channel, the length of the net, and the judgment of the fisherman. It is the mode of fishing which is in question, and the illegality of the mode of fishing practised by the respondents seems to me to consist in their proved practice, in accordance with their assertion of legal right, to obstruct the passage of fish in this river at the place in question for an illegitimate purpose, namely, not to catch the fish which their net would naturally catch, but these fish plus fish which had the river not been obstructed by their method of fishing would have escaped, either because these fish were never within the sweep of the net, or because although within the sweep when the sweep begins the fish were able to escape to an unobstructed part of the river. The respondents' mode of fishing does not appear to me to possess the "distinctive peculiarity of fishing by net and coble" mentioned by Lord Westbury in *Hay's* case (4 Macq. 553), namely, "taking a grasp of a portion of the river during such time only as is required for the boat to row round the net." I am not ignoring the points made in favour of the respondents, that their mode of fishing has been practised apparently without serious question for many years, and that there is no evidence that they in fact catch any abnormal number of fish. But I do not think these considerations can affect the legal result.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutors of the Sheriff-Substitute and the Sheriff dated respectively 4th May 1918 and 6th July 1918: Find in fact (1) That the pursuers are upper proprietors of salmon fishings in the river Nith or its tributaries as certified by the clerk of the Nith District Fishery Board by list No. 2/1 of process; (2) that in the spring of 1917 the defenders became the tacksmen of certain fishings in the Nith known as the Kirkconnel fishings; (3) that the method of fishing practised by the defenders is as follows, namely—the coble is rowed straight across to the Dumfries side of the river, the net paying itself out as it goes, the man in the coble then puts his foot on the net so as to prevent further paying out and rows the coble down stream keeping its bow or 'nose' close to the Dumfries bank, while the man with the tow-rope walking on the Kirkconnel side draws his end of the net correspondingly down stream; the net thus stretched across the river completely obstructs for practical purposes the passage of fish up the river; when the coble comes nearly opposite to the hauling-place the man in it releases the net and rows swiftly to the Kirkconnel side, when the net is hauled ashore: Find in law that the said method of fishing is not fair net and coble fishing and is illegal in respect that during the period when the paying out of the net is prevented and coble kept close to the Dumfries side the net takes a grasp of the whole width of the river during a longer time than is required for the coble to row round the net, and is a contrivance which prevents the free passage of fish up the river: Therefore grants decree of declarator and interdict in terms of the prayer of the initial writ as amended."

Counsel for the Pursuers and Appellants—Moncrieff, K.C.—Scott. Agents—Dundas & Wilson, C.S.

Counsel for Defenders and Respondents—Chree, K.C.—MacRobert. Agents—Webster, Will, & Co., W.S.

Friday, June 20.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

WOODILEE COAL AND COKE COMPANY, LIMITED *v.* ROBERTSON.

Master and Servant—Workmen's Compensation—Arising Out of and in the Course of Employment — Serious and Wilful Misconduct — Added Peril — Workman Lighting his Pipe in Firey Mine—Coal Mines Regulation Act 1911 (1 *and* 2 *Geo. V, cap.* 50), *secs.* 32 *and* 35—*Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1) *and* (2) (*c*).

In a firey mine it was an offence against the Coal Mines Regulation Act 1911 to be in possession of matches or to light a match, and that regulation was posted up and in force at the colliery, and was known to a miner there who at the customary knock-off on the afternoon shift struck a match to light his pipe. An explosion occurred by which he was killed. The miner's dependants claimed compensation. *Held* that the accident was due to a risk not reasonably incidental to the workman's employment, but which was added by the workman's own act, and that the accident therefore did not arise out of the employment.

The Woodilee Coal and Coke Company, Limited, *appellants*, being dissatisfied with an award of the Sheriff-Substitute at Dumbarton (W. J. KIPPEN, K.C.) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought against them by Mrs Annie Campbell or Robertson, for herself and as tutrix and administratrix-in-law of her pupil children, *respondent*, appealed by Stated Case.

The Case stated—"The following *facts* were established:—1. That the claimant Mrs Annie Campbell or Robertson is the widow, and the claimants Christina Robertson and Letitia Robertson are the pupil children, of the late Kenneth Robertson of 5 Ledgate Street, Kirkintilloch, and are his only dependants. 2. That the said Kenneth Robertson was a miner in the employment of the Woodilee Coal and Coke Company, Limited. 3. That on Friday, 27th September 1918, while on the back (afternoon) shift in the Meiklehill Colliery of the said company, he was personally injured by an explosion

which occurred about six o'clock. 4. That the said explosion occurred on his striking a match to light his pipe after finishing his piece at the customary knock-off in the middle of the shift. 5. That to have matches in the said pit was an offence under section 35 of the Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), and the lighting of a match an offence under section 32 of the said Act, which was posted up and in force at the said colliery. 6. That the prohibitions against the possession and use of matches were known to the said Kenneth Robertson. 7. That he died as the result of the personal injuries received through the said explosion. I found further in fact, (8) that the said explosion was an accident arising out of and in the course of the employment of the said Kenneth Robertson. On these facts I found in law that the said Woodilee Coal and Coke Company, Limited, were liable in compensation to the said dependants Mrs Annie Campbell or Robertson and Christina Robertson and Letitia Robertson, and found the pursuer entitled to expenses."

The *question of law* was — "Was there evidence upon which I could competently find that the accident which caused the death of Kenneth Robertson arose out of and in the course of his employment with the defenders?"

To his award the arbitrator appended the following *note:*—"The facts in this case seem very simple. Kenneth Robertson was a miner to trade. He died from injuries received through an explosion in the mine. The explosion occurred during the back (afternoon) shift, on which Robertson was that day working, at the usual knock-off time about six o'clock. It was occasioned by his striking a match to light his pipe. He did so in face of prohibition against having and using matches in the pit. The claimants are his only dependants, and parties were agreed that if compensation were due its amount was £300.

"It added to my hesitation in deciding this case that, at Hamilton, Sheriff Shennan, who has great experience, had decided a case (*Dyet* v. *Barr's Trust*) which, if not entirely, was very much on all fours with the present, in the opposite way to that to which I was inclined.

"The statute enacts—'If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman,' compensation is to be due. At first sight it would seem hard to find a better example than injury through an explosion in a firey mine to a miner in the mine on duty. It was, however, maintained that the accident here did not arise out of the employment, but out of the miner's lighting a match for his own purposes, and that was the contention, as I understand, sustained in the Hamilton case. I regret that I cannot agree.

"Sheriff Shennan bases his decision in the first place on the test applied by L. C. Loreburn in *Moore* v. *Manchester Miners Limited*, [1910] A.C. 498, whether the man was 'doing what a man so employed may reasonably do, within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing.' That test was on 'in the course of' the employment. It was not maintained to me as I understood that the accident here, the explosion, was not 'in the course of' the employment. Taking the test however, Robertson was having the usual recognised break in the middle of the shift, and he was at his working-place. But for the rules he disregarded there was nothing unreasonable in what he was doing, and a breach of a rule is not sufficient *ipso facto* to take a man outwith the sphere of his employment. It was within the employment that the miner should take this break or rest in the middle of the shift, and it seems to me impossible to dissociate the detail of his trying to light a pipe from its surroundings. Possibly had he broken off work at an unrecognised time with the sole object of smoking, the question would have been different.

"A different ground for the decision in *Dyet* is contained in the sentence—'He was expressly forbidden to smoke in this section and he deliberately added a peril to his employment.' 'Added Peril' was finally established by *Barnes* v. *Nunnery Coal Company, Limited*, [1912] A.C. 44, 49 S.L.R. 688, in which case the facts were that a youth went, contrary to express and enforced prohibition, riding to his work in the mine in a travelling tub which had nothing to do with his particular work in the mine, and he was killed by his head hitting the roof. *Plumb* v. *Cobden Flour Company, Limited*, [1914] A.C. 62, 51 S.L.R. 861, carried the principle further to a case where a man, not in contravention of any prohibition, in the execution of his work took advantage of a revolving shaft which happened to be convenient, thus doing the work in a way importing the danger of moving machinery not contemplated by his employers, and he was injured by falling on the shaft and being swung round on it. *Herbert* v. *Samuel Fox & Company, Limited*, [1916] A.C. 405, applied the principle to a case where the accident occurred in connection with the trucks the man had in charge, but where instead of walking in front of them, a position of comparative safety, he had, contrary to enforced prohibitions, ridden on the buffer of the leading truck, a position of great danger. *Lancashire and Yorkshire Railway Company* v. *Highley*, [1917] A.C. 352, applied the principle to a case where a railway company had allowed its employees to disregard a prohibition and take a short cut across its lines, a dangerous practice, but where on the occasion in question, the employee finding a train of trucks on one of the lines proceeded to pass through between the trucks, a different danger. In these leading cases, and the cases which followed on them, there was by the man's conduct added to his employment a peril which was *not in* the contemplation of his employment and which was non-existent but for his conduct. In the present case the peril, the chance of explosion, was peculiarly incident to the employment, existent regardless of the man's conduct. What he did, did not create

the peril, it caused the peril to materialise. It seems to me that the present case must be treated as more nearly approximating to a man's doing the right thing, but for his own purpose doing it a wrong way, and so doing bringing on himself the recognised danger of the employment—*Blair & Company, Limited* v. *Chilton*, 1915, W.C. Rep. 283.

"In Lord Haldane's opinion in *Simpson* v. *Sinclair*, 1917 S.C. (H.L.) 35, 54 S.L.R. 267, it is pointed out that what is to be looked at is the proximate cause. That had been laid down in *Shaw* (*Glasgow*) *Limited* v. *Macfarlane*, 1915 S.C. 273, 52 S.L.R 236, where a man employed at an iron foundry, being struck by a stranger, fell between boxes of molten metal and was injured, and the fall near the metal, not the blow by the stranger was looked at. Similarly in *Wicks* v. *Dowell & Company*, [1905] 2 K.B. 225, where a man employed near an open hold took a fit and fell down the hold, and in *Wright & Greig, Limited* v. *M'Kendry*, 1918, 56 S.L.R. 39, where a man employed on a concrete floor took a fit and fell, injuring his skull on the concrete floor, the fall in the surroundings of the employment, not the fit, was looked at. In the present case the proximate cause seems to me to be the explosion due to the nature of the pit where the man was employed, not his striking the match.

"As Robertson died from his injuries, no question arises as to serious and wilful misconduct under section 1 (2) (*c*).

"I was referred to *Johnson* v. *Marshall & Sons Limited*, [1906] A.C. 409; *Watkins* v. *Guest, Keen & Nettlefolds Limited*, (1912) W.C. Rep. 150, and Willis's Workmen's Compensation (17th ed.), 27-33.

Argued for the appellants—The accident did not arise out of the workman's employment. He was not doing what he was employed to do, and he added a peril to his employment by his own act. He was in conscious breach of the Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), sections 32 and 35. A variety of tests which had to be applied with care—*Plumb* v. *Cobden Flour Mills Company, Limited*, [1914] A.C. 62, *per* Lord Dunedin at p. 65, 51 S.L.R. 861—had been formulated in the cases, but judged by any of those tests the same result followed. Thus the accident was due to breach of a genuine prohibition, as in *Barnes* v. *Nunnery Colliery Company, Limited*, [1912] A.C. 44, 49 S.L.R. 688, *per* Loreburn, L.C., followed by Lord Dunedin in *Plumb's* case (*cit.*) at p. 47. The workman was doing something for his own purposes, as in *Reed* v. *Great Western Railway Company*, [1909] A.C. 31, *per* Lord Macnaghten at p. 34, 46 S.L.R. 700. If he had arrogated to himself duties which he was neither engaged nor entitled to perform, as in *Kerr* v. *Baird & Company, Limited*, 1911 S.C. 701, 48 S.L.R. 646, the same result would have followed, but the present case was *a fortiori*, for the workman was doing what he knew to be expressly forbidden. *Frith* v. *Owners of s.s. Louisianian*, [1912] 2 K.B. 155, was analogous to the present case. Where there was something idiopathic in the workman and an employment risk the workman could still recover, for the idiopathic condition was the remote cause, and added nothing to the employment risk—*Wicks* v. *Dowell & Company, Limited*, [1905] 2 K.B. 225; *Wright & Greig, Limited* v. *M'Kendry*, 1918, 56 S.L.R. 39. *Simpson* v. *Sinclair*, 1917 S.C. (H.L.) 35, 54 S.L.R. 267 (*Lancashire and Yorkshire Railway Company* v. *Highley*, [1917] A.C. 352) was not in point. Further, what the man did was not reasonably incidental to his work, and consequently the accident did not arise in the course of his employment—*Davidson* v. *Officer*, [1918] A.C. 304, 55 S.L.R. 185; *Fraser* v. *Riddel & Company*, 1914 S.C. 125, 51 S.L.R. 110; *Lancashire and Yorkshire Railway Company* v. *Highley*, [1917] A.C. 352; and *Halvorsen* v. *Salvesen*, 1912 S.C. 99, 49 S.L.R. 27.

Argued for the respondent—The accident arose out of and in the course of the employment. As regards the latter, *Davidson's* case did not overturn the earlier cases. It merely stated the tests in different language, but even upon the test there laid down the accident arose in the course of the employment, because it was reasonably and naturally incidental to his employment that the workman should take a smoke. The two questions of "arising out of" and "in the course of" were practically the same, and the only real defence in the present case was that of "added peril." That doctrine was solely developed upon the Act of 1906, which had excluded serious and wilful misconduct as a defence in certain cases. That Act was an extending Act, and the doctrine of added peril should be confined to the limits to which the decided cases had applied it. The policy of the Act was to favour dependants. In the cases of added peril the workman who was surrounded by certain employment risks added a new risk of a different kind or quality from those which his employment placed around him. That was the case in *Highley's* case, *Plumb's* case, *Brice* v. *Edward Lloyd, Limited*, [1909] 2 K.B. 804, *Barnes'* case, and *Herbert* v. *Samuel Fox & Company, Limited*, [1916] A.C. 405. In all of them the workman added a new kind of peril by his own act. In *Fraser's* case, *Wright's* case, and *Wicks'* case the peril was in existence as a peril of the employment all the time, and all the workman did was to do something to make the peril operative. That was exactly what had happened here. The gas was the peril of the employment, and the lighting of the match merely made it operative. *Simpson's* case showed that only the proximate cause should be considered. Here the proximate cause was the presence of the gas, and the accident was the explosion. That principle was applied in *Manson* v. *Forth and Clyde Steamship Company, Limited*, 1913 S.C. 921, 50 S.L.R. 687. That was a question of fact for the arbitrator. The regulations were irrelevant, for the regulation in question was not one limiting the work to be done, but merely limiting the method of doing it. *George* v. *Glasgow Coal Company, Limited*, 1909 S.C. (H.L.) 1, 46 S.L.R. 28, and Willis' Workmen's Compensation Act (17th ed.), p. 21, were referred to.

LORD MACKENZIE—The question of law stated by the learned arbitrator in this case is, "Was there evidence upon which I could competently find that the accident which caused the death of Kenneth Robertson arose out of and in the course of his employment with the defenders?" The form of question which has been approved of on more than one occasion in this Division of the Court is, Whether there were facts found proved from which I was entitled to find? and so on, and I think that is a preferable form of question.

In my opinion, the question admits of only one answer, and that is in the negative. Upon the facts set out the accident was due to a risk which was not reasonably incidental to the workman's employment.

The facts are that the deceased was a miner in the employment of the Woodilee Coal Company, and that on 27th September 1918 he was personally injured by an explosion. Then the fourth finding is, "That the said explosion occurred on his striking a match to light his pipe, after finishing his piece, at the customary knock-off in the middle of the shift." The fifth finding is, "That to have matches in the said pit was an offence under section 35 of the Coal Mines Act 1911 (1 and 2 Geo. V. cap. 50), and the lighting of a match an offence under section 32 of the said Act, which was posted up and in force at the said colliery." And then it is found that the prohibitions against the possession and use of matches were known to the deceased, and that he died as the result of personal injury received from the said explosion.

The point taken by the employers is that the accident was due to the workman having added a risk to his employment by lighting a match in a mine where naked lights were prohibited. In my judgment this is a typical case of what is known as an added peril.

The law upon that subject is well settled. I refer first to what Lord Dunedin said in the case of *Plumb*, [1914] A.C. 62, at p. 68—"A risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself." His Lordship refers to what Lord Atkinson said in the case of *Barnes* v. *Nunnery Coal Company*, [1912] A.C. 44, at p. 50—"The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter." And Lord Atkinson added these words—"It was not therefore reasonably incidental to his employment." There is a further passage in Lord Atkinson's judgment—"He exposed himself to a risk he was not employed to expose himself to—a risk unconnected with that employment, and which neither of the parties to his contract of service could ever be reasonably supposed to have contemplated as properly belonging or incidental to it."

In the case of the *Lancashire and Yorkshire Railway* v. *Highley*, [1917] A.C. 352, at p. 372, Lord Sumner deals with the matter—"Was it part of the injured persons employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment."

And the conclusion of the matter is thus put by Lord Sumner (at p. 374) in a passage every word of which seems to me to be applicable to the present case—"At the time of his death the workman was in no sense doing that which was part of or fell within his employment (whether he was or was not acting with care therein), but was for his own purpose, namely, the convenience of the moment, thoughtlessly pursuing a course which fell outside of his employment."

I do not consider it necessary to go into the more or less subtle distinctions which have been drawn between cases which properly raise the question whether the accident arose out of the employment and cases in which the question arose whether the accident occurred in the course of the employment. I think it quite sufficient in the present case to say that, judged by the legal standards contained in the opinions which I have read, the accident cannot be said to have arisen out of the employment.

The argument which we have heard this morning from Mr Fraser seems to me to be really a restatement of the points which were contained in Lord Moulton's judgment in the case of *Watkins* v. *Guest, Keen, & Nettlefolds*, 1912, B.W.C.C. 307, where he criticised Lord Atkinson's opinion in *Barnes* that the test was whether the risk was reasonably incidental to the employment on the ground that it would cut out of the Act altogether the sub-section of the Act relating to serious and wilful misconduct. I do not desire to say more than that Lord Dunedin, in *Plumb's* case, [1914] A.C. at p. 69, deals with that matter and to that part of his Lordship's judgment I refer as sufficient to meet the argument.

Mr Patrick's argument was that we should be taking a new departure and should be going further than the cases of *Barnes* or *Brice* v. *Edward Lloyd Limited*, [1919] 2 K.B. 804, or the *Lancashire and Yorkshire Railway Company* v. *Highley*, because the peril here was the identical peril to which the man's employment exposed him. He argued that you cannot found upon cases of added peril unless you can show that some peril of a kind and quality different from that to which the man's employment exposed him has been created by the workman himself. The answer to that as it appears to me is this—the peril here was not the fact that there was gas in the mine; the peril was that the man made the fire and by making that fire he added a peril which, to use Lord Atkinson's expression, was a peril which could never reasonably be supposed as properly belonging or incidental to the employment. In saying so I am not in the least running counter to anything that was laid down in the case of

M'Kendry v. *Wright and Greig*, or in the case of *Wicks* v. *Dowell & Co.*, [1905] 2 K.B. 225. In order to make these cases analogous to the present case it would have been necessary for the cause of the accident to have been, not some idiopathic condition but some gymnastic exercise for the workman's own purpose which resulted in injury. I think it would have been impossible to maintain that the principles of *Wright* and *Greig* and *Wicks* entitled the man to compensation in those circumstances. The reason why compensation was given in those cases was that given by Collins, M.R., in *Wicks*, because the man was obliged to run the risk by the very nature of his employment and the danger of the fall was brought about by the conditions of his employment. In the present case I think it is impossible to say that it was not the act of the workman himself that created the risk of the fire which was the cause of the accident.

There are various tests which can be applied, and Mr Carmont mentioned tests which are found in a variety of cases. In the first place, was there a genuine prohibition here against what the man did? There can be no question about the prohibition because it was a statutory offence, and there is an express finding to the effect that the prohibition was known to the workman. Then there are other classes of cases in which compensation has been found not due where the workman was engaged in doing something for his own purposes. Well, judged by that standard, I think the workman fails, because lighting a match for the purpose of having a smoke can only be described as a purpose of his own. Accordingly in my opinion the only legitimate conclusion on the facts is that the accident did not arise out of the employment.

LORD SKERRINGTON—This case has been argued with great ability on both sides and with a full citation of authorities. None the less it seems to me to be a simple case which can be solved by reading the words of the Act of Parliament and applying them to the facts which the arbitrator holds to be proved. It is not necessary to apply any elaborate tests nor is it helpful to study the much more difficult questions which were decided in the cases cited to us. Indeed, my view would have been the same if the question had arisen under the Act of 1897, before it had occurred to lawyers that there was so much to be said as to whether some particular act, generally a wrongful act, on the part of a workman did or did not put him out of his employment, and when for the most part counsel were content to argue that there had or had not been employment by the undertakers on, in, or about a mine or railway or other employment within the purview of the Act.

I agree with your Lordship that, having regard to the proved facts, the arbitrator was not entitled to find that the accident arose out of the employment. It undoubtedly occurred in the place of the employment, namely, in the mine, and during the hours of the employment, namely, in the authorised meal hour; and lastly, the accident consisted in the ignition of a substance which was to be found in the place of employment, namely, a gas. But when that has been said everything that can be said has been stated in favour of the judgment. The circumstances which I have narrated are not enough to demonstrate that the accident arose out of the employment. One must ask oneself—What was the man doing at the time when he was injured? Was he doing anything which he was employed to do or which he was entitled to do, or which he mistakenly thought that it was for the interests of his employers that he should do, or which was reasonably incidental to what he was employed to do? The answer to all these questions is in the negative. The man was doing something purely for his own purpose, something which he was not entitled to do in any shape or form, and which he was absolutely forbidden to do not merely by the rules of the pit but by an Act of Parliament. In these circumstances the arbiter ought, I think, to have found that the accident did not arise out of the employment.

Counsel for the appellants further maintained that at the time of the accident the workman was not in the course of his employment. I reserve my opinion as to this, but I see difficulties in the way of holding that this man was not in the course of his employment when he entered the mine, and when he hewed the coal, merely because he illegally had a box of matches in his pocket. Equally I see difficulty in holding that he was not in the course of his employment when he was resting after his work even though at the time he had a lighted pipe in his mouth. Suppose that he had met his death through an accident arising out of the employment, say, by the fall of a stone from the roof, would his claim have been defeated because he possessed a box of matches or because he was smoking at the time of the fall?

LORD CULLEN—I am of the same opinion. The explosion of gas which caused the death of the workman occurred during a period of authorised abstention from work. He intended to utilise his leisure in smoking, and in order to light his pipe he struck a match and thereby brought about the explosion. His action in striking the match was forbidden by a statutory condition of his employment of which he was aware and which he was bound to obey. It was a proceeding entirely unconnected with the work which he was employed to do. Thus, solely for his own private ends he chose to violate a regulation conditioning his employment, and intended for his own safety. In these circumstances I am unable to hold that his death was brought about by an accident arising out of his employment. It was brought about through his having misused his leisure from work in doing a dangerous thing for his own pleasure, whereby he exposed himself to a risk of being injured which the conditions of his employment did not call on him to encounter but forbade him to undertake.

The Court answered the question of law in the negative.

Counsel for the Appellant—Carmont—Russell. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Fraser, K.C.—Patrick. Agents—Weir & Macgregor, S.S.C.

Thursday, June 26.

FIRST DIVISION.

MURRAY'S TRUSTEE *v.* MURRAY.

Succession—Trust—Construction—Bequest to a Class—Ascertainment of Class—"Hold . . . for behoof of the Children of my Nearest of Kin if any there be."

A testator directed his trustees to pay over the income of the residue of his estate to his cousin and on her death to hold the residue for behoof of his son John Charles Murray in liferent and for behoof of his children in fee, and on the death of that son to hold the fee for behoof of his children if he any had, and "in case he shall have no children, then my trustee shall hold the . . . residue for behoof of the children of my nearest of kin if any there be . . ." The testator was survived by his cousin and by two sons, John Charles Murray and another, and a daughter. His cousin died a few months after him, and his son John Charles Murray died unmarried on 8th February 1908 predeceased by his sister. The other son of the testator was at that date next-of-kin, and his eldest son was then *in utero* and was born on 13th June 1908. Thereafter other children were born to him, and his wife was again pregnant, when a special case was brought to determine who were entitled to share in the residue in question. *Held* that there being nothing in the settlement to indicate an intention to postpone payment beyond the date of the death of John Charles Murray, that the period of distribution had arrived and the class of beneficiaries entitled to receive the bequest was fixed at that date, and consequently that the eldest son of the testator's surviving son, being *in utero* at that date, was entitled to the whole of the residue.

Alastair Dallas, W.S., Edinburgh, the sole acting testamentary trustee of the late James Murray, *first party;* Lieutenant James Alexander Russel Murray, a son of the late James Murray, as tutor and administrator-in-law of his pupil son Patrick Jesse Alexander Russel Murray, *second party;* and Lieutenant Russel Murray as tutor and administrator-in-law of his other pupil children, *third party*, brought a Special Case for the opinion and judgment of the Court upon questions relating to the vesting and payment of the residue of the estate of James Murray.

James Murray, the testator, died on 19th June 1897 leaving a *trust-disposition and settlement* which conveyed his whole estate to trustees for various purposes, of which the third was,—"(*Third*) my trustees shall pay over the interest or income to be derived from the residue of my means and estate to my cousin Nina Lesingham Bailey, and that annually or at such shorter times and in such sums as my trustees shall think proper, and at her death my trustees shall hold the said residue for behoof of my said son John Charles Murray in liferent for his liferent use only and for behoof of his children in fee, and they shall pay to him or for his behoof as they shall judge expedient (as regards which they shall be entitled to exercise the fullest discretion) the free yearly interest or revenue derived from the said residue, and that in such sums or proportions and at such times as my trustees shall judge expedient . . . and on the death of my said son they shall hold the fee for behoof of his children if he any have, and shall pay the same to such children, share and share alike, on their respectively attaining the age of 25 years in the case of males and at the same age or on marriage in the case of females, and in case he shall have no children who shall survive the foresaid term of payment, then my trustees shall hold the said residue for behoof of the children of my nearest of kin if there any be; and I declare that these provisions shall be alimentary and, in so far as in favour of or descending on females, shall be expressly exclusive of the *jus mariti* or right of administration of husbands, and shall not be affectable by their debts or deeds or by diligence of their creditors."

The Special Case set forth:—"1. . The only one of the trustees, original and assumed, now surviving and acting is the said Alastair Dallas, W.S., the first party to this case. . . 4. The testator was survived by the said Miss Nina Lesingham Bailey, and by three children, viz.,—The said John Charles Murray, the said James Alexander Russel Murray, and Jessie Rose Mary Murray. The said Nina Lesingham Bailey died on 8th November 1897. The said Jessie Rose Mary Murray died unmarried on 22nd August 1902, and the said John Charles Murray died also unmarried on 8th February 1908. 5. The said James Alexander Russel Murray is the nearest of kin of the testator. He has five children, viz.—(1) The said Patrick Jesse Alexander Russel Murray, who was born on 13th June 1908, and was accordingly *in utero* at the date of the death of the liferenter John Charles Murray; (2) Anton John Russel Murray, born 1st July 1910; (3) Eugenie Alexander Russel Murray, born 30th July 1911; (4) Jessie Alice Russel Murray, born 28th August 1913; and (5) Doris Mabel Russel Murray, born 1st April 1915. The said James Alexander Russel Murray is forty-six years of age, and his wife is in her thirty-seventh year and is now pregnant. . . . 6. The residue of the testator's estate at present consists of railway stocks to the value of £522 or thereby, and yields a nett income of £28 per annum or thereby. 7. Since the death of the liferenter John Charles Murray the income of the residue