Act as regards time; my present impression is that if it is a lease at all, it is one for more than 21 years. I do not think the present case is on all fours with the *Queensberry* case, but as it is unnecessary to decide this point I shall not go into it further.

LORD DUNDAS—I agree in thinking that both the questions ought to be answered in the negative. The case as presented to us was not entirely without difficulty, for questions were raised and argued by counsel which lie at all events on the fringes of difficult branches of law; but I agree with your Lordship that the matter may be satisfactorily decided upon the brief and simple grounds on which your Lordship has proceeded.

The LORD JUSTICE-CLERK was absent.

The Court answered both questions of law in the negative.

Counsel for the First Parties — Lord Kinross. Agents—Dundas & Wilson, C.S.

Counsel for the Second Party—Macphail. Agents—Lindsay, Howe, & Company, W.S.

Tuesday, July 13.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'GRATH *v.* GLASGOW COAL COMPANY, LIMITED.

Reparation — Negligence — Action Laid at Common Law and Alternatively under Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)—*Relevancy—Specification — Discrimination between Grounds of Common Law Liability and Grounds of Statutory Liability.*

A miner, who was injured while at work by an explosion of inflammable gas in the mine, raised an action against his employers concluding for damages at common law, or alternatively for a certain sum under the Employers' Liability Act 1880. The pursuer made general averments to the effect that the accident was due to the fault of the defenders or those for whom they were responsible; that the defenders and the superintendents and foreman on duty in the mine at the time of the accident failed to take any steps for the removal of inflammable gas which they knew had collected at the place where the pursuer was sent to work; that the defenders failed to arrange for a proper inspection and that no proper inspection of the mine was made before the beginning of the shift, as was enjoined by the Coal Mines Regulation Act 1887; that the pursuer was not prevented from going down before a proper inspection was made; that the foreman was in fault in not making a proper inspection; that the air courses for the ventilation of the part of the mine where the accident occurred were, in the knowledge of the manager, superintendents, and foreman, choked up by some obstruction, and that the failure to keep them free was a contravention of the Coal Mines Regulation Acts. The averments in support of the common law claim were not distinguished from those in support of the Employers' Liability Act claim, and the two pleas-in-law were both applicable to either claim.

The Court *dismissed* the action as irrelevant, on the ground that the pursuer had failed to state specifically what were the grounds of the common law claim, and what were the grounds of the statutory claim.

Bernard M'Grath, who was employed as a brusher in the Kenmuirhill Colliery, Lanarkshire, belonging to the Glasgow Coal Company, Limited, was injured while at work on 21st June 1908 by an explosion of inflammable gas. He raised an action in the Sheriff Court at Glasgow against the Glasgow Coal Company concluding for £350 in name of damages, or, alternatively, for £200 under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42).

The pursuer averred—"(Cond. 3) . . . The pursuer worked under the orders and supervision of John M'Kernan and John Paterson, foremen in the employment of the defenders, who were superintendents in the sense of the Employers' Liability Act 1880. The fireman in said pit was Patrick Vaughan, and the pursuer also worked under his superintendence, and was bound to conform to his orders. On the night of said date the pursuer started work at the coal face in the 'Vertreewell' section under the orders and superintendence of the foresaid superintendents and fireman, and while he was in the act of boring a hole in the brushing face an explosion of inflammable gas occurred, knocking the pursuer down and injuring him as after mentioned. . . . (Cond. 5) The accident to the pursuer was due to the fault and negligence of the defenders and those for whom the defenders are responsible. In particular, the defenders and their said superintendents and fireman knew that inflammable gas had collected in said pit prior to the shift in which the pursuer was employed starting work that evening, but notwithstanding this they failed to take any steps to have the gas removed. It is the invariable practice in mines when gas is discovered to have it removed by causing a current of air to circulate through the part of the pit where the gas is discovered, this being done by widening the air course, or by causing a draught by means of a screen of brattice cloth fixed in the pit workings, and the defenders failed to set up in said pit in the road or place where said inflammable gas had collected a current of air for the purpose of causing a draught, or to adopt any other means of ventilation for the purpose of removing said gas, as they were bound to do in

accordance with the invariable practice adopted in such mines, and this caused the said explosion. (Cond. 6) The defenders are required by the Coal Mines Regulation Act 1887 to have a proper inspection of the mine made before each shift starts work. This is absolutely necessary for the protection of the miners. Prior to said accident the defenders failed to provide for a proper inspection by a fireman of the pit in which the pursuer was injured before the shift on which the pursuer started work commenced. It was the duty of the defenders and their said managers, foremen, and fireman, for whom defenders are responsible, to prevent pursuer or any other workman from going down into said pit until a proper inspection of said pit has been made in terms of said statute. Had such inspection been made prior to the workmen being allowed to enter said pit said inflammable gas would have been discovered and steps could have been taken to have same removed. They failed to do so, and through their negligence they caused said accident. Said accident was also due to the fault of the said Patrick Vaughán, the fireman in said pit, for whom the defenders are responsible, in respect that he failed to make a proper inspection of said pit before allowing the pursuer and the other men on said shift to go down the pit and start work. The said Patrick Vaughan stated to the pursuer and the other men that everything was right down the pit, and the pursuer, in reliance on said statement, and on the fact that the said fireman had signed the book at the pit-head certifying that everything was right below, went down the pit and started to his work at the coal face. If the said Patrick Vaughan had made a proper inspection of said pit before allowing the pursuer and the other men to proceed to the coal face, he would have seen that it was not safe for them to start work owing to the presence of a large quantity of inflammable gas, but the said Patrick Vaughan negligently failed to make any inspection or a proper inspection of the said pit, and thus caused said accident to the pursuer, for which the defenders are responsible. The pursuer was not aware of the presence of inflammable gas in said pit when he went down to commence his work on said date. Further, the air courses through which the necessary draught of air was meant to pass to said part of the pit at which pursuer was working were choked up by water or other obstruction, and thus prevented free passage of air to said part of the pit at which pursuer was working. Said air courses had been in this condition for a considerable period prior to the date of said explosion, and this was well known to the said manager, superintendents, and fireman, but they culpably failed to take any steps to remedy same, and have said pit in a safe condition for pursuer and the other workmen engaged therein. If the said manager, superintendents, and fireman had caused said air courses to be put into proper condition, and caused a proper and sufficient draught of air to pass through same, no inflammable gas would have collected at the point where the explosion occurred, and said accident would not have happened to the pursuer. Said failure to keep said air courses free of water or other obstruction is a contravention of said Coal Mines Regulation Acts, and the accident to pursuer was due to defenders' failure in regard thereto . . . ."

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault and negligence of the defenders, or those for whom they are responsible, is entitled to reparation therefor. (2) The sum sued for being in the circumstances fair and reasonable, decree therefor with interest and expenses ought to be granted as craved."

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant, and they further called on the pursuer to distinguish the ground on which he based his claim—(1) at common law, and (2) under the statute.

On 29th January 1909 the Sheriff-Substitute (FYFE) pronounced an interlocutor finding the averments not sufficient to support the crave of the initial writ, and dismissing the action.

Note.—"I some time ago took occasion to indicate from the bench that I am not going to entertain actions laid alternatively at common law and the Employers' Liability Act unless the pleadings specifically state what are the grounds of the common law claim and what are the grounds of the statutory claim.

"It is much too common to make a claim for a slump sum and to fling together a number of facts in the shape of a general condescendence. That is not proper pleading, and if it happens that the case is appealed for jury trial it leads to a very great deal of unnecessary trouble in stating the questions to be proponed to the jury.

"I have called attention to this matter so repeatedly that I propose in the future to dismiss every action in which the alternative grounds of action are not clearly discriminated. In my opinion an action stated (I think often purposely stated) in this general fashion is not relevantly laid.

"A pursuer is presumed to know what exactly is his common law case and what exactly is his statutory case, and it is for him to state this, not for the Court to fish for it."

The pursuer appealed to the Sheriff (MILLAR), who, on 19th May 1909, adhered.

Note.—"Quite recently in a case that came up from Airdrie Sheriff Glegg, who has had large experience and has great knowledge of this branch of the law, commented on the looseness of practice in the pleadings of cases involving employers' liability. Agents were in the habit of piling on every possible ground of liability without fully considering either the possibility of proving the averments made or the grounds of legal liability under which the case is brought. In this case Sheriff Fyfe, who has also had very large experience, emphatically protests against a similar course

of procedure. Since the passing of the Sheriff Courts Act 1907 this matter has come to be of greater importance than formerly, by the introduction of jury trial in the Sheriff Court. By that statute the duty is laid upon the Sheriff of formulating the questions that are to be addressed to the jury, and where the record is confused both as to facts and grounds of liability it makes the Sheriff's duty one of great difficulty, if not impossible to perform. With these expressions of opinion I desire to express my entire concurrence. I think the time has come when greater attention will require to be paid to enforcing proper rules of pleading in cases of this kind. It was contended in the present case that there was no statutory or general order of the Court laying down the form in which the pleadings should be presented, but I think it is part of the duty of the Sheriff to see that the grounds of action are clearly stated in the record in order that the opposing party may have full notice of the case which he may be called upon to meet. . . .

"At the close of the argument on the appeal I asked the pursuer's agent if he was prepared to rest his case on the record as it stood, and he said he was."

The pursuer appealed by way of Stated Case.

The questions of law for the opinion of the Court were—"(1) Whether the pursuer has stated a relevant case at common law, or, alternatively, under the Employers' Liability Act 1880. (2) Whether the said action should have been dismissed. (3) Whether a proof of pursuer's averments should be allowed."

Argued for the pursuer (appellant)—The pursuer had stated a relevant case both at common law and under the statute. The facts founded on were set forth distinctly, and it could not be demanded that each fact be specifically labelled as being in support of the one or the other branch of the case. But if it were necessary specifically to separate the averments into two, then the averments in condescendence 5 were relevant in support of an action under the statute, while those in condescendence 6 would found an action at common law, though it was difficult in many cases to say whether, *e.g.*, a breach of a statutory obligation founded a claim at common law or only under the statute—*Black* v. *Fife Coal Company, Limited*, 1909 S.C. 152, 46 S.L.R. 191; *Bett* v. *Dalmeny Oil Company*, June 17, 1905, 7 F. 787, 42 S.L.R. 638; *David* v. *Brittannic Merthyr Coal Company*, [1909] 2 K.B. 146.

Counsel for the defenders (respondents) were not called on.

LORD LOW—There is no doubt that the looseness with which records in cases of this kind are frequently drawn in the Sheriff Court almost amounts to a public scandal, because the expense which is caused and the amount of judicial time which is taken up in trying to find out whether a relevant case has been stated are often very great. I know that it is often very difficult to draw a good record in such cases where the distinctions which the law has drawn are often very fine and not easy of application to the particular case, but with a little care the pleadings could be made a great deal better than they generally are. Of course it is not fair that one individual should be punished for the sins of many. But this record is very bad. The pursuer claims damages alternatively at common law and under the Employers' Liability Act, and in support of that alternative case he makes a confused statement of facts without in any way separating or distinguishing between the facts upon which the claim at common law is founded and those which support the claim under the Employers' Liability Act. What makes the matter worse is that in the pleas-in-law no distinction is drawn between the two cases. Of course alternative sums are claimed in the initial writ, and the second plea-in-law is—"The sum sued for being in the circumstances fair and reasonable decree therefor with interest and expenses ought to be granted as craved." The only other plea is—"The pursuer having suffered loss, injury, and damage through the fault and negligence of the defenders, or those for whom they are responsible, is entitled to reparation therefor." That is not correct pleading considering that the rules of law regulating the two claims are different, and that, generally speaking, they are founded upon different facts. Accordingly the defenders have not in the record as framed fair notice of what the case is which they have to meet upon either of the alternative claims, and therefore I think that the learned Sheriffs were quite right in throwing out the action.

LORD ARDWALL—I agree with everything your Lordship has said, and would only add that in addition to bad condescendences we are constantly seeing defences which are as bad if not worse, and I think it high time that practitioners in the Sheriff Court should mend their ways. I should also like to state my opinion that when a charge is made of contravening the Coal Mines Regulation Acts, the section and sub-section of the Act alleged to have been contravened should be distinctly set forth.

LORD DUNDAS—I entirely concur. I agree with the Sheriff's complaint as to the increasing necessity for some material improvement in the pleadings in cases of this nature in the Sheriff Court. We cannot expect or demand perfection, but I think the Sheriff-Substitute's desideratum is moderate, viz., that the pleadings shall discriminate clearly between the grounds of the claim at common law and these under the statute respectively. In the present case no attempt at such discrimination appears to have been made.

The LORD JUSTICE-CLERK was taking a proof.

The Court answered the first and third question in the negative, and the second in the affirmative, and found the defenders entitled to expenses.

Counsel for the Pursuer (Appellant)—Munro—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders (Respondents)—Horne—Strain. Agents—W. & J. Burness, W.S.

Wednesday, July 14.

SECOND DIVISION.

[Sheriff Court at Glasgow.

SPIERS *v.* ELDERSLIE STEAMSHIP COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 4—*Execution by Contractor of Work Undertaken by Principal—"In the Course of or for the Purposes of his Trade or Business"—Shipowner—Cleaning of Boilers.*

A shipowner contracted with W. for the cleaning of the boilers in one of his vessels. W. engaged a number of boiler-scalers to do the work, and one of them, S., while so employed, was injured by an accident. The work of boiler-scaling is occasionally performed by shipowners themselves through their own employees without the intervention of a contractor. *Held* that the work of boiler-scaling was not work undertaken by the shipowner in the course of or for the purposes of his trade or business in the sense of section 4 of the Workmen's Compensation Act 1906, and that the shipowner was therefore not liable to S. in compensation under said section.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Contract of Employment.*

S. while engaged in the cleaning of the boilers of a ship was injured by an accident. S. was one of several boiler-scalers engaged to clean the boilers by W., who contracted with the shipowner to do the work. S. was subject to the orders of W. in the performance of the work, a certain supervision over him and the other workman being exercised by a foreman in the employment of the shipowner. S received his wages from W., who in turn received the money in instalments from the shipowner as desired for payment of wages. *Held* that S. was not in the employment of the shipowner, and therefore not entitled to receive compensation from him under the Workmen's Compensation Act 1906.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 4 (1), enacts—"Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him. . . ."

In an arbitration under the Workmen's Compensation Act 1906 between Charles Spiers and the Elderslie Steamship Company, Limited, the Sheriff-Substitute at Glasgow (DAVIDSON) refused compensation, and at the request of the claimant (Spiers) stated a case for appeal.

The *facts* stated were—"(1) That the appellant was injured while working in a ship belonging to the respondents on 6th April 1908. (2) That the said ship was in the harbour at Glasgow at the time. (3) That in consequence of his injury he was incapacitated for work, and was still so at the date of my judgment (23rd February 1909). (4) That no notice was given to the respondents of the accident till 2nd October 1908, but that the failure to give notice was due to excusable error. (5) That the appellant at the time of the accident above mentioned was one of several boiler-scalers engaged by Andrew Williamson to do cleaning work in the boilers of the ship, and he was in the act of cutting out a large piece of salt, which had accumulated owing to a leak in one of the boilers, when the accident happened. (6) That the said Andrew Williamson contracted with the respondents to do this work. (7) That the appellant was subject to the orders of the said Andrew Williamson, a certain supervision over him and the other workmen being exercised by a foreman, Charles Swettenham, in the employment of the respondents. (8) That the said Andrew Williamson had no place of business and no capital. (9) That the appellant had no contract with anyone except Williamson, and that the appellant received his wages from Williamson, who in turn received the money in instalments from the respondents as desired for payment of wages. (10) That the appellant's average wage was 25*s.* per week. (11) That shipowners on the river Clyde have occasionally had the work of boiler-scaling performed by their own men without the instrumentality of a contractor."

On these facts the Sheriff-Substitute found that the appellant was not at the time of the accident in the employment of the respondents within the meaning of the Workmen's Compensation Act 1906.

The *questions of law* were—"(1) Whether, on the facts stated, the appellant was a workman in the employment of the respondents at the time of said accident within the meaning of the Workmen's Compensation Act 1906? (2) Whether, on the facts stated, the work at which the appellant was engaged at the time of the said accident was work undertaken by the respondents as principals in the course of or for the purposes of their trade or business within the meaning of the Workmen's Compensation Act 1906."