I do not think this is a very satisfactory statement, that they were believed by the respondents to be entirely competent, but I believe, from the language used by Lord Low, that that was the opinion of the Second Division.

The gas that produced the fatal effect was carbon monoxide gas, a deadly but obscure gas of slow and insidious action, not very familiarly known in ordinary mines, but likely to be generated in and likely to escape from a pit, part of which had a smouldering fire, being the product of imperfect or incomplete combustion. The respondents were acquainted with the risks of the gas. They had themselves an unextinguished or smouldering fire in one of the neighbouring pits, and this so attracted their attention to the risks of monoxide gas that they in 1901 circulated a pamphlet on the subject amongst their officials and employers drawing attention to its danger.

In the year 1905 a connection was actually made from the pit, the seat of danger, to the pit where the death was caused, and in the words of Lord Low—"The death of the miner was caused by carbon monoxide gas having found its way into pit No. 11 along the air passages from the old fire, and the managers and firemen were not alive to the danger, having no previous experience of carbon monoxide." This connection created a new and dangerous position in pit No. 11, which cast upon the defenders the *onus* of seeing that the manager, assistant manager, and fireman were competent to deal with this new peril, alive to its reality, and duly warned as to the observance of the rules 1 and 7 so often referred to. The case of *David* v. *Merthyr Coal Company*, A.C. 1910, 74, quite supports this view, and Lord Halsbury then said that "the burden of proving that the authorities of the mine had done their duty in taking proper care of the safety of the miners" was on the defendants. Their Lordships deemed it right, after the first hearing here in July 1910, to remit the case to the Second Division to answer the question, When the connection was made, "did the defenders take all practicable means to secure that the persons engaged in supervision and the fireman appointed as a 'competent person' under the statute were possessed of the knowledge and qualifications required to deal with the special danger of the presence of noxious gases arising from the connection made?"

The reply of the Second Division (after findings on the general case) was to the effect that it would have been practicable, and that the "defenders did not take any means at the time when the connection was made or thereafter to secure that the knowledge and qualifications of the persons engaged in the supervision and of the fireman were sufficient to enable them to deal with the special danger which might arise from a sudden outburst of the gas."

It will be noticed that the finding in the remit mentions "sudden outburst," which was not mentioned in the question remitted to them and cannot narrow the duty of the defenders.

Whatever may have been the statutory duty of the respondents as to ventilation adequate to dilute and render harmless noxious gases, I think that when this connection was made with pit No. 11 the steps indicated in the question remitted should have been taken, and it is to be regretted special warning was not circulated amongst their officials, drawing their attention to the new and deadly danger which might be thus introduced by the possible and insidious presence of this monoxide gas. I think that the question needed closer examination than the Second Division gave it at the first hearing, and required the remit to ascertain a crucial fact. What is the effect of the finding in the remit? We must not allow ourselves to be hampered or embarrassed by other findings. Is it shown that it is now open to the House to consider whether the defenders are liable? I think it clearly is, and that your Lordships are quite justified in holding that the defenders were guilty of neglect of their statutory duties in not taking any steps to deal with the special danger of the presence of noxious gases arising from the connection made.

I therefore think that the appeal should be allowed.

Counsel intimated that parties were agreed that the interlocutor of the Sheriff-Substitute should be restored.

Their Lordships reversed the interlocutor of the Second Division appealed against and restored that of the Sheriff-Substitute, with expenses to the pursuer.

Counsel for the Pursuer (Appellant)—Munro, K.C.—MacRobert. Agents—D. R. Tullo, S.S.C., Edinburgh—Walker, Son, & Field, London.

Counsel for the Defenders (Respondents)—Horne, K.C.—Harold W Beveridge. Agents—W. T. Craig, Glasgow—W. & J. Burness, W.S., Edinburgh—A. & W. Beveridge, London.

COURT OF SESSION.

Friday, December 8.

FIRST DIVISION.

MITCHELL INNES'S TRUSTEES *v.* MITCHELL INNES AND OTHERS.

Process — Special Case — Competency — No Real Lis between Parties — Power of Trustees to Sell Heritage.

In a special case brought by the trustees under a trust settlement and the beneficiaries interested therein, to determine whether the former had power to sell a certain heritable estate, parties were agreed that a sale would be in the best interests of the trust estate. *Held* that the special case was competent.

Galloway v. *Campbell's Trustees*, July 11, 1905, 7 F. 931, 42 S.L.R. 712, *followed*.

Observations (*per* Lord Kinnear) on the competency of special cases where there is no real litigation between the parties.

A Special Case was presented for the opinion and judgment of the Court by George Dalziel, W.S., Edinburgh, and others, the trustees acting under the trust-disposition and settlement of the late Thomas Shairp Mitchell Innes of Phantassie, *first parties*, and Miss Isabella Mitchell Innes, a daughter of the truster, and the four children of Mrs Christina Mitchell Innes or Anderson, a deceased daughter of the truster, *second parties*.

The Case set forth, *inter alia*—". . . The first parties are satisfied that it would be in the best interests of the trust estate to sell the estate of Phantassie, and the second parties are desirous that the first parties should do so. A question, however, has arisen as to whether the power of sale conferred by the trust-disposition and settlement extends to the estate of Phantassie, and the first parties are not prepared to sell without having the matter judicially determined; further, it is necessary to have this judicially determined in order to satisfy intending purchasers, and to enable the first parties to afford an unquestionable title to a purchaser. The first parties maintain that the general power of sale conferred on them by the trust-disposition and settlement does not extend to the estate of Phantassie, which is otherwise specifically dealt with throughout the deed. The second parties maintain that the power of sale conferred on the first parties extends to the whole trust-estate, including the estate of Phantassie, which was the only heritable estate left by the truster."

The *question of law* was—"Are the first parties entitled, under the powers of sale conferred by the trust-disposition and settlement of the said Thomas Shairp Mitchell Innes, to sell the estate of Phantassie? or, otherwise, Are they entitled to do so with the consent of the beneficiaries?"

Counsel for the first parties cited *Galloway* v. *Campbell's Trustees*, July 11, 1905, 7 F. 931, 42 S.L.R. 712.

LORD PRESIDENT—In this case, had it not been for the decision in *Galloway* v. *Campbell's Trustees* (1905, 7 F. 931), I should have had great doubt whether the question stated here could be competently raised in a special case, because parties are agreed as to the expediency of the sale, and there is no proper contention between them. But *Galloway* v. *Campbell's Trustees* is a direct precedent, and I am prepared to follow it. On the merits I have no doubt whatever that the trustees have power to sell.

LORD KINNEAR—I agree, but should like to add that though I think we must follow *Galloway* v. *Campbell's Trustees*, 1905, 7 F. 931, in this case, I still think that the Court must always be cautious in entertaining cases of this kind where there is no real litigation, because if any conflict of interest should arise hereafter of which we know nothing at present, our answer to this question will not be *res judicata*, and yet may embarass the decision of a real question of disputed right. If therefore it seemed probable that a purchaser might object to the title, I would be against entertaining the question now. But, looking at the whole case, I agree with your Lordship that that is hardly a practical difficulty, because if a purchaser, which is hardly probable, should take objection, it would still be open to him to bring the question before the Court.

LORD MACKENZIE—I agree with your Lordship.

LORD JOHNSTON was sitting in the Lands Valuation Appeal Court.

The Court answered the first branch of the question in the affirmative, and found it unnecessary to answer the second branch.

Counsel for the First Parties—Macphail, K.C.—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Blackburn, K.C. — Pitman. Agents — J. & F. Anderson, W.S.

Wednesday, December 20.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'MILLAN *v.* BARCLAY, CURLE, & COMPANY, LIMITED.

Reparation—Master and Servant—Liability at Common Law and under the Employers' Liability Act 1880 (43 *and* 44 *Vict. c.* 42)—*Averments—Relevancy.*

A rivet boy, whose duty it was to run about the deck of a ship, then in course of construction, and pick up and throw overboard red-hot parings falling on it from above, slipped and fell over the side thereof and was killed. In an action of damages at the instance of his father against the employers, laid alternatively at common law and under the Employers' Liability Act 1880, the pursuer averred that the defenders were in fault in failing to fence the deck, that this was a usual and necessary precaution, and that the defenders knew or ought to have known that the deck in question when wet (as it was on the day of the accident) was specially liable to become slippery. He also averred that it was the duty of the defenders' foreman, under whom the deceased was working, to take precautions against his falling over the side of the deck, that such precautions were usual and necessary in the circumstances, and that he had failed to take them.

The Court, while allowing an issue under the Act, *dismissed* the action, so