No. 6 of process, with the omission therefrom of (1) the words 'dykes, fences, gates, hedges, drains, ditches, water-courses, and others' occurring in the 27th and 28th lines of page 6 and in the first line of page 7 thereof; (2) the same words occurring in the 3rd and 4th lines of page 7 thereof; (3) the words 'including march fences' occurring in the 7th and 8th lines of page 7 thereof; (4) the words 'dykes and others' occurring in the 14th line of page 7 thereof; (5) the clause commencing 'and in regard to march fences' in the 23rd and 24th lines of page 7 thereof, and ending with the words 'after said repairs so made' in the 2nd line of page 8 thereof; and (6) the words 'fences and others' occurring in the 7th line of page 8 thereof; and appoint the pursuer to lodge such an amended draft lease in process, and that by the first box day in the ensuing vacation, and meantime continue the cause," &c.

Counsel for the Pursuer—Murray, K.C.—MacRobert. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Sandeman, K.C.—Guild. Agents—Guild & Guild, W.S.

Thursday, March 16.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

KERR *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising "Out of and in the Course of the Employment"—Miner Acting Outwith the "Sphere" of Employment.*

The rules of a pit, worked in terms of the Explosives in Coal Mines Order of 21st February 1910, provided that explosives capable only of being fired by detonators should be used; that the detonators should be securely kept and issued only to shot-firers; and that every charge should be fired by a competent person appointed in writing to perform the duty. On the occasion in question, after the shot-firer had left the pit, a miner who had a detonator in his possession—which, however, he had not received from the shot-firer—started to fire a shot. In the course of the operation an explosion occurred whereby he was killed.

Held that the accident did not arise out of and in the course of the deceased's employment within the meaning of the Workmen's Compensation Act 1906.

Mrs Elizabeth Buchanan or Kerr, Leggat House, Catrine, widow of the deceased Andrew Kerr, miner, Catrine, as an individual and as tutor and curator for her child Alexander Kerr, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from William Baird & Company, Limited, coalmasters, Hurlford, in respect of the death of the said Andrew Kerr. The Sheriff-Substitute (MACKENZIE), acting as arbitrator, having awarded compensation, a case for appeal was stated.

The *facts* were as follows:—"(1) That the deceased Andrew Kerr was a miner in the employment of the defenders in their Number One Gilminscroft Colliery; (2) that on 20th August 1910 the said Andrew Kerr was killed by the explosion of a shot in said pit in the circumstances hereinafter detailed; (3) that the said pit was unsafe, and was accordingly wrought in terms of the Explosives in Coal Mines Order of the 21st February 1910, by which, *inter alia*, it is ordered with regard to the explosives and the method of firing shots, section 1 (*a*), that only permitted explosives shall be used, and section 2 (*a*) that every charge shall be fired by a competent person appointed in writing for this duty, and section 4 (*a*) and (*b*) that detonators shall be under the control of some person specially appointed in writing, and shall be issued only to shot-firers or other persons specially authorised in writing, and that all detonators shall be kept in a securely locked box; (4) that the explosive used in this pit was that known as samsonite, and that the firing was effected by means of an igniter fuse and detonator; (5) that a witness, John Rennie, pit fireman, Catrine, was appointed in writing by the defenders as the person authorised to fire shots and to have the custody of detonators; (6) that the course of proceedings in this pit was that when a miner had a shot ready for firing, the said John Rennie gave him a detonator which was affixed to the fuse, that the hole was then charged with the detonator end of the fuse among the explosive, that a portion of the fuse with the igniter end extended out of the hole, which was stemmed, these things being normally all done by the miner, and that Rennie then fired the shot by using a pair of pliers, which had the effect of breaking a small glass globe inside the igniter and so liberating a chemical substance in the tube which kindled the fuse, and travelling at a rate of from 18 inches to 2½ feet per minute, caused the explosion; (7) that while miners were supplied with the explosive and with fuses, they were not allowed to have detonators, which were issued to Rennie and kept by him in a locked box, and that miners were not allowed to fire the shots, that shots could not be fired by means of explosive and fuse except with the aid of a detonator; (8) that on the said 20th August, between two and three o'clock p.m., after the shot-firer Rennie had left the mine, the deceased proceeded to bore a hole in the face for the purpose of blasting, which was part of his employment with the defenders, in making a passage in the mine through stone and metal; (9) that having bored the hole, the deceased called his fellow-

workman Gibson to him and had at the time the shot ready for firing; that he told Gibson he was going to fire the shot, and that the two of them put up a tree, as is usual, for the protection of the roof; (10) that while the men were so engaged about 6 or 8 inches of the exposed part of the fuse and igniter were lying on the pavement; (11) that the deceased then struck the igniter with a hammer in order to fire the shot, but that instead of the usual interval of time elapsing during which it is customary for the men to seek a place of safety, viz., three to four minutes, the explosion occurred at the moment when the deceased struck the igniter; (12) that the explosion caused such injuries to the deceased that he died therefrom; (13) that there was no evidence to show where the deceased had obtained the detonator which must have been used to fire the shot, but that he did not get it from Rennie; (14) that the cause of the explosion was an accidental pressure, unknown to Kerr and Gibson, on the igniter while it was lying exposed, and not the blow with the hammer; (15) that at the time of the explosion Kerr was in his ordinary working place and in his ordinary working time; (16) that the accident arose out of and in the course of the deceased's employment with the defenders; (17) that the pursuer and her child Alexander Kerr were totally dependent on the earnings of the deceased."

The Sheriff-Substitute further stated—"On these facts as proved I found in law that the defenders were liable to the pursuer in compensation for the death of the deceased, and assessed the same at the sum of £297, 6s. 9d. I therefore decerned against the defenders for payment to the pursuer for herself, and as tutor and curator for her child, of the said sum of £297, 6s. 9d. as craved, and found the defenders liable to the pursuer in expenses."

The *question of law* was—"Was the said Andrew Kerr killed by accident arising out of and in the course of his employment with the respondents?"

Argued for appellants—The deceased at the time of the accident was acting outwith the "sphere" of his employment. There were different grades of employment in this pit, including amongst others those of shot-firer and miner. The former alone was entitled to the custody of detonators. Either by theft or otherwise the deceased obtained possession of a detonator and constituted himself a shot-firer. He was in the position of the footman on the box who arrogated to himself the duties of the driver, or of the railway guard who ventured to drive the engine. The case of *Conway* v. *The Pumpherston Oil Company*, March 9th, 1911, *supra*, p. 632, was distinguishable, for there the workman was not acting outwith the sphere of his employment.

Argued for respondent — The facts showed that the accident happened, not in firing the shot, but in preparation for firing it. The deceased was entitled to prepare the shot for firing. Further, he was entitled to procure a detonator from the shot-firer, and the fact that on this occasion he procured it elsewhere was a mere act of disobedience which did not deprive the respondent of her right to compensation. The case was governed by that of *Conway* (*cit.*).

LORD PRESIDENT—I cannot agree with the result at which the learned Sheriff-Substitute has arrived in this case. I had occasion in the very recent case of *Conway* v. *Pumpherston Oil Co.* to make some remarks, which it is not necessary for me to repeat here, upon the question of the sphere of a workman's employment, and gave as an illustration the case of a footman who arrogated to himself the duties of coachman.

I think it is quite clear that in this case the accident did not occur whilst the injured man was performing his ordinary work, but whilst he was arrogating to himself duties which he was neither engaged nor entitled to perform. The pit in which he was employed was unsafe, and was accordingly worked in terms of the Explosives in Coal Mines Order of 21st February 1910. This order provides that certain specified explosives only shall be used—explosives that can only be fired by detonators; it provides that detonators shall be securely kept, and that a charge shall only be fired by a shot-firer, a competent person appointed in writing to perform this duty. John Rennie was the appointed shot-firer in this mine, and was the person who alone was authorised to fire a shot. No doubt it was the ordinary practice of this mine that part of the preparation for firing a shot should be done by the miner, but the detonators were only supplied by Rennie, and when the preparations were completed the actual firing was done by Rennie.

On the occasion in question, after Rennie had left the mine, this man took it on himself to prepare and fire a shot. He had a detonator in his possession—where he obtained it does not appear, but it certainly was not from Rennie. Therefore the whole operation which he took upon himself to perform was an operation which he was neither authorised nor engaged to perform. It was not part of his employment to prepare shots generally, but only to be present and help the shot-firer in such preparation. He knew that he had no instructions from Rennie to prepare for a shot. He prepared for the shot on his own initiative, and he started to fire the shot on his own initiative. It is quite true that the explosion seems to have occurred at its precise moment, not by his immediate act, but because he and his companions had already started the chemical action of the fuse. But it is quite clear that this man met his death because he started upon an an operation which was outside the scope of his employment. It is therefore impossible to hold that this accident arose out of and in course of the employment.

LORD JOHNSTON—I concur and have nothing to add.

LORD MACKENZIE—I agree.

LORD KINNEAR was absent.

The Court answered the question of law in the case in the negative, recalled the determination of the Sheriff-Substitute as arbitrator, sustained the appeal, and decerned.

Counsel for Appellants—D.-F. Scott Dickson, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Munro, K.C. —J. M. Hunter. Agents—Macpherson & Mackay, W.S.

Friday, March 17.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

CRAWFORD & LAW *v.* THE ALLAN STEAMSHIP COMPANY, LIMITED.

Ship—Bill of Lading—Through Bill of Lading—Liability of Shipowner—Onus—Loading in Rain.

The consignees of a number of sacks of flour under a through bill of lading from Minneapolis to Glasgow *via* New York, found on arrival of the flour at Glasgow that a number of the sacks were caked. The bill of lading, which was signed by an agent representing both the inland carriers and the shipowners "on behalf of carriers severally but not jointly," bore that the flour had been received at Minneapolis "in apparent good order," and provided that no carrier should be liable for loss not occurring on its portion of the through route. It appeared that the flour was loaded at New York in rain. In an action at the instance of the consignees against the shipowners for payment of the damage caused by caking, *held* (*rev.* judgment of Lord Mackenzie, Ordinary) (1) that the *onus* was on the pursuers to prove that the defenders received the flour in good order, failed to deliver it in like order, and were responsible for any damage caused by its being loaded in rain, and that they had failed to discharge this *onus;* and (2) that the shipowner under a through bill of lading which covered inland and ocean transit was not bound to refuse to ship goods in wet weather tendered to him by the inland carrier on behalf of the shipper.

Observations as to the duty of shipowners under a through bill of lading which bound them to promptly present to inland carriers on account of owners of goods any claims for damage.

Crawford & Law, flour importers, Glasgow, *pursuers*, for themselves, and as assignees of certain other firms of flour importers, brought an action against the Allan Line Steamship Company, Limited, *defenders*, for payment of the sum of £184, 19s. 5d., being the loss sustained by them through short weight and caking on certain consignments of sacks and bags of flour forwarded on through bills of lading from Minneapolis, and conveyed from New York to Glasgow on one of the defenders' ships. The loss in respect of short weight amounted to £17, 6s. 11d., and pursuers' claim on this ground was ultimately abandoned in the Inner House.

The bills of lading, which were in similar terms, were subscribed by an agent on behalf of carriers severally but not jointly, and bore that the flour was to be carried *via* the Great Lakes in connection with other carriers on the routes. A specimen bill of lading was to the following effect—"Received at Minneapolis, . . . the following property in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, numbered, consigned and destined as indicated below—. . . Shipper's Weight. . . To be carried to the Port (A) of New York, N.Y., and thence by Allan State Line to the Port (B) Glasgow, Scotland (or so near thereto as steamer may safely get, with liberty to call at any port or ports in or out of the customary route), and to be there delivered in like good order and condition as above consigned, or to consignee's assigns."

Annexed thereto were certain "conditions," which provided, *inter alia*—"I. With respect to the service until delivery at the Port (A) first above-mentioned it is agreed that—1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control; or by floods or by fire; or by quarantine; or by riots, strikes, or stoppage of labour; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet, or decay. . . . 3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. . . . 10. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer. 11. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamer, her master, agent or servants, or to the steamship company, or on the steamer pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company. II. With respect to the service after delivery at the Port (A) first above-