relevantly to allege the circumstances which he says tend to show the meaning of the words complained of, and above all he is bound to produce the whole document out of which he has chosen to pick a single sentence to form the subject of this complaint. I think there is no relevant averment here of any fact which would enable a jury to put a different meaning upon the words than the innocent meaning which they naturally bear, and if the pursuer intended to make a complaint of slander from the use of language in one sentence of a letter he was bound to give us the context in which it occurred as well as the particular sentence of which he complained. I therefore agree with your Lordship that there should be no issue.

LORD ORMIDALE—I concur with your Lordships.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Pursuer (Respondent)—M'Clure, K.C.—Normand. Agents—Mackenzie & Kermack, W.S.

Counsel for Defender (Reclaimer)—Watt, K.C.—D. Anderson. Agent—James A. B. Horn, S.S.C.

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## HOUSE OF LORDS.

*Tuesday, December* 19.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord Kinnear, and Lord Shaw.)

### BLACK *v.* FIFE COAL COMPANY, LIMITED.

(*Ante*, November 24, 1908, 46 S.L.R. 191, and 1909 S.C. 152.)

*Reparation—Master and Servant—Negligence—Statutory Duty—Common Law Liability of Master for Consequences to Fellow-Servants of Breach of Statutory Rule by Servant—Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 49, *General Rules* 4 (1), 7, *Special Rule* 37.

The Coal Mines Regulation Act 1887, sec. 49, enacts—"The following general rules shall be observed, so far as is reasonably practicable, in every mine."

*Held* that although this did not impose on the mine-owner an absolute duty that the rules be observed, it placed on him, in the event of a breach of a rule, the *onus* of proving that he had done everything that was practicable to have the rule observed. If he failed to discharge this *onus*, he was liable at common law for any damage resulting therefrom, and could not derive protection from the doctrine of common employment.

*Circumstances* in which *held* that the owners of a coal mine were liable at common law and not under the Employers' Liability Act 1880 only, for the death of a miner from carbon monoxide gas, where the presence of the miner in the mine was held to be due to breaches of general rules 4 (1) and 7, and special rule 37, by the under-manager in charge of the mine and the fireman, inasmuch as the mine-owners had not taken such means as were open to them of making these officials competent to deal with carbon monoxide.

This case is reported *ante ut supra.*

The pursuer appealed to the House of Lords.

The interlocutor of the Sheriff-Substitute (HAY SHENNAN) and the interlocutor of the Second Division which was appealed against, giving the findings in fact, were in these terms:—

*The Sheriff-Substitute's*—"The Sheriff-Substitute finds in fact as follows—(1) The deceased Alexander Hynd Black, the husband and father of the pursuers, was, on 27th April 1906, and for some time prior thereto, in the employment of the defenders as an oncost worker in their No. 11 Pit, Lumphinnans. On the night of Thursday, 26th April, he and Thomas Serrie were sent to repair the main brae in that pit. Early on the morning of Friday, 27th April 1906, while they were so engaged, they were overcome by carbon monoxide gas and lost their lives. (2) At the time of the accident the air current for ventilating No. 11 Pit was brought down the shaft of No. 1 Pit, being thus the downcast shaft, and after passing through the Lochgelly splint and parrot seam of No. 1 Pit ventilated all parts of No. 11 Pit, the shaft of which was the upcast for the return air. The Lochgelly splint and parrot seam is universally recognised to be specially liable to spontaneous combustion, and part of this seam in No. 1 Pit was on fire in 1901. This outbreak was treated by sealing up the fire area with stoppings, but it was not possible in long wall workings as these were to be sure that the fire was quite extinguished. The air course from No. 1 Pit to No. 11 Pit passed near some of these stoppings, and any fumes which might escape from leaking stoppings must be carried with the air through all the workings of No. 11 Pit. (3) On Tuesday, 24th April 1906, John Gray, who was manager of both pits, was informed by Hunter, an oversman in No. 11 Pit, that there was a strange smell in the air coming to No. 11 Pit, and he instructed Hunter to examine the workings. Hunter found some smoke issuing from stoppings not far from the seat of the old fire in No. 1 Pit and set men to repair them. Gray then formed the opinion that the smell came from the seat of the old fire in No. 1 Pit. (4) On Wednesday, 25th April, and Thursday, 26th April, there was smoke or haze with a peculiar smell in the workings of No. 11 Pit, and several of the miners, including the deceased Black,

were affected with headache and vomiting. Some of the men complained of the air to Gibbons, the fireman, who himself felt the effect a little in his head. The air on the Thursday was rather clearer in appearance. The men were allowed to work in the pit as usual on both days, and Black and Serrie were sent down on Thursday night to do repairing work. (5) After the first discovered leak in the stoppings was repaired, smoke and fumes were found to be issuing from another leak, and men began to repair this second leak on Thursday, 26th April. On Friday, 27th April, about three a.m., a squad of men resumed work at this stopping; but in two or three minutes some of them were overcome, and they had to abandon the work of repair for the time. It was probably at this time that the deceased Black lost his life in No. 11 Pit. (6) The symptoms in No. 11 Pit on the three days before the accident pointed to the recrudescence of the fire in No. 1 Pit, and this entailed the danger of carbonic monoxide being thrown off from the fire through incomplete combustion. Carbonic monoxide is a deadly poison when present in the air in very small quantities, and it has no colour, taste, or smell, and can be detected only by its effects. But its presence in underground fires is a recognised danger, and it is usually preceded by, and sometimes accompanied with, a white watery vapour. The cause of the deceased Black's death was the escape of carbonic monoxide from the fire in No. 1 Pit, and the possibility of this escape might have been reasonably anticipated and its consequences averted. (7) John Gray, the manager of the two pits, though believing that a strange smell was coming from the seat of the old fire, did not know that there was any danger of a discharge of carbonic monoxide, and did not then know the symptoms of carbonic monoxide poisoning. He was not aware of the danger of allowing men to work in No. 11 Pit while fumes were being discharged in noticeable quantities from leaking stoppings in No. 1 Pit. Defenders were negligent in appointing to the charge of these pits, in which there was risk of a fire breaking out, a manager who was not competent to take the necessary precautions in view of a possible outbreak of carbonic monoxide gas. (8) John Hunter, though described as under-manager and performing the duties of under-manager, was not appointed in writing as required by section 21 of the Coal Mines Regulation Act 1887. For about a month before the accident Gray, the manager, had through illness not been fit for complete work, and Hunter filled Gray's place so far as necessary. The defenders were negligent in allowing Hunter to act as under-manager, and to exercise daily personal supervision of the mine without appointing him in writing. (9) Hunter was not qualified to act either as under-manager or as overseman in No. 11 Pit. He was not aware of the liability of the Lochgelly splint and parrot seam to spontaneous combustion, and he did not know of the danger of carbonic monoxide being thrown off from the fire. His professed theoretical knowledge of carbonic monoxide is most inaccurate. The defenders were negligent in appointing Hunter as oversman in a pit in which there was risk of the air being contaminated with carbonic monoxide gas. (10) John Gibbons, one of the firemen in No. 11 Pit at the time of the accident, was not then qualified to act in that position. He did not know of the danger of carbonic monoxide being discharged into the air course in the event of the fire in No. 1 Pit becoming active. He knew nothing about carbonic monoxide, or of the precautions to be taken in connection with it. The defenders were negligent in failing to see that Gibbons was instructed on these matters at the time when the connection was made between No. 1 Pit and No. 11 Pit, and the air course for No 11 was brought past the fire area. (11) The system of ventilation adopted by defenders for No. 11 Pit was adequate and satisfactory so long as proper means were taken to secure that noxious gases were not discharged in injurious quantities from the fire area into the air-course. (12) The defenders' officials, Gray, Hunter, and Gibbons, having duties of superintendence, were in fault in allowing men to work in No. 11 Pit while the stoppings of the fire area were leaking, as they were on the two days before the accident. (13) Pursuers have suffered loss through the death of the deceased Alexander Hynd Black, which may be fairly estimated at the sums of £200 for Mrs Black, £40 for John Black, £40 for William Butler Black, £60 for David Cameron Black, and £60 for Christina Erskine Black: Finds in law that the defenders are liable to pursuers in reparation for the death of the said Alexander Hynd Black in respect that his death was due to their negligence in failing to appoint competent officials in No. 11 Pit: Therefore decerns against defenders in favour of the pursuer Mrs Elizabeth Butler or Black for £200 sterling for her own behoof; of the pursuers John Black and the said Mrs Black, as his curator, for £40 sterling; of the said Mrs Black as tutor for William Butler Black for £40 sterling; of the said Mrs Black as tutor for David Cameron Black for £60 sterling; and of the said Mrs Black as tutor for Christina Erskine Black for £60 sterling: Finds the pursuers entitled to expenses: Allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and report."

*The Second Division's* — "The Lords having heard counsel for the parties on the defenders' appeal against the interlocutor of the Sheriff-Substitute of Fife, dated 30th July 1907, sustain the appeal, and recal the said interlocutor appealed against: Find in fact in terms of the first five findings in fact in the said interlocutor appealed against: Find further in fact (6) that the cause of the death of Alexander Hynd Black was the escape of carbon monoxide gas from the fire in No. 1 Pit; (7) that John Gray, the manager, John

Hunter, the under-manager, and John Gibbons, the fireman, all at No. 11 Pit, were possessed of the qualifications and experience usually required of persons holding these offices; (8) that there was no negligence on the defenders' part in appointing and continuing to employ the said manager, under-manager, and fireman; (9) that the said John Hunter and John Gibbons, having duties of superintendence in No. 11 Pit, were guilty of negligence in respect that, although for two days prior to the accident they were aware that a haze having a peculiar smell had appeared in the pit, and that several workmen had been seized with headache and sickness, they took no steps by withdrawing the workmen or otherwise to guard against injury to those employed in the pit, until the cause of the haze and the smell were discovered and removed; and (10) that the said John Gibbons failed to observe the provisions of rules 4 (1) and 7 enacted by section 49 of the Coal Mines Regulation Act 1887, and also of special rule 37, passed in terms of the powers conferred by section 51 of the said Act, and that the said John Hunter failed to observe the provisions of said rule 7: Find in law that the pursuers have no claim against the defenders at common law, but only under the Employers' Liability Act. . . ."

After a hearing on the 8th and 10th March 1910, on the 25th July 1910 their Lordships remitted the case to the Second Division to pronounce a finding in fact upon the following question—"When the connection was made with the old mine in which smouldering fires followed by the giving off of carbon monoxide gas had previously occurred, 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?"

On 12th July 1911 the Second Division pronounced this interlocutor—"Find in fact—(1) That for several years prior to the formation of the connection between No. 1 Pit, in which work was being carried on down to December 1905, and No. 11 Pit, the ventilating current passed from the said No. 1 Pit through a pit known as No. 7 Pit, in which men were at work. (2) That no evil results had followed from the connection between No. 1 Pit and No. 7 Pit during the whole period above mentioned; and that so long as the stoppings which surrounded the area of the old fire in No. 1 Pit were kept in a good state of repair, the air current was of sufficient volume to dilute and render innocuous any poisonous gas formed by the smouldering fire. (3) That no new or special danger from noxious gases was created by the formation of the said connection between No. 1 Pit and No. 11 Pit, except that any poisonous gas which escaped from the smouldering fire passed through No. 11 Pit instead of No. 7 Pit, and that the workman in No. 11 Pit, instead of those in No. 7 Pit, were exposed to the risks arising from a sudden outburst of carbon monoxide gas. (4) That owing to the long wall workings of No. 1 Pit it was impossible to seal up the burning area so as to entirely prevent carbon monoxide escaping therefrom; that this was well known to Gray the manager, Hunter the under-manager, and Gibbons the fireman; and that they were fully aware of the necessity of repairing leaks in the stoppings round the fire area when these became obvious. (5) That the presence of carbon monoxide is of very rare occurrence in mines, and that it would be impracticable to engage persons, whether as manager, under-manager, or fireman, who had had any experience of it. (6) That Gray, the manager, had some theoretical knowledge of the properties of carbon monoxide, but was unaware of the symptoms resulting from poisoning by gas; that owing to illness, he had not been in the pit for a month prior to the accident, although at the time of the accident he was able to take a general supervision above ground; that Gibbons, the fireman, was ignorant of its characteristics and its effects; but that Hunter, the under-manager, had had personal experience of the gas and its effects, having been involved in the disaster which occurred at defenders' pit at Hill of Beath in 1901, when six men lost their lives through carbon monoxide poisoning, but that he did not in fact discover that carbon monoxide was being carried by the air current into No. 11 Pit, although he was at the time engaged in repairing or directing the repair of leaks in the stoppings, and was aware that the smoke which he detected was coming from the smouldering area through leaks. (7) That the connection between No. 1 and No. 11 pits had been made eleven months before the accident; that no evil results had followed; and that apart from the possibility of the stoppings suddenly giving way, the defenders had no to reason to anticipate any sudden outburst of carbon monoxide gas, which the air currents might not be sufficient to dilute so as to render them innocuous. (8) That it would have been practicable (had such a danger been anticipated) for the defenders to cause instructions to be given to Gray, Hunter, and Gibbons as to the symptoms and dangers of an outburst of carbon monoxide; and that the defenders did not take any means at the time when the connection between No. 1 and No. 11 pits 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 outbreak of carbon monoxide gas."

After consideration—

LORD CHANCELLOR—It is not necessary for me to enter in detail on this case. I have had the advantage of reading the opinion or of conferring with my noble and learned friends, who will deal with the details and facts of the case. It is

enough to say that upon the findings of fact of the Second Division, by which we are bound, I consider there was a duty upon the mine-owners to appoint and keep in charge persons competent to deal with the dangers arising in this mine, and that they did not discharge this duty, whereby this unfortunate man met with his death.

I therefore think the appeal ought to be allowed.

LORD KINNEAR—I address your Lordships at this stage with the permission of my noble and learned friend opposite (Lord Ashbourne).

I have found this a case of difficulty both in itself and because of my respect for the opinions of learned Judges from whom I differ. The question is whether the respondents are liable in damages for the death of a workman in their employment in respect of their own fault, or whether death was due to the fault of fellow-workmen for whom the employers are not responsible except in terms of the Employers' Liability Act 1880. The Court below has rejected the first alternative, and has found in law that the pursuers, the appellants, have no claim against the defenders, the respondents, at common law, but only under the Employers' Liability Act. This finding in law which your Lordships are asked to review is based upon a series of specific findings in fact, which by the statute regulating appeals of this description this House is bound to accept as "finally and conclusively fixing the several facts so specified." The interlocutor appealed against was pronounced by the Second Division of the Court of Session, on reviewing a judgment of the Sheriff Court of Fife proceeding on a proof taken upon a record made up in that Court. The Court of Session had full power to review the Sheriff's judgment both in fact and in law, and for that purpose the learned Judges were bound to consider the proof and determine the facts for themselves. But their judgment is appealable to this House "only in so far as the same depends on or is affected by matter of law." This House, therefore, as Lord Watson puts it in *Mackay* v. *Dick & Stevenson*, "has no concern with the proof led in the Sheriff Court," and although a remit may be made to the Court below to pronounce further findings if it can be shown that there are material questions of fact left undetermined, "that can only be shown," says Lord Watson, "by a reference to the record and not to the proof." In this case, accordingly, your Lordships being precluded from looking at the proof, made a remit to the Court of Session in order to obtain their determination of a material question of fact fairly raised upon the pleadings and the opinions of the learned Judges, but which had not been explicitly answered in the interlocutor under appeal. We now have their answer, which is perfectly clear and explicit, in the interlocutor of 12th July, and the whole determining facts are therefore to be found in the two interlocutors read together.

From these interlocutors it appears that the deceased miner was killed by a poisonous gas while working in the defenders' colliery on the 27th April 1906. The pit in which he was working, No. 11 Pit, was at the time ventilated by an air current brought down the shaft of another pit (No. 1), with which it had been brought into connection in the previous year, and the accident was due to the formation of this connection. No. 1 Pit contained a seam called the Lochgelly splint and parrot seam, which according to the finding of the Court is universally recognised to be specially liable to spontaneous combustion, and part of it was on fire in 1901. The fire area had been sealed up, but it was impossible, from the character of the workings, to be sure that the fire was quite extinguished, and in fact it was still smouldering when the connection with No. 11 was made. It appears that an underground fire in this condition may give off a gas called carbon monoxide, which is so poisonous that the presence of a very small quantity of it in the atmosphere will cause death. It is, however, a gas of very rare occurrence in mines, and the learned Judges say in their opinions, although it is not expressly so found in the interlocutors, that it is very difficult to detect its presence except by its effect on the system, since it has neither colour, taste, nor smell, and cannot be perceived by the senses. It was an escape of this deadly carbon monoxide gas from No. 1 into No. 11 which caused the death of the miner.

These facts being ascertained, the Court had next to inquire whether the death was imputable to the fault of any person or persons employed in the mine, and on this question they found that the gas escaped into No. 11 Pit through leaks in the stoppings which surrounded the whole area of the fire in No. 1 Pit. I do not understand that the mere existence of leaks is imputed to negligence. But the possibility of their occurrence, and the necessity for repairing them when they occurred, was known to the manager, under manager, and fireman, and it is found that "John Hunter, the under manager, and John Gibbons, the fireman, were guilty of negligence in respect that although for two days prior to the accident they were aware that a haze having a peculiar smell had appeared in the pit, and that several workmen had been seized with headache and sickness, they took no steps, by withdrawing the workmen or otherwise, to guard against injury to those employed in the pit until the cause of the haze and smell were discovered and removed," and further they found that John Gibbons failed to observe the provisions of rule 4 (1), and rule 7, enacted by section 49 of the Coal Mines Regulation Act 1887, and also of special rule 37 passed in terms of the powers conferred by section 51 of the said Act, and that the said John Hunter failed to observe the provisions of the said rule 7. The grounds in fact and law for these findings are expressed very concisely and

forcibly by the Lord Justice-Clerk when he says—"Upon the question whether there was conduct on the part of the responsible persons in charge involving liability under the Employers' Liability Act I have no doubt whatever. I cannot hold that either Hunter, the under manager, or Gibbons, the fireman, fulfilled their duty of due inspection or of moving the men out of danger in the circumstances. The account given of the exceptional state of things that was found on the day in question convinces me that there was sufficiently strong ground for not allowing the ordinary work to go on until it was made clear by proper means being taken that there was no danger." I take it that the learned Judges thought that the two men in question neglected a duty imposed upon them by the circumstances, independently of special enactment, as well as by the statutory rules cited in the interlocutor. But for the present purpose it is more important to attend to the specific duties imposed by the statute. The general rule 4 (1) provides for a daily inspection of the mine before the miners go to work, and in particular it prescribes that "a competent person" shall inspect the mine, "and shall ascertain the condition thereof" in certain respects, and in particular "so far as the presence of gas . . . and general safety are concerned," and that a report "specifying where noxious or inflammable gas, if any, was found present," and "what, if any, other source of danger were or was observed shall be recorded without delay in a book to be kept at the mine for the purpose and accessible to the workmen." Rule 7 prescribes that if at any time it is found by the person for the time being in charge of the mine or any part thereof that by reason of inflammable gases prevailing in the mine or that part thereof, or if from any cause whatever the mine or that part is dangerous, every workman shall be withdrawn, and a competent person appointed for the purpose shall inspect the mine and make a true report of its condition; and a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, be readmitted into the mine or part found dangerous until the same is stated by the person appointed as aforesaid not to be dangerous." The special rule No. 37 required the fireman to record without delay, in a book to be kept at the mine for the purpose and accessible to the workmen before commencing work, where noxious or inflammable gas, if any, was found present. For the application of these rules to the case it is proper to add that "the person for the time being in charge of the mine" was Hunter, the under-manager, because the manager was unwell at the time and unable to go down the pit; and that Gibbons, the fireman, was the competent person required to make the daily inspection and to make and record the reports specified in rule No. 1 and the special rule. The learned Judges impute to these two persons therefore that they failed to observe rules which are perfectly clear and explicit, and obviously of the utmost importance for the protection of the workmen. For two days before the accident they had observed the presence in the workings of a peculiar haze or smoke, and at the same time they knew that some of the men had been suffering from headache and sickness. They might not be sufficiently instructed to connect these symptons with carbon monoxide, but there was evidence enough of the presence of a poisonous gas of some kind to make it their plain duty to keep the men out of the pit until the leakage from No. 1 Pit had been discovered and stopped. This plain duty they failed to perform, and the fireman Gibbons failed also to perform the special duty incumbent upon him of recording these things in a book accessible to the workmen, and so affording them an opportunity of refusing to go in to the working-places until the haze had been got rid of.

Now the judgment is not impugned in so far as it imputes to these two men negligence for which the respondents are liable under the Employers' Liability Act; and the grounds on which it has been so decided, so far as we are in a position to judge of them, appear to me irresistible. But the question remains whether the judgment is right in so far as it finds that the respondents are liable only under that Act and not otherwise.

This finding in law is based upon two specific findings in fact: (7) that John Gray, the manager, and the under-manager and the fireman, "were possessed of the qualifications and experience usually required of persons holding these offices"; and (8) that "there was no negligence on the defenders' part in appointing and continuing to employ the said manager, under-manager, and fireman." If this last finding were an exhaustive statement of fact and of fact only, it would be conclusive of the whole case, because your Lordships have no jurisdiction to review the decision of the Court below on matters of fact. But it involves matter of law, because it means that no ground of liability in respect of negligence has been established against the respondents. But negligence is not a ground of liability unless the person whose conduct is impeached is under a duty of taking care, and whether there is such a duty in particular circumstances, and how far it goes, are questions of law. If a definite duty has been ascertained, a finding that it has been duly performed or neglected is a mere finding in fact which your Lordships will not review. But a finding as to negligence which implies the existence of a duty without explicitly defining it is a proposition of mixed fact and law. Your Lordships must therefore disentangle as well as you can the facts from the law in order that you may decide the question which the parties are entitled to bring to this House by way of appeal. In that duty I think there is little difficulty in the present case, because the learned Judges have explained very clearly the legal liability which in their view attaches to

the respondents. In so far as the eighth finding "depends on or is affected by" the law so expounded it is unquestionably subject to appeal.

The main ground on which the judgment on this point was impugned by the appellants' counsel was that the statute imposes the duties, which are found to have been neglected, absolutely and directly upon the mine-owners, and therefore that they have a good ground of action independently of negligence. I agree that if an absolute duty is imposed upon mine-owners by statute they must be liable absolutely to those for whose benefit it is imposed; and that if the things so required to be done are not done, it will be no answer to say that the failure is not owing to any fault or omission of theirs. That such an absolute duty may be imposed by statute I have no doubt whatever, and probably there may be some such duties imposed upon mine-owners by the statute in question. But I find no such absolute duty in the statute with reference to the two rules which are said to have been infringed. The table of rules in which they occur is introduced by the general enactment that the following general rules are to be observed (not absolutely and in any event, but) "so far as reasonably practicable in every mine." Nor are the two rules in dispute addressed directly to the mine-owners. Section 49 imposes a variety of obligations upon a variety of persons, some upon managers and inspectors, some upon working colliers, some upon owners, and some upon anybody who goes down into the pit; and the particular rules with which we are concerned are imposed expressly and directly not upon the owners themselves but upon the manager in charge for the time being or upon the person specially appointed by him or the owners for a certain specific purpose. But it is unnecessary to argue whether rules so qualified and so directed import an absolute duty on the respondents or not, because the point is decided by the judgment of this House in *David* v. *The Merthyr Coal Company*. In that case an action was brought by the widow of a miner who had been killed by an explosion in a mine caused by blasting operations conducted in contravention of the statutory rules; and the learned Judge by whom the case was tried directed the jury that the duty of the owners in respect of the rules was in the first place to publish them, and in the next place to enforce them to the best of their power as rules for the working of the mine; and that if they did so to the best of their power they would not be responsible if one of their servants by a breach of the rules caused damage; and with these directions he left to the jury the questions, first, whether the shot was fired in contravention of the rules, and, secondly, whether the contravention was brought about by the defendants not taking reasonable means to prevent it by enforcing the rules to the best of their power. But, with reference to this last question, he farther directed them that it was the duty of the plaintiffs to give evidence that the mine-owners had neglected their duty of enforcing the rules. The jury answered the second question in the negative, and the Court of Appeal by a majority ordered a new trial on various grounds, as to which there was a great diversity of judicial opinion. The judgment was affirmed in this House, but on one ground only, to wit, that the learned Judge had misdirected the jury as to the *onus* of proof. Lord Halsbury pointed out that the Act required certain precautions to be taken, none of which were taken, that this circumstance obviously called for some explanation, and that on the question whether the authorities of the mine had done their duty in taking proper care for the safety of the miners, the burden of proof lay upon the defendants. The noble and learned Earl expresses no disapproval of the charge in so far as it explains the duty of the mine-owners, nor does he indicate that the question whether they had not taken all reasonable means to prevent the accident was not a proper one for the jury, for in stating the effect of the misdirection his Lordship says that although the learned Judge left the question to the jury—which I think implies that he left the proper question to the jury—he left it in such a way, and with such a direction, that it was hardly possible for them to find any other verdict than that which they did find.

It appears to me that by ordering a new trial on these grounds this House has negatived the absolute statutory liability for which the appellants contend. For if each of the rules contained in section 49 imposes on the mine-owners an absolute duty irrespective of negligence, it would have been no answer to say that they had taken all reasonable means to prevent contravention, and no question of *onus* could have arisen. But then the case decides at the same time that although it be not absolute duty there is still a duty cast upon the mine-owner in respect of the performance of the statutory rules, even when these are to be actually carried out by other persons than the mine-owners themselves, and farther, that if an injury is caused by a breach of the rules the burden of proving that they have done all in their power to prevent such breach lies upon the mine-owners themselves. I confess to thinking that the learned counsel for the appellants put their case unnecessarily high when they argued so strenuously for an absolute liability. The judgment of which they complained finds that the respondents are not liable because the accident which caused this miner's death was due to the negligence of persons in their employment. The true question appears to me to be, not whether the statute imposes an absolute duty with reference to each and every one of the specific rules which the 49th section contains, so that in every case of contravention and in all circumstances the owners must be liable for any consequent injury; but the question is whether it imposes such a

duty upon the mine-owner personally as to preclude him from putting forward the defence of common employment. This is, of course, a perfectly well-established exception from the ordinary rule of law which makes a master responsible for his servants, because it is held to be an implied term of the contract of service that the workman takes the risk of injuries arising from the negligence of other servants in the same employment. But that goes no further than to relieve the master of liability to his servant unless there be negligence on his part in that which he personally undertakes, or is required by statute to do, for the benefit of the servant.

The question which is raised by the judgment, therefore, is whether there was any statutory duty incumbent upon the respondents themselves which will exclude the plea of common employment, notwithstanding that the direct cause of injury has been found to be the negligence of their under manager and fireman. I think that that question again is decided by the case of *David* v. *The Merthyr Coal Company*. But to apply that decision to the present case it is necessary to see what is the precise statutory duty in which the respondents are said to have failed. The judgment in *David* does not expound in detail the particular clauses of the Act upon which the question arises; and I cannot express with confidence any opinion of my own as to the exact construction of the 49th and 50th sections, because it is hardly possible to do so without finding oneself at variance with one or other of the very eminent Judges who have already given conflicting opinions upon that point. I venture to say, however, that to my mind the preferable way of interpreting the Act is to take these two consecutive clauses together, to consider how they are related to one another, and so to get at the true meaning and intent of the whole enactment.

Now the 49th section, as I have already said, imposes certain specific duties upon particular persons, but it begins with a general imperative enactment that the rules which are thereafter to be stated in detail shall be "observed so far as is reasonably practicable in every mine." I think that is an enactment expressly directed not only to people who are charged with the actual performance of specific duties, but also to the owners who have the ultimate control of the mine. There is nothing in the form of the language to limit its application to particular persons. It is addressed to all whom it may concern; and I think it impossible to suppose that the mine owners are outside the scope of that general enactment. But the particular rules which are covered by it are for the most part addressed not to the owner but to the working miners and managers underground. For example, I think it out of the question to hold that if a working collier neglects a specific direction as to the use of a safety lamp, or if he is found in particular parts of the mine with lucifer matches in his possession, that is a breach of an absolute duty imposed upon the mine-owner. It may be that certain of the other rules of a different character directly affect the mine-owner, as was held by the Court of Session in *Bett* v. *Dalmeny Oil Company* (7 Fr. 787). But the two with which we are now concerned are not among these, because mine-owners are absolutely debarred by the statute from interfering personally with the management of the mine. They are bound by very stringent regulations to appoint certificated managers and under managers, whose authority completely displaces their own. It is nothing to the purpose to say that employers, and in particular joint-stock companies, must act through their servants, because the point to be established is that the defence of common employment is excluded by reason of a statutory duty imposed on the employers personally, which they cannot throw over upon their servants. But I think the appellants make that point good when they appeal to the general enactment that the rules shall be observed, because in so far as it is addressed to the mine-owners that provision in my opinion imposes upon them a duty to use due care and diligence to secure that the rules shall be obeyed. If this is a duty of diligence, it follows that the mere breach of a rule addressed directly to a servant will not of itself fix the employer with an absolute liability, but, on the other hand, it follows equally that the occurrence of an accident through a breach of rule, which it was his duty so far as possible to prevent, raises a presumption against him which he is called upon to rebut. If the rules are broken and mischief follows, there is *prima facie* evidence of failure of duty, and although the employer may have a complete defence if he has done his best the burden of proving it lies upon him. This involves no departure from the general rule that where the balance is even as to the existence of negligence, the party who founds upon the negligence of another must prove his cause of action, because the scale is turned when it is proved that an accident has happened which the employer was bound to prevent.

I come to this conclusion upon the 49th section alone, but I am confirmed in my reading of it by the provisions of the 50th section, which make every contravention of, or non-compliance with, the general rules an offence against the Act punishable by a fine. I agree that the imposition of a penalty as for a statutory offence does not prove that there is also a civil liability. But the 50th section does not define the offence which it makes punishable otherwise than by reference to the 49th. It assumes that there are duties already created, and recognises that they are incumbent in different ways upon different persons. For it begins by enacting that every person who contravenes any of the general rules shall be guilty of an offence, and this is as directly applicable to owners and managers as to anybody else; and then it goes on to show that there is another and different duty imposed upon

owners and managers as such, and not upon persons engaged in the daily work of the mine. For it says that in the event of a contravention by any person whomsoever "the owner, agent, and manager shall each be guilty of an offence against this Act unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance." I cannot read this last clause as the remission of a penalty which it assumes to be already imposed. It is an essential part of the definition of the offence. If any person whosoever, other than the owner himself, has contravened a rule, the owner has committed no breach of duty and is guilty of no offence, provided he can prove that he has taken all reasonable means to the best of his power to prevent such contravention. If he has not taken such means he is in breach of duty and is therefore guilty of an offence. I do not go to the penalty clause for the purpose of inferring a civil liability. But I think it of material importance to the question we have to determine, because in order to express the penal consequences of a breach by the mine-owner of his statutory duty it formulates that duty more precisely than had been done by the 49 section.

If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson* v. *The Newcastle Waterworks*, and by Lord Herschell in *Cowley* v. *Newmarket Local Board*, solves the question. We are to consider the scope and purpose of the statute, and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine-owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention. Therefore I think it quite impossible to hold that the penalty clause detracts in any way from the *prima facie* right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability. I think this has been found both in England and Scotland in cases in which the point was directly raised, the case of *Groves* against *Lord Wimborne* in England, and *Kelly* against the *Glebe Sugar Refining Company* in Scotland.

Then, if that be so, the only question that remains is whether the duty so imposed upon the mine-owner of using all due care and diligence to prevent the contravention of the rules by anybody in the mine is or is not a duty that precludes him from putting forward the plea of common employment. I think it is very clear it is such a duty. The negligence of the persons in the employment of the respondents is the very cause of liability which the statute creates. They are to do their best in order to prevent persons in their employment from contravening the rules, and it is out of the question to say that it is a good defence to show that the direct cause of the injury was the negligence of their servants, which is the very thing they were bound to prevent, if they did not do what was in their power to prevent it. But I am afraid I ought not to have detained your Lordships so long by an examination of the statute or its legal consequences, because I say again I think this point, like the former, is directly decided by the case of *David* against *The Merthyr Colliery Company*, for your Lordships in that case held that when an action had been brought for an injury caused by a contravention of the rules, the question as between the plaintiff and the mine-owners was whether the contravention had happened notwithstanding that the mine-owner had done all in his power to prevent its happening, and that the burden of proving that he had performed that duty, which was cast upon him for the safety of his workmen, lay upon the mine-owner.

The only question that remains then is whether upon the findings in fact which form the only basis upon which your Lordships must apply the law to the particular facts of this case, it is shown that the respondents have discharged the burden laid upon them by proving that they have performed their duty towards their workmen. I should have thought this very doubtful if it had to be determined by reference to the interlocutor first appealed against, as explained by the opinions delivered in the Court below. It is evident in the first place that the learned Judges treated the case as an ordinary action for negligence, in which it was for the pursuers to prove the negligence that they alleged. And since the injury was due to the fault of fellow servants, the Court held that this could only be done by showing that the master had failed to use due care and diligence in the selection of competent persons to superintend and carry on the work. This is clearly brought out in the opinion of the Lord Justice-Clerk, where he says — "On a consideration of the evidence in this case I am not satisfied that the defenders have been proved to have been negligent in making the appointment." This is not the point of view which the statute requires to be taken. But a difficulty was created by the terms of the interlocutor finding that the defenders were not negligent. It is preceded, as your Lordships are aware, by a finding that the persons whose conduct is impugned as negligent were possessed of the qualifications and experience usually required in persons holding their office. If the succeeding finding that there was no negligence meant only that the employers were not negligent in respect that at the time they made the appointments they had satisfied themselves that the qualifications and

experience of these two men were those of ordinary under-managers and firemen, who might be without the knowledge or experience which would enable them to detect and guard against danger from carbon monoxide, your Lordships I think would have required to consider whether that was a finding "affected" (in the words of the Judicature Act) by an erroneous view of law. But then there might be quite a different question if the terms of the finding that there was no negligence in continuing to employ these persons were intended to mean that when a new danger was brought into existence by the connection of No. 11 Pit with No. 1, so as to expose the persons working in the former pit to injury by the escape of poisonous gas from the latter, the respondents had directed their attention to the question of the skill and experience which were required for dealing with the emergency and had continued to employ the men originally appointed because they were then satisfied that they possessed such skill and experience. I apprehend it might very reasonably be said that mine-owners, who are themselves precluded from interfering with the workmen in the mine, could do no more than take due care to see that the people whom they employed were competent, and had qualifications adequate to meet the particular danger which they had to consider, and therefore your Lordships thought it necessary that we should obtain from the Court a more specific statement as to what they held that the respondents had really done in order to satisfy themselves of the competency of the men employed to deal with this particular emergency. Your Lordships have received an answer, and I think it necessarily follows from all I have said that the answer actually given by the Court to this question is conclusive against the respondents, for the answer is that "It would have been practicable"—and I pause there to remind your Lordships that under the provisions of section 49 practicability is the test—"that it would have been practicable (had such a danger been anticipated) for the defenders to cause instructions to be given to Gray, Hunter, and Gibbons as to the symptoms and dangers of an outburst of carbon monoxide, and that the defenders did not take any means at the time when the connection between No. 1 and No. 11 pits 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 outbreak of carbon monoxide gas."

I think that is conclusive of the whole question. But then the learned Judges in the Court below have thought it necessary or proper to accompany this answer to the question which was put to them by your Lordships by a series of findings in fact, which were not before the House when the case was first argued. I think, if I may respectfully say so, the Court was perfectly right in taking this course, because I think it was for them to make it clear to the House what the specific determining facts really were, and if they had omitted from their first interlocutor, for reasons which might be perfectly sufficient in the view which they took of the law, any specific fact which they thought material to the question put to them by this House, it was right and proper that they should now state it and bring it under your Lordship's notice. But then I think the only question which arises upon this specific statement of new facts is whether anything in that statement modifies or detracts from the legal effect of the final statement that the respondents took no means to secure that the knowledge and qualifications of the persons engaged in supervision were sufficient to enable them to deal with the special danger which arose. This might not have been conclusive if it had been found no such means were practicable. But the contrary is found in the preceding sentence. I think this amounts to a finding in fact that the respondents failed to perform the duty imposed upon them for the safety of their workmen, inasmuch as they failed to take all reasonable means to the best of their power to prevent the contravention of rules which brought about the accident.

I am therefore of opinion, and I so move your Lordships, that the interlocutor appealed from should be reversed. I presume, unless the parties agree as to damages, the case must go back to the Court of Session in order that they may assess damages upon the ordinary rules of common law liability, and not upon the limited scale provided by the Employers' Liability Act. It is not for this House to assess damages, and I think we cannot restore the judgment of the Sheriff-Substitute upon that point except of consent, because his decision is subject to appeal to the Second Division of the Court, and the parties if they desire it are entitled to obtain the judgment of the Appellate Court upon that matter. I venture to hope that when the principle of the employers' liability has been fixed, there may be no further litigation as to the amount of damages, but, formally, I think the point must be left open to the Court unless the counsel for the parties agree to accept the Sheriff's decision.

LORD SHAW—On the position of this House in view of the findings of the Second Division I agree entirely with the judgment of my noble and learned friend Lord Kinnear. It appears to me that on pure questions of fact, the findings must be here accepted as final. But (1) it is not so in regard to any findings which are findings in law or on mixed fact and law; (2) nor is it so as to the legal results implied in or following from any findings whether of law or of fact.

The case on its merits and facts is one of such general importance in the mining and industrial world, and has been so fully and anxiously presented and considered, that I have thought it right to resume them as follows:—Alexander Hynd Black and a

fellow workman, Serrie, both oncost workers in the defenders' No. 11 Pit, Lumphinnans, on 27th April 1906, lost their lives in the mine by inhaling carbon monoxide gas. The learned Sheriff-Substitute Shennan has detailed the circumstances in the first five findings in fact by him, which are adopted in the interlocutor of the Second Division. No one can peruse these without being satisfied that, if it were possible to impute personality and knowledge to a limited company, the defenders must have been well aware that the particular coal measures there being worked were of a specially dangerous character, owing to the occurrence of fires and the escape of noxious and deadly gases. Three men, Gray, the manager, Hunter, the under manager, and Gibbons, the fireman, were employed at the pit. The Second Division find "(9) that the said John Hunter and John Gibbons, having duties of superintendence in No. 11 Pit, were guilty of negligence in respect that, although for two days prior to the accident they were aware that a haze having a peculiar smell had appeared in the pit, and that several workmen had been seized with headache and sickness, they took no steps, by withdrawing the workmen or otherwise, to guard against injury to those employed in the pit, until the cause of the haze and the smell were discovered and removed." The learned Sheriff-Substitute in the adopted findings shows that this was not a mere case of withdrawing the workmen, but a case on two, and possibly three, successive days of re-admitting workmen to parts of the mine in which the most noxious and dangerous gas, known as carbon monoxide, was apt to operate with fatal effect.

It is extremely difficult to understand how, in such a situation, men could be supposed to be competent who had no knowledge of the dangerous properties of the gases in these pits, or of the peril to human life involved in the non-withdrawal or re-admission of workmen in the circumstances described. I share to the full, accordingly, the view expressed by the learned Lord Justice-Clerk when he says—"I have found this case to be not unattended with difficulty, particularly in view of the fact that the Sheriff-Substitute, who evidently gave the case great attention, has held that the defenders are liable in damages at common law on the ground that they did not exercise due care in appointing persons of sufficient skill to take charge of the works in their mine." I think it incredible that if men had had such knowledge, without which it is manifest that the lives of those who had to obey their orders were put in hourly peril, they should not have complied with rigour and alacrity to the statutory obligations prescribing imperatively for the withdrawal and non-admission of men from and to the dangerous area.

As the case originally came to your Lordships' House it was a matter for consideration whether the Second Division did find, or did not, that the persons "put in charge of the works" by the respondents knew these essential facts—essential, that is, if the intention of the Legislature to afford those workmen protection from the perils which surround them were to receive anything like attention and effect? Lord Low remarks that it is, "proved that the death of the miner Black was caused by carbon monoxide having found its way into No. 11 Pit along the air passage from the old fire, and that the managers and fireman were not alive to the danger, having had no previous experience of carbon monoxide." What then, this being so, was the actual finding of fact upon which their Lordships' judgment could proceed? It is in these terms—"(7) that John Gray, the manager, John Hunter, the under manager, and John Gibbons, the fireman, all at No. 11 Pit, were possessed of the qualifications and experience usually required of persons holding these offices."

What did this mean? Did it mean that they knew what do appear to be the essentials of their business in so far as the protection of human life is concerned and so were competent? It seems to be clear, from the learned Judges of the Second Division, that their view was that these men did not know these essentials. Or did it mean that they were ignorant thereof, and yet, nevertheless, were competent for their business, because this ignorance was consistent with the possession of the "qualifications and experience usually required?" If so, I find it difficult to figure a finding more hazardous to the pit workers of this country, and more inconsistent with the spirit of those protections which the Legislature thought fit to provide in the Coal Mines Regulation Acts. I may say that I held it to be not entirely satisfactory that after an express finding of incompetency made with care, and on apparently strong and sound reasons, by the Sheriff-Substitute, the Court of Session should, recalling these findings, tender the bare proposition that these men had the qualifications and experience usually required. But further consideration of that proposition, standing by itself, may be foregone in view of the further findings made in answer to the supplementary question remitted by this House on 25th July 1910 to which I shall afterwards refer.

By their tenth finding the learned Judges of the Second Division find "that the said John Gibbons failed to observe the provisions of rules 4 (1) and 7 enacted by section 49 of the Coal Mines Regulation Act 1887, and also of special rule 37, passed in terms of the powers conferred by section 51 of the said Act, and that the said John Hunter failed to observe the provisions of said rule 7." The last finding is "That the pursuers have no claim against the defenders at common law, but only under the Employers' Liability Act."

None of the findings of the Second Division deal with what appears to me to be one of the most important rules directly applicable in the present case, viz., rule 1. It is in these terms—"An adequate amount of ventilation shall be

constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working-places of the shafts, levels, stables, and workings of the mine and the travelling roads to and from those working-places shall be in a fit state for working and passing therein." That rule is expressly founded upon by the pursuers and appellants, and, indeed, is quoted at length in the 10th article of their condescendence in the action.

Rule 1 thus founded on is the first of a series, following words which, so far as they themselves are concerned, are absolute and imperative, viz., "The following general rules shall be observed, so far as is reasonably practicable, in every mine." It is admitted that protection in the present case from noxious gases was reasonably practicable, and so the unconditional imperative, both of the words of the section and of the specific language of rule 1, remains. This unconditional imperative dealt with in further passages in my judgment is, I repeat, one which arises on the assumption that the prescribed protection under the rules was "reasonably practicable."

Rule 1 appears very clearly indeed to throw around workmen pursuing the hazardous calling of coal mining these two elementary protections—that the air of the workings shall be fit to breathe, and the roads fit to travel without peril.

The question as to roads was tried in Scotland in *Bett* v. *Dalmeny Oil Company, Limited* (7 Fr. 787), and another rule (21), also providing for the same protection, was founded on, viz., "the roof and sides of every travelling road and working-place shall be made secure . . ." A road had not been properly supported while the operation of cutting away certain pillars was being conducted, and this in consequence of the negligence of the manager or oversman. It was strongly contended that notwithstanding the statutory obligation for safety the pursuers could not recover under the common law, but that the sole remedy lay under the Employers' Liability Act, the accident having been caused through the fault of the manager or oversman as fellow employees. A verdict was given for the pursuers.

Lord M'Laren delivered the judgment of the First Division, consisting of himself, Lord Adam, and Lord Kinnear. He used these words—"It follows, then, that the verdict ought not to be disturbed unless the defenders are in a position to say that this is a case falling within the rule as to common employment. Now the principle of that rule is that it is an implied term of the contract of service that the workman takes the risk of such misfortunes as may result from the negligence of persons who are engaged in the organisation of labour of which he is a member, and that the master is only responsible for the performance of such duties as he can reasonably be supposed to undertake in person, such as the provision of a competent staff of men, adequate material, a proper system, and effective supervision. But in the case under consideration the duty of supporting the roof is a statutory duty, and stands on a different plane from those duties which a master undertakes as implied conditions of the contract of service. The duty is not merely to provide a competent underground manager, and to supply him with material for supporting the roof of the mine where necessary. The statutory duty of the mine-owner is to give necessary support to the roof, and in my opinion it is not an answer to a case of neglect of that duty to say that the employer had delegated the performance of the duty to a competent manager."

In *Groves* v. *Wimborne*, 2 Q.B. 1898, 402, a case founded upon the neglect to keep machinery properly fenced in accordance with the provisions of the Factory and Workshops Act, the same view on the point of principle was taken, Lord Justice A. L. Smith remarking—"In the present case, which is an action founded on the statute, there is no resort to negligence on the part of a fellow-servant or of anyone else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of his statutory duty on to the shoulders of another person." Lord Justice Rigby's language is, if possible, still more unambiguous. It is in the following terms—"There has been a failure in the performance of an absolute statutory duty, and there is no need for the plaintiff to allege or prove negligence on the part of anyone in order to make out his cause of action. That being so, the doctrine of common employment is out of the question."

When to the dicta of these learned Judges there are added those of Lord Justice Fletcher Moulton and Lord Justice Buckley in the case of *David* v. *The Britannic Merthyr Coal Company, Limited*, it cannot be denied that a powerful body of authority stands on the books in favour of the proposition in its absolute sense, that the defence of common employment is not pleadable to an action based upon the neglect of statutory duty. I desire for myself to say that I appreciate the force and cogency of the opinion of Lord Justice Fletcher Moulton in the case of *David*.

There are three views:—(1) Either the imperative declaration of Parliament that the air of a pit should be fit to breathe by the workman, must be read in, what is *ex facie* its absolute and peremptory sense, subject to no exception; or (2) That this declaration was subject to exception in every case where personal fault could not be established against the mine-owner, and that the defence of common employment was one so imbedded in the law that it must be assumed to have been left open unless expressly excluded by the terms of the Act; (3) Or a third situation may be figured, of which *David's* case is, indeed, an example. The Court of Appeal in *David's* case, notwithstanding the judg-

ments referred to, did not apply the rule in its absolute sense, but remitted the case for new trial, leaving the burden of proof upon the mine-owner to establish the defence that he had done everything possible to obey the terms of the statute, and that what happened had occurred by reason of some disregard of the rules, in defiance of the owner's regulations and efforts. This view was acquiesced in by the House of Lords, but I desire to put on record that I do not for myself express any dissent from the main proposition laid down by Lord Justice Fletcher Moulton, which is in line with those already cited from Lord M'Laren, Lord Justice A. L. Smith, and Lord Justice Rigby, that the defence of common employment is not stateable where a statutory duty imperatively laid has been neglected. I repeat that it was not treated as necessary to decide that question in *David*.

The case may be figured of the most careful superintendence, the most complete compliance by the mine-owners, so far as they were concerned, with every obligation resting upon them under the statute, of the settled order and management of the mine being in such a position that unless disturbed the statute would have been in all points complied with; and yet that such a disturbance took place by reason of something which—to put it in the language of another Act of Parliament—might be called the serious and wilful misconduct of some person engaged in the employment. I take that case to be reserved, and I treat the point of whether responsibility in such cases would attach to the mine-owner as not one which is necessary to be here decided. But when I come to this present case I find that it is in no respect whatever a case of the disturbance of the settled order and management of this mine, but, upon the contrary, it is a case in which the Judges have found that what did occur happened not by reason of any person interfering with the management, interposing something which caused the accident in spite of all that the owners and the management had done, but simply and solely in consequence of the equipment of the mine, in the sense of the staff charged with the performance of the statutory duties, being insufficient, because the staff was entirely ignorant of what was necessary in gassy mines for the protection of human life. I cannot bring myself to think that such a state of matters as that is permissible without civil responsibility at common law in face of a statute which has declared for the protection of the lives of the workmen in mines in this country that the air in which they work and travel shall be fit to breathe.

Rule 7 makes stipulations for the withdrawal of workmen in case of danger; it confirms, in my judgment, the need for the knowledge of noxious gases on the part of the management, and in no respect abates or shifts the obligations upon the owner arising under rule 1. It appears from the judgments of the Judges of the Second Division that the manager was appointed in 1902, and the under manager and fireman in 1904. At these dates this pit was not known to be gassy, and, although for myself I should hold it to be a dangerous thing, some excuse might be tendered for the proposition that the staff need not be acquainted with gas dangers. In 1901, however, in an adjoining pit several men lost their lives by the escape of carbon monoxide gas. And in 1905 a connection was made of that gassy and dangerous pit with the pit now in question, the latter being thus rendered, as is now lamentably clear, liable to the presence of the fatal gases. What was done to equip the officials of the latter pit with the knowledge necessary to cope with the changed and dangerous conditions? It rather appeared that nothing was done. They remained as ignorant as before.

It is at this point that reference can appropriately be made to the procedure of this House in the cause on 25th July 1910. On that day it was adjudged "that with a view to the further hearing of the cause, the cause be, and the same is hereby remitted to the Second Division . . . in order that the learned Judges of that Division may pronounce a finding of fact upon the following question, viz.—When the connection was made with the old mine in which smouldering fires, followed by the giving off of carbon monoxide gas, had previously occurred, 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 learned Judges have given in answer a careful series of eight findings dealing with the history of the pit and other matters, but the reply to the specific question remitted by the House is answer 8, which is in these terms—"That it would have been practicable (had such a danger been anticipated) for the defenders to cause instructions to be given to Gray, Hunter, and Gibbons as to the symptoms and dangers of an outburst of carbon monoxide; and that the defenders did not take any means at the time when the connection between No. 1 and No. 2 Pits 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 carbon monoxide gas."

This matter being thus cleared up, I now recall the situation as described in the findings of the Second Division. Three men—the manager, the under-manager, and the fireman—have been found incompetent by the Sheriff-Substitute on account of their ignorance of the knowledge which would appear to be elementary if human life is reckoned of value in such circumstances. The Court of Session do not pronounce, notwithstanding these express

findings of incompetency, that the men so failing in the equipment of knowledge were competent (it is manifest that that could not be done; it would not be a finding but a flat contradiction of fact), but they find that they were "possessed of the qualifications and experience usually required of persons holding these offices." A pronouncement has been made that the staff of a mine is possessed of the qualifications and experience usually required, although the officials are men who do not know the elementary necessities for the protection of the lives of the workmen who are under their orders.

The great gravity and general importance of an acquittance of the mine-owners from common law responsibility, an acquittance which is furnished on any such finding, is only too obvious; and still more serious may be the effect in destroying or tending to destroy those safeguards which Parliament had set up in the case of those working in the coal mines of the country. It is admitted that if the mineowner had been an individual managing his own pit, and ignorant of the requirements or dangers attending the working of those gas-bearing seams which formed part of the workings, his plea of ignorance would have availed him nothing as a civil defence to a common law claim, and that the plain imperative of the statute bound him in the responsibility of providing his workmen with those protections which had been prescribed. But it is said that the owner can escape the responsibility of his own dangerous ignorance by organising the mine with a staff labouring under the same dangerous ignorance, and that although the former case would fall under the plain peremptory rule of the statute and its consequences the latter case forms an exception thereto.

When one considers that nearly the whole if not all, of the mines of this country are under delegated management, then this alleged exception to the imperative statutory rule is seen to be no mere exception, but to be equivalent to a destruction of the rule as a safeguard of life. It is argued that law courts must consent to this destruction because the exception is the fruit of legal doctrine, and the decision of the Second Division is defended on that ground. The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable.

But the Court below hold that the company are not responsible at common law because these men were fit when appointed, Lord Low remarking on the fact that the connection between the two pits "was not made till early in 1905, a considerable time after the appointment of these men."

With much respect to the Court below, it humbly appears to me that they have not attached the proper significance to these facts. When this pit was turned, or possibly turned, into a gassy pit, then —if not before, certainly from that time onwards—the permitting of men without the requisite knowledge of gases and their dangers to be on the managing staff of the mine was an inexcusable neglect on the part of the owners, and I fail to understand what a reference to some previous date and a different set of conditions has to do with abating this serious responsibility.

But this point is made unhappily clearer by another, viz., by considering what rule 7 requires as to the inspection when gases are found in any part of the mine. "A competent person appointed for the purpose" is to inspect and make a report, and no person is to be admitted, &c., until he, "the competent person," declares that it is no longer dangerous but free from noxious or deadly gases.

Not one of these things was done in the present case. For who was the "competent person?" The owners had recognised their duty to appoint a competent person, and he had accordingly been named as such by the 43rd special rule of the pit. He was the fireman—the man possessed of no theoretical or practical knowledge on the subject of pit gas and appointed before the connection with the gassy pit was made. This was the man who was ticketed by the owners as the "competent person" under the statute. In my opinion this proceeding was on the part of the owners most highly reprehensible and dangerous, and it led to these two men's deaths. It constituted what in my opinion was a defiance of those protections which the Coal Mines Regulation Act had, after scrupulous care by Parliament, thrown around the coal workers of this country.

In my opinion the judgment should be reversed, and the decree given for the sums brought out by the learned Sheriff-Substitute as due at common law should be restored.

LORD ASHBOURNE—The question in this case is whether there is a liability at common law or under the Coal Mines Regulation Act 1887, or whether the damages can be assessed only under the Employers' Liability Act.

Your Lordships cannot review the findings of fact of the Second Division which were originally before the House, but your Lordships are at liberty to consider whether, taken in connection with the further finding on the remit ordered, a question of law is raised which calls for examination.

It is found that there was negligence on the part of the manager, assistant manager, and the fireman, but that the respondents are not liable, as those three officials were in a common employment with the deceased, and were appointed by the respondents after they were "satisfied that they were possessed of the qualifications and experience usually required of persons holding these offices."

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.