident did not arise out of and in the course of his employment.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1 (1), enacts—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation . . ."

John M'Daid, message boy, Paisley, with the consent and concurrence of his father, Thomas M'Daid, as his curator and administrator-in-law, claimed compensation under the Workmen's Compensation Act 1906 from his employer, James Steel, fishmonger, Paisley, and the matter was referred to the arbitration of the Sheriff-Substitute at Paisley (LYELL), who assoilzied the defender, and at the request of the appellant stated a case for appeal.

The following *facts* were proved—"(1) On 5th October 1910, and for some three or four months prior to that date, the appellant was a message boy in the employment of the respondent, who is a fishmonger in Paisley. (2) During that period the appellant's duty was to carry from the respondent's shop and deliver fish, *inter alia*, at the Royal Alexandra Infirmary, Paisley. (3) That the kitchen of this infirmary is situated on the third storey, and is reached by a staircase and also by a slow moving hydraulic hoist. (4) That on the said 5th October 1910 the appellant was, in the course of his employment, delivering fish at the infirmary. (5) That he carried the

fish on a board on his head to the infirmary, entered by the door by which tradesmen and message boys usually enter, walked past the foot of the said staircase, entered the said hoist on the ground floor, the gate of which was—as was usual—standing open, pulled the rope, and caused the hoist to ascend. The floor of the hoist when at rest on the ground floor was on the same level as the floor. (6) That the said hoist was of simple construction. The operator, after entering the hoist on the ground floor, needed only to pull the rope downwards, when the hoist ascended slowly and stopped automatically at the third floor. Similarly, by pulling the rope upwards the hoist was caused to descend from the third floor and stop automatically at the ground floor. (7) That as the said hoist was passing the second floor the appellant's foot in some way got jammed between the floor of the hoist and the wall. (8) That the foot was so seriously injured that it was found necessary to amputate part of the great toe and all the other four toes. (9) That the said hoist is one of several in the building, and is intended and used only for the conveyance of heavy loads to the kitchen. (10) That there is displayed on the ground floor and on the other floors, by the side of the hoist, a notice in the following terms—'Notice. This hoist is to be used only by servants of the institution, and worked only by those specially authorised by the directors. All other persons are strictly prohibited from using or working the hoist. By order of the directors, Robert Balderston, president.' (11) That it is not proved that the appellant ever read the said notice or had his attention directed to it. (12) That the appellant had been on several occasions prior to the day of the accident forbidden to use and work the said hoist, it having been discovered by the superintendent and the porters at the infirmary that message boys did so use and work the hoist in the absence of the officials. (13) In particular, that on the evening of the 4th October, the day previous to the accident, the appellant had been found by James Irvine, porter at the infirmary, making his way towards the hoist, and had been recalled and rebuked by him and threatened with personal chastisement if he was again found attempting to make use of the hoist; and that he was then and there ordered to carry his fish to the kitchen by way of the stairs, which he did. (14) That the appellant knew on 5th October 1910 that in using the said hoist and working it himself he was doing wrong, and, immediately after the accident and before being removed from the hoist, voluntarily confessed that he had been forbidden so to use the hoist by the said James Irvine."

The Sheriff "*found* further in fact that in so using and working the said hoist on the occasion libelled, after deliberately walking past the front of the staircase, by means of which it was to his knowledge his duty to reach the kitchen, the appellant was doing an act outwith the scope of his employment; and . . . . in law, that in respect the accident happened to the appellant in consequence of his taking a means of access to the kitchen which he had been ordered not to take, and from his meddling with the machinery of the hoist which he had been forbidden to touch, the said accident did not arise out of and in the course of his employment."

The *question of law* was—"Was the Sheriff-Substitute right in holding that the accident did not arise out of and in the course of the appellant's employment?"

Argued for the appellant—Disobedience to instructions did not *per se* take a man outside his employment, and in any event the order disobeyed was not given by the appellant's master but by a third party. To go outside the employment the workman must do something for his own purposes only—*Conway* v. *Pumpherston Oil Company*, March 9, 1911, 48 S.L.R. 632. The Sheriff's finding in fact was really a legal inference, and in *Conway's* case the Court treated it as such. To use the hoist was the natural way to reach the kitchen. That it was a dangerous way did not take the appellant outwith the Act—*Durham* v. *Brown Brothers & Company, Limited*, December 13, 1898, 1 F. 279, 36 S.L.R. 190. The accident was an ordinary risk of the employment as message boy, and consequently arose out of it—*M'Neice* v. *Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15. This was a simple hoist, and had been worked by boys in similar circumstances.

Argued for the respondent—The appellant, in choosing a road which was not the ordinary road, went out of his employment and involved his master in risks which he had not undertaken. The boy in so using the lift changed the sphere of his employment and exposed his master to a higher premium of insurance—*Hendry* v. *The United Collieries Company, Limited*, 1910 S.C. 709, 47 S.L.R. 635; *Kane* v. *Merry & Cuninghame, Limited*, February 7, 1911, 48 S.L.R. 430.

LORD KINNEAR—The Sheriff-Substitute has in my opinion rightly decided the question put to us in the case, which, however, as so often happens, is a mixed one of fact and law; but the case is so stated that we can separate the questions of fact, upon which the Sheriff is final, and the question of law which may be properly appealed to this Court. The Sheriff-Substitute in his finding at the end of the stated case separates between fact and law in a perfectly distinct manner; but the appellant's counsel says—and I think there is ground for saying so—that in his finding in fact there is also involved law. He finds that what the appellant was doing when he met with this accident was outside the scope of his employment. He finds that as a fact, and he goes on to find in law that it was therefore an accident which did not come within the definition of the statute. But, then, it is said that although he was not directly employed to do what he did it was still by legal implication one of the things which fell within the scope of his employment. In order to

answer that I think it is necessary to see exactly what the Sheriff-Substitute says as to the facts.

The appellant was a message boy employed by a fishmonger in Paisley, and it was part of the duty for which he was employed to carry fish from his master's shop to the infirmary at Paisley. It is said that the kitchen of this infirmary is situated on the third storey, and is reached by a staircase and also by a slow-moving hydraulic hoist. It is not, so far as I can see, said distinctly that the boy's duty was to deliver fish at the kitchen and not merely at the outer gate or door of the infirmary. But I think it may be fairly inferred from what the Sheriff says afterwards that he holds the former to have been his duty. At all events it was frankly conceded by Mr Moncrieff that it was his business to deliver fish at the kitchen of the infirmary on the third storey. Therefore the appellant was still in the course of his employment when he was taking fish from the outer gate to the kitchen.

But then the Sheriff goes on to say that there were two ways in which he might reach the kitchen—one the ordinary way of going up the stairs, and the other by using the hoist, the gate of which is on the ground floor and which is of simple construction, and is intended for carrying heavy loads from that floor to the kitchen. The Sheriff again does not say distinctly that the hoist was not intended to be used or was not generally used for carrying a load of the description which the message boy had to carry. It may have been, so far as the findings of the Sheriff are concerned, that the man in charge of the hoist might allow or invite such loads to be taken up by the hoist. I do not think it is very material to consider, and we cannot determine whether the fact is actually so or not. What is distinctly found is that the hoist was intended for carrying heavy loads, and that it was announced by a public notice to all persons entering the infirmary that the hoist was to be used only by servants of the institution and worked only by those specially authorised by the directors. All other persons were strictly prohibited from using or working the hoist.

Now the first inference to be drawn from that clearly is that this hoist was not the ordinary means of access for message boys going to the kitchen. Then the Sheriff goes on to say that it is not proved that the appellant had ever read this notice or had his attention directed to it; but that he had been on several occasions prior to the day of the accident forbidden to use and work the hoist. Then he gives a special instance of the appellant having been so forbidden on the evening of the 4th October, the day previous to the accident, when he had been found by the porter of the infirmary making his way towards the hoist and had been recalled and rebuked by him, and then and there ordered to carry his fish to the kitchen by way of the stairs, which he did. This being the arrangement at the infirmary, it is said that when the boy arrived at the infirmary on this particular occasion he found the gate of the hoist standing open, that he then entered the hoist and pulled the rope for himself and caused it to ascend, and that in the course of its ascent, he himself having thus put it in motion, and while it was still in motion, his foot got jammed between the floor of the hoist and the wall.

The Sheriff says that in doing this the appellant knew that he was doing wrong, and that immediately after the accident and before being removed from the hoist he voluntarily confessed that he had been forbidden to use the hoist. On these facts the Sheriff does not go on to find that the boy was guilty of serious and wilful misconduct and that the accident was due to such misconduct. As he has not so found, it is not for us to consider whether that would have been a correct finding or not in the circumstances of this case. But I think the learned Sheriff was perfectly right in giving no judgment upon that point, because the primary question is the one which he decides, viz., whether the boy met with this accident in the course of his employment or not. Now he says that the appellant was not in fact within the scope of his employment when he was doing this thing. If this is a mere question of fact, the Sheriff's finding is conclusive and we cannot disturb it.

But I am not at all disposed to dissent from Mr Watt's view that this question may involve a question of law—of legal implication—as to what the employment of the boy really was. He was employed to carry fish from the fishmonger's shop, and to use the public streets, and also the ordinary means of access which it was necessary for him to use, in order to reach the place of delivery; and therefore it may be that the risks of accident incident to the ordinary means of access to the infirmary kitchen were risks incident to his employment. But I think it necessarily follows from the description of his employment that if he chose to enter an open hoist which he knew he was not entitled to enter, and took upon himself to work the lift, exposing himself to risks arising from his own conduct of machinery which it was not his business to operate, he thereby exposed himself to new risks which were not within the contract of employment which he made with his master. It was not an accident connected with his employment in any way. He was not employed to work a lift. Upon that simple ground I think the judgment of the Sheriff is right, because if the judgment is right in fact that he was not employed to do what he did, but voluntarily exposed himself to risks which he was not invited nor authorised to incur, it follows, in my opinion, that the accident that happened to him did not arise out of and in the course of his employment. It arose out of an adventure which he chose to undertake for his own pleasure and in the course of his doing what he was not employed to do. I am therefore of opinion that the

judgment of the Sheriff is right, and that we must answer the question of law in the affirmative. That is my opinion, and I must say I have come to it without any hesitation.

I only desire to add that I am not prepared to assent entirely to all the findings which are contained in the general findings with which the learned Sheriff concludes his statement. I think that he has combined a variety of different reasons of different degrees of cogency that bear more or less directly upon the point in issue, whereas the true ground of judgment, I think, is that the appellant was doing something he was not employed to do, and thereby incurred danger which would not have been incurred in the work in which he was employed.

LORD DUNDAS—I entirely concur in all that your Lordship has said, and I do not think I could usefully add anything more.

LORD MACKENZIE—I am of the same opinion. When the boy met with this accident he was doing something which he was not employed to do as a message boy. The statement in finding 5 is quite distinct, that he pulled the rope and caused the hoist to ascend, and in finding 7 it is said that while the hoist was passing upwards he met with the accident. Therefore I think it is plain that the accident was due to nothing that happened during the course of his employment in delivering his message, but because he took upon himself to discharge the duties of the hoist man.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Respondent—Constable, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Friday, May 26.

EXTRA DIVISION.

[Sheriff Court at Airdrie.

KELLY *v.* THE AUCHENLEA COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (1)—*Injury by Accident—"Accident"—Pneumonia Caused by Inhalation of Poisonous Gas.*

A miner employed in a mine in the course of his work fired a shot of gunpowder, and about three minutes after the explosion returned to the working-place when it was still full of smoke. He subsequently died from pneumonia, caused by the inhalation of carbon monoxide gas generated by the explosion. It was found proved that this gas was generated by the combustion of gunpowder in varying proportions depending on the ventilation, that similar blasting operations were of daily occurrence, and that on previous occasions the deceased had suffered from headache and nausea caused by the gas. In a claim at the instance of the deceased's dependants, *held* that death resulted from an accident within the meaning of the Act.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1), enacts—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation. . . ."

Jane Brelsford or Kelly, wife of the deceased Robert Kelly, miner, Cleland, as an individual and as tutrix and administratrix-in-law for her pupil child Robert Kelly junior, and Nellie Kelly, a daughter of the said Robert Kelly by a previous marriage, claimed compensation under the Workmen's Compensation Act 1906 from the Auchenlea Coal Company, Limited, Howmuir Colliery, Cleland, in respect of the death of the said Robert Kelly. The Sheriff-Substitute (MILLAR CRAIG), acting as arbitrator, with the assistance of a medical assessor, having awarded compensation, a case for appeal was stated.

The following *facts* were admitted or proved—"1. That on 27th June 1910 the deceased Robert Kelly was working as a miner with his brother Patrick Kelly in the employment of the appellants in the lower Drumgray seam of the Howmuir Colliery, where he had worked since the end of March 1910. 2. That about 10 a.m. on that date, in the course of their work, the deceased and his brother 'fired a shot' of about ¾ lb. of gunpowder (the usual charge) in their working-place in the said colliery. 3. That having retired after preparing the shot they voluntarily returned to their working-place about three minutes after the explosion, when the working-place was still full of smoke. 4. That shortly thereafter both felt ill, the deceased being considerably worse than his brother. 5. That after working for about three-quarters of an hour, during which time they repaired the damage done by the explosion and filled and took out one hutch of coals, they decided to abandon work for the day as they were feeling too ill to continue. 6. That they accordingly proceeded to the pit bottom, but were not allowed to ascend the shaft by the pit bottomer, who believed that he was not entitled to allow them to do so before the end of the shift, without authority from the oversman or under manager. 7. That the deceased and his brother were thus kept waiting for about two hours and a half at the pit bottom, where they were exposed to cold and draught. 8. That on the two following days the deceased was still ill, but was able to be at work, and it was not proved that he put out less coal than usual. 9. That on the next day the pit was idle and the deceased was still ill, but was able to be out for a short time.