sixty-four (see Merchant Shipping Act 1894, section 5, sub-section 2), and when so acting employs workmen in connection with the work of the ship, does not establish the relation of employer and employee for the purposes of this Act between each one and all of the registered owners on the one hand and the workman on the other; it would be absurd if it were to be held to do so, and shipping business could not be carried on on such a footing. This Division of the Court had occasion to consider and decide this matter recently in the case of *Gorman* v. *Gibson & Company*, and it was there held that it was the managing-owners who were the employers of a stevedore's labourer, and not the registered owners of the vessel in the loading of which the accident happened. Of course, ultimately, in an accounting for the profits and losses of the "Dolphin" for the last or the present year, the respondents as part-owners of that vessel will have to bear their share of the loss caused by the compensation found payable in the arbitration out of which this case arose, but that does not affect any of the questions now under consideration.

The third question is, "Whether Sharpe at the time of his death was (*a*) a partner of, or (*b*) a joint-adventurer with, the appellant, or with the appellant and Captain Tait, in a course of trading carried on by means of the 'Dolphin'?" When I try to discover in the stated case what was the course of trading I cannot find it. There was no course of trading carried on apart from the use of the ship. The fact that Mr Sharpe generally found the cargo for the ship on her voyages from Dalbeattie to Liverpool cannot be the foundation for a partnership or joint-adventure between him and the other part-owners, entitling them to bind each other in obligations undertaken in connection with the business of the vessel. Therefore in attempting to argue that there was a partnership or joint-adventure in this matter, the appellant is forced to rely solely on the fact that Mr Sharpe was an owner of shares in the ship along with the appellant and Captain Tait. Now it is quite settled that the fact of persons being co-owners of shares in a ship does not make them partners. They have little power as regards each other, and the majority cannot pledge the credit of the minority against their will, and if they disagree as to the management of the vessel any of them may bring an action of sett and sale for disposal of their shares or of the whole vessel—in short, joint-owners are not partners, but are separate individuals holding definite shares in a common subject, and where there are several of them the subject in which they are all interested is in the ordinary case managed by a manager or managing-owner, who within certain limits is empowered to act for them in the management of the ship, but this does not render them either partners or joint-adventurers.

Accordingly I am of opinion that Mr Sharpe was neither a partner nor a joint-adventurer with the appellant or Mr Tait or one or other or both of them.

I accordingly think that the first question should be answered in the affirmative, and the second and third in the negative.

LORD GUTHRIE—It looked at one time as if this case raised an important general question, namely, whether the decision in the English case of *Ellis* (1905, 1 K.B. 324) could be applied in Scotland in view of the difference between the Scots and the English law of partnership. In *Ellis* there was a partnership, and it was held that one of the partners who had been employed by the partnership, and who had been injured while so employed, could not recover compensation from himself and the other partners under the Workmen's Compensation Act on the ground that a person who is both employer and employed is not a workman in the sense of the Act. If that question arises in Scotland it will have to be carefully considered. In Scotland a firm is a separate *persona*, and it may be a question whether the reasoning of the Master of the Rolls, dealing with the case of an incorporated company, and holding that in that case a shareholder of a company doing work for the company is not in the position of employer and employed, does not equally apply in Scotland to the case of a proper partnership. But that question does not arise here, because I concur in the view that on the facts of the present case no partnership existed between the deceased and the other joint-owners of the ship. I think, therefore, that the questions should be answered as your Lordship proposes.

The LORD JUSTICE-CLERK concurred.

The Court answered the first question in the affirmative, and the second and third questions in the negative.

Counsel for the Appellant—Hamilton. Agents—Hill, Murray, & Brydon, S.S.C.

Counsel for the Respondents—Chree—J. A. Christie. Agents—Henry Bower, S.S.C.

Thursday, February 10.

FIRST DIVISION.

SNEDDON AND OTHERS *v.* THE GREENFIELD COAL AND BRICK COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of and in the course of his Employment*"—*Miner Leaves Cage at Wrong Level, and is Found Dead, having been Scalded to Death by Exhaust Steam from a Pump—Fact and Law.*

A miner descending by a cage which stopped at only two levels, got out at the higher instead of the lower. He tried to get back into the cage, but it had resumed its descent. He then got down to the lower level by means of a perpen-

dicular ladder, in a "blind" pit, and reached a point within eleven yards of the spot where he should have left the cage. Instead of proceeding there, and thence to his working-place, he proceeded in the opposite direction by a road dismantled of hutch rails, descending at a gradient of 1 in 9, and having two pipes about 3½ inches in diameter running along it, whereas the road to his working-place was laid with hutch rails, and ascended at a gradient of 1 in 35, and had no such pipes running along it. He proceeded about 600 feet along this road, and passed three brattice screens and a pump, near which he was found dead, having admittedly been scalded to death by exhaust steam from the pump. There were no brattice screens on the proper road. His father and sisters claimed compensation from his employers. On these facts the Sheriff-Substitute, acting as arbiter, found that the claimants had failed to prove that the deceased met his death by accident arising out of and in the course of his employment, and assoilzied the employers, and in a stated case on appeal, put as the question of law, Was he right on the facts found by him in so holding.

The Court *held* that the question was a pure question of fact, but that the arbiter had no evidence before him from which he could properly hold that the miner was not in the course of his employment, and *answered* the question in the negative.

Rule laid down in *Mackinnon* v. *Miller*, 1909 S.C. 373, 46 S.L.R. 299, and *Jackson* v. *General Steam Fishing Company, Limited*, 1909 S.C. (H.L.) 37, 46 S.L.R. 901, *followed*.

Alexander Sneddon, miner, Mary Sneddon, Jessie Sneddon, and Agnes Sneddon, all residing at 14 Balgair Terrace, Shettleston, the father and sisters of the deceased Robert Sneddon, claimed compensation under the Workmen's Compensation Act 1906 in respect of his death, from the Greenfield Coal and Brick Company, Limited, Greenfield Colliery, Shettleston, and being dissatisfied with the award of the Sheriff-Substitute (BOYD), acting as arbiter under the Act, appealed by way of stated case.

The Case stated—"The case was heard before me and proof led on 26th April 1909, when the following *facts* were established—1. That the appellant Alexander Sneddon is a miner at Shettleston, and is the father of the deceased Robert Sneddon, who was also a miner, and who worked, in company with his father, in the respondent's employment at Greenfield Colliery, Shettleston. 2. That the other appellants are sisters of the said deceased. 3. That the deceased was twenty-six years of age, and had been working in that pit for many years and knew it well. 4. That the cage by which miners are lowered into said pit, stops at only two levels, the lower being the one at which deceased should have left the cage, and that he should then have proceeded to his working-place by a gradually ascending mine or road with which he was quite familiar. 5. That on the morning of 6th August 1908 the deceased descended in the cage, and got out at the higher level which is about 12 feet above the other level. 6. That he tried to get back into the cage, but it had resumed its descent, and he then got down to the lower level by means of a perpendicular ladder in a 'blind' pit, a few yards distant from the shaft. 7. That on reaching the bottom of the ladder he was on the same level as, and within 11 yards of, the spot where he should have left the cage and entered on the road to his working-place. 8. That instead of proceeding to the shaft and entrance of the road of his working-place, the deceased for some unexplained reason proceeded in the opposite direction and entered a road known as the Barney Dook road. 9. That this road was not an authorised way for miners, but no notice was posted in the mine forbidding miners to use the road. 10. That it did not lead to the deceased's working-place, but led towards the pump in connection with which the deceased had no duties. It was unlike the road to the deceased's working-place, which is laid with hutch rails and ascends at a gradient of 1 in 35, while the Barney Dook road is dismantled of its hutch rails, descends at a gradient of 1 in 9, and has two pipes about 3½ inches in diameter running along it. There are no such pipes in the road to the deceased's working-place. 11. That the deceased travelled down said Barney Dook road to a point between 600 and 700 feet from the foot of the shaft, and passed two brattice screens and the pump, and a third screen on the other side of the pump, and his dead body was afterwards found lying on the road 35 feet past the pump. 12. That the road leading from the shaft to the deceased's working-place was not crossed anywhere by screens or fences. 13. That the average weekly earnings of the deceased at the date of accident were £1, 2s. 2d. 14. That the appellants jointly were in part dependent on the deceased's earnings, viz., to the extent of 12s. per week, and that if they had been entitled to compensation an award of £98, 12s. would have been reasonable and proportionate to the injury sustained by them jointly through the deceased's death.

"No evidence was led to show the cause of deceased's death, and before the appellants' proof was closed I pointed this out to their agent, who replied that they relied on the admission contained in the defences. The admission referred to is in answer 4 and 5 of the defences, and is in the following terms—'Denied. Explained that the deceased reached the level of the Barney Kiltongue seam by means of a small blind pit, and should thereafter have proceeded to his working-place in the ordinary way by means of a mine leading upwards to the level of the Kiltongue seam. Instead of doing so the deceased proceeded for a considerable distance down a disused road known as the Barney Dook, and ultimately

having passed the pump which is situated near the foot of said dook, sustained injuries through being scalded by exhaust steam from the pump, which resulted in his death.'

"On these facts I *found* that the appellants had failed to prove that the deceased Robert Sneddon met his death by accident arising out of and in the course of his employment. I therefore assoilzied the respondents, and found no expenses due to or by either party."

"The *question of law* for the opinion of the Court is—Was the arbitrator right in holding on the facts found by him that the accident to the deceased Robert Sneddon did not arise out of and in the course of his employment with the respondents?"

Argued for the appellants—The deceased had started with the object of proceeding to his place of work, and there was nothing in the facts found to show that he was not honestly endeavouring to find his way there when he was killed. There was no evidence in the succeeding findings to upset the result to which the first eight findings led, namely, that he was honestly endeavouring to reach his place of work. It was sufficient for the appellants to show that the deceased man was or might have been legitimately on his master's business when he was killed—*Jackson* v. *General Steam Fishing Company, Limited*, 1909 S.C. (H.L.) 37, 46 S.L.R. 901; *Mackinnon* v. *Miller*, 1909 S.C. 373, 46 S.L.R. 299; *Grant* v. *Glasgow and South-Western Railway*, 1908 S.C. 187, 45 S.L.R. 128; *O'Brien* v. *The Star Line, Limited*, 1908 S.C. 1258, 45 S.L.R. 935.

Argued for the respondents—The question was a pure question of fact—*O'Brien*, *cit. sup.* *Prima facie* one would not have thought that a workman 700 feet away from any place where he had a right to be was in the course of his employment. It could not be said that the view of the Sheriff that the deceased was not in the course of his employment was a view which there was no evidence to support, or one to which no reasonable man had fairly a right to come. As showing the opposite inferences which might be fairly drawn from similar facts, they contrasted *Marshall* v. *Owners of Steamship "Wild Rose,"* [1909] 2 K.B. 46, with *Mackinnon* v. *Miller* (*cit. sup.*).

At advising—

LORD PRESIDENT—In this case the question of law for the opinion of the Court is, "Was the arbitrator right in holding on the facts found by him that the accident to the deceased Robert Sneddon did not arise out of and in the course of his employment with the respondents?"

I had occasion in the case of *Mackinnon* v. *Miller* (1909 S.C. 373) to express my view in a sentence, which I shall here repeat, as to the function of the Court in a case of this sort:—"It is quite evident that so stated the question is one of fact, and of fact only. Your Lordships are not judges of fact, and you will only, of course, interfere with the arbiter's decision if it be shown that he has come to an erroneous decision upon fact, either by being influenced in coming to his decision on fact by some erroneous view in law—a result which is possible—or by having, as it has been sometimes expressed, misdirected himself; or further, if he has proceeded entirely contrary to evidence, or upon no evidence at all. In fact the position which your Lordships here hold is very analogous to, if not entirely the same as, the position which you hold in reviewing the verdict of a jury." Since I said that on 12th January 1909 there has been decided in the House of Lords the case of *Jackson* v. *General Steam Fishing Company* (1909 S.C. (H.L.) 37), upon an appeal from the Second Division of this Court, and I think the views of the learned Lords in that case entirely bear out the sentence I have read from my own judgment in the case of *Mackinnon* v. *Miller*.

Accordingly the only question we have to consider is whether the Sheriff-Substitute's view upon the facts can be supported. Well here, I confess, I have had considerable difficulty, but, not without hesitation, I have in the eventual result come to the conclusion that it cannot be supported. I agree that that is, so to speak, a strong step, but I am driven to the conclusion that the judgment cannot really be supported. The whole history of the case is given in the Sheriff's own findings. The deceased was a miner; the cage by which he was lowered stops at two levels, the lower being the one at which the deceased should have left the cage, and then he should have proceeded to his working-place by a gradually ascending road with which he was familiar. He left the cage at the higher level and then tried to get back into the cage, but it had resumed its descent, and he then got down to the lower level by means of a perpendicular ladder in a "blind" pit a few yards distant from the shaft, where he was on the same level as, and within eleven yards of, the spot where he should have left the cage and entered on the road to his working-place. Instead of proceeding to the shaft and entrance of the road of his working-place, the deceased, for some unexplained reason, proceeded in the opposite direction and entered a road known as the Barney Dook road. He seems to have proceeded in that road for some way and he then came into the proximity of a pumping engine, and his body was found there in such a manner as to make it quite clear that he had been killed by the exhaust steam from the pumping engine.

It seems to me in this case that it is quite clear that the man mistook his way in the dark and lost his life. Inasmuch as the road down which he proceeded was a different sort of road, we are told he ought to have discovered his mistake. It seems there were pipes in the road down which he went, while there were no pipes in the road by which he usually went; there were two brattice screens in this road, there were none in the other. The Sheriff-Substitute seems to have left entirely out of

consideration the fact, which is our common experience, that once having lost your way and being in the dark, you may go on further losing your way when you are trying to find it; and it seems to me that this man in going down there was doing so for the purpose of getting to his work in the course of his employment. He met with an accident which arose out of his employment in this sense, that the employment was in a place where there was danger into which he fell. I am not quite sure if I am not transgressing in saying that there was really no evidence on which the Sheriff-Substitute could go, or that the verdict was contrary to the evidence; but on the best consideration I have been able to give to the case I think the verdict here ought to be reversed, and that we should answer the question in the negative.

LORD KINNEAR—I agree. I think this is a pure question of fact. The question as put to us by the learned Sheriff is one of fact only. There have been many cases before us in which a question so put appears, when it is read in connection with the statements, to be intended to raise a question of law, and so the Court is put to do what the Sheriff ought to have done, and disentangle the law from the facts for itself. I do not think this question requires any such treatment; it is put as a question of fact. I do not think, therefore, we can interfere with the Sheriff's judgment on the ground that his decision on a question of fact has been determined by some erroneous view of law; and I agree with your Lordship that the only ground on which we can disturb it is that his judgment on fact is not justified by any evidence before him—in short, that he had not facts proved to him from which he could properly draw the further inference in fact that the injury which happened to this man did not happen in the course of his employment. I entirely participate in what your Lordship says about not interfering with an award on that ground, and, of course, I accept as binding upon us what was said in the House of Lords, that we cannot interfere with the judgment of the Sheriff on a question of fact unless we can say that there were no materials before him from which he could properly draw such an inference in fact; and that question we must, of course, consider with exact reference to the specific facts from which he tells us he drew his inference, and which we must accept as binding for the purpose of this decision.

Now the question the Sheriff had to consider was whether the accident which this man met with occurred out of and in the course of his employment. That it arose out of it in the sense that has been assigned to these words by the decisions—namely, that it was a risk incidental to the employment in which he was engaged—there can be no doubt, because he was employed in the mine, and he had the misfortune to get too close to the steam-pump and met with his death. But then the question whether the accident was in the course of his employment is a different one; and I suppose that really means whether, in the particular circumstances, he was at the time and at the place at which it happened in the course of his duty as a miner, or whether he was there for some other purpose. Now, upon the facts which the Sheriff has stated, there seems to me no question that he was there in the course of the performance of his duty as a miner. It is quite true that he was not at the place of his actual work, but he was going to his place of work, and while he was going through the mine passages to the place at which he was to work he was, in my opinion, in the course of his employment, and accidents arising there from dangers incidental to the mine seem to me to be accidents arising in the course of his employment. I think there is no question that he lost his way and honestly endeavoured to find his working-place. The Sheriff says that instead of proceeding to the shaft and entrance of the road of his working-place the deceased for some unexplained reason proceeded in the opposite direction and entered another road. Now that means that no reason for taking this wrong direction had been proved to the Sheriff which would enable him to say that the man was not going to his work, but was engaged in some purpose of his own, of amusement or otherwise, in going elsewhere. The Sheriff does not find in fact that there was any purpose in this man's mind except of going to his work. He does find that he went in a wrong way; but if no reason for his doing so can be suggested, the inference is that in going to his work he lost his way in the dark, and having so lost his way he blundered into this place and was exposed to the risk of the accident which happened. I must say upon these facts I reach the conclusion that there was no evidence before the Sheriff from which he could properly hold that the miner was not in the course of his employment, because he was not doing his duty as a miner but something else. If the Sheriff had found in fact that he went out of the way intentionally and for his own purposes it would have been another matter. But he does not so find in terms, nor does he state any fact from which that inference can be drawn.

I agree that the question should be answered in the way your Lordship proposes.

LORD JOHNSTON—To justify an award of compensation under the Workmen's Compensation Act 1906, personal injury must have resulted from accident "arising out of and in the course of the employment." These are two separable things. That which happens "in the course of" does not necessarily arise "out of" the employment, though that which arises "out of" can hardly otherwise than happen "in the course of."

In the present case the workman was a miner on his way to his working face, when by a mistake he landed from the

descending cage at a wrong level, and in seeking his way back to his proper road took a wrong turning, and proceeded along the road to which that wrong turning gave him access, for a considerable distance, till he met his death by scalding from the exhaust of a steam pump which apparently he passed. The Sheriff has stated all that is proved regarding the deceased's proceedings after he entered the wrong turning. And on the statement of these facts it would appear to me that the questions to which he had to address himself were, whether the deceased having started in a wrong direction became bewildered and blundered on, expecting that he would somehow get round to his destination, or whether out of foolhardiness and idle curiosity, having entered on a part of the mine which was unfamiliar to him, he wandered on to satisfy that idle curiosity. Now, these questions are purely questions of fact.

The Sheriff states that, on the facts which he found proved, he determined that the deceased's representatives had failed to prove that the deceased met his death by accident arising out of and in the course of his employment.

I think that the Sheriff has correctly stated the position. It is for the injured workman or his representatives to prove that injury or death occurred by accident arising out of and in the course of his employment. There is, therefore, an *onus* on them which they must discharge. But the question whether they have discharged it is in this case, whatever it may be in some, a pure question of fact. If the Sheriff has come to an erroneous conclusion on the questions of fact which I have said he had to consider, I cannot see how he could in this case be led into such opinion on any erroneous view of the law.

He may have given more weight to the *onus* upon the present appellant than this Court would have given. But he was entitled in law to give to it some weight, and the matter of less or more is not a question of law. He may have been satisfied that the deceased went on out of idle curiosity. We might be satisfied that he wandered on in innocent bewilderment. But if we differed from the Sheriff the difference would arise on fact, and neither on law, nor on law applied to the facts. The case does not fall under the category of *Jackson* v. *General Steam Fishing Company, Limited* (1909 S.C. (H.L.) 63, [1909] A.C. 523), where it appears to have been thought possible to hold that the question which the Sheriff had to decide was one of mixed fact and law.

I must, however, advert to the question put. The Sheriff asks, "Was the arbitrator right in holding, on the facts found by him, that the accident" to the deceased did not arise out of and in the course of his employment? If this question means, Has the Sheriff rightly interpreted the statute in holding that the facts which he found proved fulfil the statutory conditions? then a question of mixed fact and law, and therefore a question of law which justifies appeal on case stated, has arisen. But if the question is intended to mean this, and not merely Has the Sheriff come to a sound conclusion on the evidence? I think that the Court is entitled to learn from the four walls of the case wherein the Sheriff conceived he was interpreting the statute, what were the opposite views between which he had to make up his mind, and wherein was his difficulty. From the present case as stated I cannot see that the Sheriff was concerned with any question of statutory interpretation but with a mere question of fact.

So far, therefore, I should have been prepared to hold that there was no question competently before us in this stated case, and therefore to refuse the appeal. But it has been recognised that the Court may competently entertain a case such as the present and answer the question in the negative, if we are satisfied that the Sheriff went either against evidence or without evidence, assimilating the stating of a case in such circumstances to the granting of a rule in jury court practice. If this is within the purview of the statute, I agree that cases do occur in which it is very salutary that the power be exercised, and that, as your Lordship proposes, this may be treated as one of them.

LORD M'LAREN was absent.

The Court answered the question of law in the negative.

Counsel for the Appellants—Constable, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Clyde, K.C. —M'Laren. Agents—Cumming & Duff, S.S.C.

Thursday, February 10.

SECOND DIVISION.

[Sheriff Court at Glasgow

M'VICAR *v.* JOHN ROBERTSON & SON.

Sheriff—Process—Jury Trial in Sheriff Court—Interlocutor Applying Verdict—Findings in Fact by Sheriff—Competency—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *secs.* 31 *and* 32, *and First Sched.* (146).

In a jury trial in the Sheriff Court the Sheriff proponed certain questions of fact to the jury, and subsequently issued an interlocutor applying the verdict. This interlocutor contained certain findings in fact on the answers of the jury and admissions of the parties, and it continued—"Upon these facts finds in law that in respect the answers returned by the jury to the questions proponed to them do not support the case laid on record . . . the verdict is for the defenders. . . ." In an appeal by the pursuer the Court, while refusing the appeal, *recalled* the findings in fact of the Sheriff as incompetent.