under section 45 of the Companies Consolidation Act 1908 for confirmation of certain special resolutions duly passed which, *inter alia*, purported to modify the conditions contained in the company's memorandum so as to re-organise its share capital by the division of its shares into shares of different classes. In moving for intimation of the petition on the walls and in the minute book, counsel for the petitioners submitted that advertisement of a petition for re-organisation of the share capital of a company was unnecessary in respect that it was a purely domestic matter, that it involved no reduction or alteration of amount of capital, and that by it the rights of creditors could not be affected. Reference was made to *in re Ashanti Development, Limited*, 1911, W.N. 144, 27 T.L.R. 498, and *Robert A. Munro & Company, Limited*, December 18, 1912, 50 S.L.R. 274.

The Court (LORD PRESIDENT, LORD JOHNSTON, and LORD MACKENZIE) ordered intimation as craved.

Counsel for Petitioners—Lord Kinross. Agents—Guild & Shepherd, W.S.

Friday, February 21.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

SMITH *v.* FIFE COAL 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—Breach of Rule by Miner—Miner Contrary to Rule Undertaking Duty Exclusively Reserved to Shot-Firer.*

The use of explosives in a mine was regulated by certain statutory rules which provided, *inter alia*—"(*a*) Every charge shall be fired by a competent person (hereinafter called the shot-firer) appointed in writing for this duty by the owner, agent, or manager of the mine, and not being a person whose wages depend on the amount of mineral to be gotten. . . . (*e*) Where the charge is fired by an electrical apparatus the shot-firer shall not use a cable for the purpose which is less than 20 yards in length. He shall himself couple up the cable to the charge, and shall do so before coupling the cable to the firing apparatus. He shall also himself couple the cable to the firing apparatus. Before doing so he shall see that all persons in the vicinity have taken proper shelter."

A duly appointed shot-firer was in the habit, unknown to the management and in breach of the regulations, of delegating to the miners working in his shift the duty of coupling the cable to the charge. No such practice was proved to exist so far as regarded the other shot-firers in the mine. A miner who worked in the shift where the practice obtained, having coupled the cable to the firing apparatus, was about to retire, when the shot-firer fired the shot and injured the miner.

Held that the accident happened while the miner was undertaking a duty outwith the sphere of his employment, and accordingly did not arise out of it.

Kerr v. *William Baird & Company, Limited*, 1911 S.C. 701, 48 S.L.R. 646, *followed.*

This was an appeal by way of Stated Case from a decision of the Sheriff-Substitute (UMPHERSTON) at Dunfermline in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between James Smith, miner, Kelty, *respondent*, and the Fife Coal Company, Limited, Leven, *appellants*.

The Case stated—"This is an arbitration is an application to award compensation under the Workmen's Compensation Act 1906.

"The *facts* are as follows:—1. The respondent was a miner in Benarty Pit, which belongs to the appellants, and the Explosives in Coal Mines Order of 21st February 1910, made by the Secretary of State for the Home Department, under section 6 of the Coal Mines Act 1896, applied to the pit at the date of the accident after mentioned and was duly posted at the pithead. Said Order provides, *inter alia*, as follows—(*a*) . . . [*quoted supra in rubric*] . . . (*b*) Every charge of the explosive shall be placed in a properly drilled shot-hole and shall have sufficient stemming, and each such charge shall consist of a cartridge or cartridges of not more than one description of explosive. . . . (*d*) No charge shall be fired except by means of an efficient electrical apparatus so enclosed as to afford reasonable security against the ignition of inflammable gas or by a permitted igniter-fuse as hereinafter defined. (*e*) . . . [*quoted supra in rubric*]. . . ."

"In terms of section 2 (*a*) of said Order the appellants had duly appointed a man called Robert Howard to act as one of the shot-firers in the section in which pursuer worked, and at the time of the said accident Howard was so acting. The pursuer was not authorised to act as shot-firer. The shots in this pit were fired by the shot-firers by means of an electrical apparatus.

"2. The method of firing a shot is (1) to place the detonator in the hole prepared by the miner and to stem it, (2) to connect the detonator wire to the cable, (3) to connect the cable to the electric battery, and (4) to turn the handle on the battery. The placing of the detonator in the hole and stemming of the charge are always done by the miner, not by the shot-firer. The rest of the operation is, under the Explosives in Coal Mines Order above mentioned, the duty of the shot-firer. It was part of the respondent's duty to bore a hole for each shot and to charge the shot-

hole and stem the shot, and under section 2 (*e*) of said Order it is the duty of the shot-firer to couple up the cable (which conveys the electric current) to the charge, and to do this before coupling the said cable to the firing apparatus. It is also his duty to himself couple the cable to the firing apparatus, and before doing so to see that all persons in the vicinity have taken proper shelter.

"3. Three or four days after the respondent commenced work in the section Howard showed the respondent how to connect the detonator wire (which is a short wire running down the middle of the shot and projecting a short distance beyond the shot-hole) to the cable and asked him to do this part of the work. From that time until the date of the accident the respondent was in the habit of making this connection after the charge was stemmed, and this practice was common but not universal among the miners in that section during Howard's shift, although no such practice was proved so far as the other shot-firers in the pit were concerned, and the practice was unknown to the management. The rest of the work was done by the shot-firer. The shot-firer was, in virtue of his appointment, the person in charge of the shot-firing operations, subject to the provisions of the foresaid Order and also of the Special Rules under the Coal Mines Regulation Act of 1887, which were in force in said pit at the time of the accident.

"4. There was evidence to the effect that other miners had themselves fired shots in Howard's absence, but if they did, this also was unknown to the management, and respondent never fired a shot himself. The respondent was requested by Howard on one occasion to fire a shot himself, but he did not do so.

"5. On 28th June 1912 the respondent had prepared a hole for blasting (which preparation was part of his duties), and sent for Howard, who brought the detonator and firing equipment. Howard did not go forward to the face, but remained at a point about 30 feet therefrom round a corner from and out of sight of the point where the shot was. He gave the detonator and the end of the cable to the respondent and proceeded to get ready the rest of the apparatus and repair some damage which had been done to the cable. He did not ask the respondent to connect the shot with the cable, but the purpose of his giving respondent the detonator and cable was that the respondent might so connect the shot, and the respondent assumed that Howard desired him to do this.

"6. The respondent put the charge in the hole, stemmed it, then connected the wire of the shot to the cable, and was proceeding to go to a place of safety when the charge was fired by Howard, and the respondent was seriously and permanently injured, his left arm as a result having to be amputated below the elbow.

"7. The connecting of the detonator wire with the cable took less than a minute, and the respondent had just turned to go when the charge was fired by the shot-firer. The latter, who was at the other end of the cable about 30 feet away, heard a shout, 'Right—fire away,' which he thought came from the respondent, but it was in fact from a neighbouring miner, and was addressed to that miner's drawer, who had informed him that a shot was to be fired in their vicinity. The rapidity with which the explosion followed the connecting of the cable to the detonator wire showed that the cable had been connected to the battery before it was connected to the charge.

"8. The respondent stated that he was unaware of said Order of 21st February 1910, and that if he had thought it was a breach of rule to connect the shot with the cable he would not have done it. It was proved that a miner may have duties to perform in his working-place after he has stemmed a charge, such as collecting his graith or setting a prop, although this was not the reason for the respondent being at the place.

"9. The whole work of firing a shot takes about five or six minutes. In this section nine or ten shots per day were fired on an average. On the day of the accident only three shots were fired.

"10. The respondent was entitled to be at his working-place at the moment when Howard fired the shot, and the cause of the accident was Howard's connecting the cable to the battery before the cable was connected to the charge, and before seeing that all persons in the vicinity had taken proper shelter (which act was in breach of said Explosives in Coal Mines Order), and firing the shot without ascertaining that all persons in the vicinity had taken proper shelter. The act of Howard in allowing the respondent to connect the cable to the charge was also a breach of said Order, and the respondent was not acting in the course of his employment in doing so, but this was not the cause of the accident, although the shot would not have gone off unless the cable had been connected to the charge either by the respondent or Howard.

"On the foregoing facts I *found* that the pursuer sustained personal injury by accident arising out of and in the course of his employment with the defenders and appellants, and that the respondent was entitled to compensation at the rate of 20s. per week."

The *question of law* for the opinion of the Court was—"Whether there was evidence upon which it could be competently found that the respondent sustained an accident arising out of and in the course of his employment on 28th June 1912?"

Argued for the appellants—The accident to the respondent did not arise out of and in the course of his employment, because the respondent, without having the excuse of an emergency, (1) had disobeyed one of the statutory pit orders which limited the sphere of his employment, and (2) had arrogated to himself a duty which he was neither engaged nor entitled to perform—

Kerr v. *William Baird & Company, Limited*, 1911 S.C. 701, *per* Lord President (Dunedin) at p. 704, 48 S.L.R. 646, at p. 647; *Lowe* v. *Pearson*, [1899] 1 Q.B. 261; *M'Allan* v. *Perthshire County Council* (*Western District*), May 12, 1906, 8 F. 783, 43 S.L.R. 592. The respondent was not doing what it was reasonable for him to do in the course of his employment — *Moore* v. *Manchester Liners, Limited*, [1910] A.C. 498, *per* Lord Loreburn, L.C., at p. 500; *Barnes* v. *Nunnery Colliery Company, Limited*, [1912] A.C. 44, *per* Lord Atkinson at p. 49. There was no finding in fact by the arbiter that the respondent was unaware of the rule, but, in any event, since the rule had statutory effect the state of knowledge of the respondent was irrelevant—*Dobson* v. *United Collieries, Limited*, December 16, 1905, 8 F. 241, 43 S.L.R. 260. Even if the proximate cause of the accident was the action of the shot-firer, such a consideration was irrelevant, because the question was not as to whose the fault was, but simply did the accident arise out of and in the course of the respondent's employment? — *Dunham* v. *Clare*, [1902] 2 K.B. 292, *per* Collins, M.R., at p. 296. The question in the present case was not a pure question of fact. Moreover, in *Kerr* v. *William Baird & Company, Limited*, *cit.*, findings in fact by the arbiter were overturned by the Court of Session. *Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632, was different from the present case, because there the workman was engaged within the sphere of his employment (*per* Lord Kinnear, 1911 S.C. at p. 667, 48 S.L.R. at p. 636), but in the present case the respondent had arrogated to himself another person's duties.

Argued for the respondent—The accident arose out of and in the course of the respondent's employment. The arbiter had so decided, and as the question in the present case was one of fact and not of law the Court could not disturb his finding—*Barnes* v. *Nunnery Colliery Company, Limited*, *cit.*, *per* Earl Loreburn, L.C., at p. 46; *Mackinnon* v. *Miller*, 1909 S.C. 373, *per* Lord President (Dunedin) at p. 378, 46 S.L.R. 299, at p. 302; *Kane* v. *Merry & Cuninghame, Limited*, 1911 S.C. 533, 48 S.L.R. 430. In *Kerr* v. *William Baird & Company, Limited*, *cit.*, the workman committed a direct breach of an order which caused the accident, but in the present case the respondent in assisting the shot-firer was not doing what was absolutely forbidden, for the order was addressed to and singled out the shot-firer, and the appellants could have been convicted of a breach of the statutory rules on account of his action—Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 50. The respondent's action was not the proximate cause of the accident. The proximate cause was the action of the shot-firer. The respondent was entitled to rely on the appellants' employees observing the statutory orders, and if they had done so the accident would not have happened, and even if the respondent was guilty of contributory negligence that would not void his claim — *Radley* v. *London & North-Western Railway Company*, 1876, 1 App. Cas. 754, *per* Lord Penzance at p. 759; *Bett* v. *Dalmeny Oil Company, Limited*, June 17, 1905, 7 F. 787, 42 S.L.R. 638; *Black* v. *Fife Coal Company, Limited*, 1909 S.C. 152, 46 S.L.R. 191, *rev.* 1912 S.C. (H.L.) 33, 49 S.L.R. 228, [1912] A.C. 149; *Watkins* v. *Naval Colliery Company* (1897), *Limited*, [1912] A.C. 693; *Conway* v. *Pumpherston Oil Company, Limited, cit.*; *Harding* v. *Brynddu Colliery Company, Limited*, [1911] 2 K.B. 747; *Mawdesley* v. *West Leigh Colliery Company, Limited*, October 18, 1911, 5 B.W.C.C. 80. In any event, even if the respondent had acted outwith the sphere of his employment he must be held to have reverted to his employment at the moment of the accident, because it was his duty to be on the spot at the time the shot was fired.

LORD DUNDAS—On 28th June 1912 the respondent, a miner in the appellants' employment, met with a serious personal injury by accident in their Benarty Pit, owing to the discharge of a blasting shot when he was in its immediate vicinity. We have to determine whether or not the accident arose out of and in the course of the respondent's employment. The learned arbiter has decided in the affirmative. I have come to the conclusion that his decision cannot be supported.

The Explosives Order of 21st February 1910, which is partially printed in the case, applied to Benarty Pit at the date in question, and was duly posted at the pit-head. It defines (section 2) the conditions under which "permitted explosives" may be used in the pit. No one but a competent "shot-firer," duly appointed in writing, and not being a person whose wages depend on the amount of mineral to be gotten, is to fire a charge. Robert Howard was the duly appointed shot-firer; the respondent, of course, had no power or authority to act in that capacity. The Order prescribes that every charge is to be placed in a properly-drilled shot-hole, and to have sufficient stemming. It is not specifically said that the drilling and stemming may be done by a miner, but in practice they are so done, and the arbiter finds that it was part of the respondent's duty to drill the hole, charge it, and stem the shot. With the exception of these minor operations the whole duties in connection with the firing of a shot are by the Order expressly laid upon the shot-firer. It provides that where (as here) the charge is fired by an electrical apparatus, the shot-firer shall himself couple up the cable (of not less than 20 yards in length) to the charge, and shall do so before coupling the cable to the firing apparatus; that he shall also himself couple the cable to the firing apparatus, and before doing so shall see that all persons in the vicinity have taken proper shelter. The removable handle, by turning which the shot is fired, is to remain at all times in the personal custody of the shot-firer while on duty. It seems that in spite of the clear words of the Order, it was common,

though not universal, for miners, on Howard's instruction and at his request, to couple the charge to the cable. The existence of this objectionable practice was not known to the management. On the occasion in question the respondent, after drilling the hole, charging it, and stemming the shot, coupled the charge to the cable. Before he had time to retire, Howard fired the shot, and the respondent was seriously injured. Howard was at the time at a point round the corner and out of sight from the place where the shot was, and he fired it because he erroneously thought that a shout "Right—fire away" came from the respondent. Howard had connected the cable with the firing apparatus before the cable had been connected with the charge, and before seeing that all persons in the vicinity had taken proper shelter. The arbiter finds that the cause of the accident was Howard's conduct in firing the shot under the circumstances mentioned in breach of the Order. He further finds that "the act of Howard in allowing the respondent to connect the cable to the charge was also a breach of said Order, and the respondent was not acting in the course of his employment in doing so, but this was not the cause of the accident, although the shot would not have gone off unless the cable had been connected to the charge either by the respondent or Howard."

I think the learned arbiter has fallen into error in finding upon these facts that the accident arose out of and in the course of the respondent's employment. He seems to me to have approached the matter from a wrong standpoint, and to have decided it having regard to the common law rules of liability and contributory negligence, which are, I think, wholly beside this question under the Workmen's Compensation Act.

It appears to me that what we have to decide is whether or not this accident occurred in the respondent's "sphere of employment," to use a phrase common in recent cases, and that, if it did not, he cannot recover compensation under the Act. It has often been laid down that it is not every breach of a master's order that will, so to speak, put a servant outside the sphere of his employment (*e.g.*, *Whitehead*, [1901] 2 K.B. 48, *per* Collins, L.J., at p. 51; approved in *Conway*, 1911 S.C. 660, *per* Lord Dunedin at p. 665). It is clear that a master may competently prescribe the sphere of his workmen's employment and limit it by way of restrictive orders, and the Court must in each case distinguish upon the facts between something done by a workman entirely outside that sphere and something done within it, though contrary to order and even (it may be) amounting to serious and wilful misconduct. A workman does not cease to be in the course of his employment merely because he acts negligently or recklessly in the performance of his work (*e.g.*, *Durham*, 1898, 1 F. 279). But if he travels outside the sphere of his employment without an order, or in violation of an order, he will not recover compensation, unless indeed a case of necessity or great emergency is made out, when a reasonable extension of his duties may sometimes be inferred. If the workman acting within the sphere of his employment violates an order, the master may be liable in compensation, but if he arrogates to himself the functions of some other servant whose duties are different from his own (*e.g.*, *Kerr*, 1911 S.C. 701), or travels into some territory with which he has nothing to do (*e.g.*, *O'Brien*, 1908 S.C. 1258), the result is otherwise. One must in each case consider whether, when the accident occurred, the injured man was "doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing" (*per* Lord Loreburn, L.C., in *Moore*, [1910] A.C. at pp. 500, 501).

In the present case the respondent in coupling the charge to the cable was directly violating the Order posted up at the pit-head. The arbiter says the respondent stated that he was unaware of it, but this is not a finding in fact of the man's ignorance, and one need not therefore decide whether such a finding would have been relevant for consideration. But the respondent was not only acting in breach of an order, he was doing something he was never employed or paid to do, and which another person, whose position rendered him competent for the appointment, was employed and paid to do. I can see no ground for holding that the accident arose out of and in the course of the respondent's employment. I think that, upon the learned arbiter's findings, one is constrained to the opposite conclusion.

I do not propose to deal in detail with former decisions; but there are passages in the opinions of noble and learned Lords in the recent case of *Barnes* ([1912] A.C. 44) which I think may usefully be cited. The Lord Chancellor (Loreburn) at p. 47, after observing that "the question whether or not an injury by accident arose out of the employment is quite different from whether there has or has not been misconduct," pointed out that the Court could not deny the workman compensation "on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do, and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." Lord Atkinson (at p. 49) emphasised the necessity of drawing a distinction "between the doing of a thing recklessly or negligently which the workman is employed to do and the doing of a thing altogether outside and unconnected with his employment." Lord Mersey (at p. 51) pointed out that the workman, when riding in a tub against orders, "was not only violating the conditions of his employment but was engaged in an act quite outside its scope. . . . He was not

doing a permitted act carelessly, but he was doing an act which he was prohibited from doing at all." The case of *Kerr* (1911 S.C. 701) comes pretty close to the present upon its facts, involving as it did a disobedience to the Explosives Order 1910. I think one may fairly apply to this respondent what Lord Dunedin said in regard to *Kerr*—"He was arrogating to himself duties which he was neither engaged nor entitled to perform. . . . He started upon an operation which was outside the scope of his employment."

As already observed, I think the arbiter has gone astray by regarding the matter as if we were here in a common law action by the respondent for damages against his employers. Counsel who sought to support the award pressed upon our attention the doctrine of cases like *Radley* (1876, 1 A.C. 754) and *Carse* (1895, 22 R. 475), to the effect that a pursuer, though himself guilty of contributory negligence, may yet recover damages if the defender could, in the result, by ordinary care and diligence have avoided the accident. They also referred us to *Black* ([1912] A.C. 149), *David* ([1910] A.C. 74), and *Watkins* ([1912] A.C. 693), which dealt with the question of an employer's liability in damages for negligence upon a breach of a statutory rule or order affecting him. I do not think either category of cases has any application here. We are not in the region of fault or negligence. We are considering, under the Workmen's Compensation Act, whether or not there was evidence to show that this accident arose out of and in the course of the respondent's employment. For the reasons I have stated, I am of opinion that there was not; and I am for answering the question of law put to us in the negative.

LORD SALVESEN—The question in this case is whether the respondent, who was employed as a miner by the appellants, sustained an accident arising out of and in the course of his employment. That he met with an accident in the course of his employment I assume, although this is by no means plain, and the sole question is whether that accident arose out of his employment. The accident consisted in the workman being struck by some material which was dislodged by a cartridge shot fired by a man called Howard, who was shot-firer in that part of the pit where the respondent worked. The shot was deliberately fired by Howard by means of an electric apparatus which had been connected with the cartridge, and but for the presence of the respondent in too close proximity the explosion was a perfectly safe and proper operation.

The use of explosives in the pit where the respondent was employed is regulated by an Order of date 21st February 1910. Section 2 provides that every charge must be fired by a competent person called the shot-firer, appointed in writing for this duty, and not being a person whose wages depend on the amount of mineral to be gotten. This regulation is plainly made for the safety of the miners working in the pit. In order to further ensure their safety there is a provision that the shot-firer shall himself couple up the cable to the charge, and shall do so before coupling the cable to the firing apparatus, and also himself couple the cable to the firing apparatus, Before doing so he shall see that all persons in the vicinity have taken proper shelter. All these duties are therefore exclusively laid upon the shot-firer, and the order in which the various duties are to be performed is prescribed. There is no regulation, however, that the shot-firer shall himself bore the hole for each shot, or charge the shot-hole and stem the shot, and according to the practice of this pit it was part of the respondent's duty to perform these operations.

No question is raised as to Howard's having been properly appointed, or as to his competency. It appears, however, that Howard was in the habit, in breach of the regulations, of delegating one of his duties to the miners. In particular, it is found that three or four days after the respondent commenced work in the section Howard showed the respondent how to connect the detonator wire to the cable, and asked him to do this part of the work. From that time until the date of the accident the respondent was in the habit of making this connection, and this practice was common among the miners who worked in the pit in Howard's shift, although no such practice was proved so far as the other shot-firers in the pit were concerned. On one occasion Howard asked the respondent to fire the shot himself, but the latter refused to do so, although other miners had fired shots in Howard's absence. This habitual breach of the regulations by Howard and the miners in his section was unknown to the management.

The accident on 28th June 1912 happened in this wise—The respondent had prepared a hole for blasting and sent for Howard, who brought the detonator and firing equipments. He gave the detonator and the end of the cable to the respondent; and although he did not ask the respondent to connect the detonator with the cable the respondent understood that he desired him to make the connection. Howard did not go nearer than 30 feet to the place where the charge was to be fired, and the point at which he remained was out of sight of that place. Howard did some repairs to the cable and connected it with the battery, and hearing a shout "Right—fire away," which he erroneously thought came from the respondent, he turned the handle so as to transmit an electric current along the cable. The respondent had just a moment before connected the cable with the detonator, and was turning to go when the charge was fired, and he was seriously injured. Howard took no means of seeing that all persons in the vicinity had taken proper shelter before firing the shot.

It is manifest from this statement of facts that the accident to the respondent would not have happened but for his undertaking a duty which under the

regulations was exclusively to be performed by the shot-firer. Howard's action in turning the handle of the battery would have been harmless but for the respondent's act in coupling up the cable with the detonator. It was accordingly argued by the appellants that the accident which happened to the respondent was due to his having done work that was outside the scope of his employment and prohibited by the regulations, and did not therefore arise out of his employment. It is equally true, however, that the respondent's act in coupling up the cable to the detonator would not have produced any accident but for Howard's firing the shot without having seen that all persons in the vicinity had taken shelter.

On these facts, I have come to the conclusion, differing from the arbitrator, that the accident did not arise out of the respondent's employment. It is extremely important that the statutory regulations should be enforced not merely against the shot-firer but against all the other persons in the pit. The respondent must be taken to have known that he was prohibited from connecting the detonator with the cable, and it is certain that if he had respected this prohibition the accident would not have occurred. The lax system which Howard had introduced was only possible through the respondent and the other miners conniving at Howard's breach of duty. Had Howard performed the work allotted to him in the order prescribed in the regulations he would first have done any repairs that were necessary to the cable and then proceeded to connect the cable with the detonator. If, as presumably would be the case, the respondent was then at his working-place, Howard would have ordered him to take shelter and proceeded to the battery and connected it with the cable. Thereafter he was at liberty to fire the shot, there being apparently no other persons who were exposed to danger at that part of the pit. Had the shot been fired just at the moment when the respondent was effecting the connection it could scarcely be maintained that the accident was not due to his act in so connecting it, and I can see no reason for making a distinction because of the fact that the connection had been actually completed the moment before and the respondent was just on the point of proceeding to shelter. His presence there at the time was due solely to his performing a duty which was expressly laid upon the shot-firer, and which for his protection the regulations prohibited him from discharging.

The cases cited at the discussion appear to me to justify the conclusion at which I have arrived. In *Kerr* v. *Wm. Baird & Company Limited* (1911 S.C. 701) the miner who was injured had no doubt taken it upon himself to prepare and fire the shot, but the explosion occurred at the precise moment that it did, not by his immediate act, but because he had already unintentionally started the chemical action of the fuse. The Lord President said—"It is quite clear that this man met his death because he started upon an operation which was outside the scope of his employment." In *Barnes* v. *The Nunnery Colliery Company* (1912 A.C. p. 44) a boy in the colliery met his death from riding in an empty tub to his work instead of walking as he ought to have done. Boys were expressly prohibited from riding to their work. It was held that there was no evidence to justify the finding that the accident arose out of the deceased's employment, for his death was caused by an added peril to which by his own conduct he exposed himself. Lord Loreburn said—"If the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do, and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." And Lord Mersey said—"He was not doing any permitted act carelessly, but he was doing an act which he was prohibited from doing at all." I think these observations apply to the present case.

The decision in the case of *M'Allan* v. *Perthshire County Council* (8 F. 783) is also in point. There, as here, the workman who was injured had taken upon himself for the purpose of obliging his fellow servant a part of that servant's duties and was injured while doing so. We were referred by the respondent to the case of *Conway* (1911 S.C. 660), but on its facts that case is clearly distinguishable from the present. The workman no doubt was doing a prohibited thing, but it was in the course of performing his ordinary duties. The Lord President thus summed up the facts —"The man here was fetching a pick for the work on which he was engaged. Doubtless in fetching the pick he contraverted an order, but I think that was only disobedience and nothing more, and the mere fact that he went into the upset does not take him out of the sphere of his employment." The decision in *Harding* v. *Brynddu Colliery Company Limited* (1911 2 K.B. 747), proceeded on the same lines, and was held to be really indistinguishable from that of *Conway*.

Certain authorities were referred to by the junior counsel for the respondent in support of a collateral contention that the employer here would be liable at common law to the injured workman. That is, however, not the question before us, and I need only say in passing that I do not think the cases cited go very far in that direction. I have accordingly come to be of opinion that the question of law falls to be answered in the negative.

LORD GUTHRIE—I am of the same opinion. The essential facts are—first, that the respondent was in the place where he was injured at the time when he was injured because, immediately before, he had been doing work which was the proper work of another employee, and which the respondent, under the Secretary of State's Order of 21st February 1910 (duly posted

at the pithead), was expressly prohibited from doing; second, that the conduct of the respondent on the occasion in question was not authorised by the management of the pit, and his practice of doing similar work to that which he had been doing immediately before the accident was unknown to the management; and third, that no emergency had arisen in consequence of which the respondent's disobedience to the provisions of the Secretary of State's said Order might not have prejudiced his rights under the Workmen's Compensation Act.

In these circumstances, it seems to me clear that this is not a case of accident to a workman arising out of acts by him in the course of his duty. In such a case, on the authorities to which your Lordships have referred, the fact that such acts have been performed in disobedience to orders may not disentitle the workman to the benefits of the Act. Instead of such a case the accident here arose out of actings outside the sphere of the workman's employment. Under the cases quoted such actings prevent the workman from successfully maintaining that he has sustained an injury arising out of and in the course of his employment.

The Sheriff holds that while the respondent in connecting the cable with the detonator was not acting in the course of his employment in doing so, this was not the cause of the accident. Apparently he thinks that the respondent, having completed the operation which took him out of the course of his employment, had again resumed the course of his employment in the few seconds that elapsed before Howard turned the handle and the explosion occurred. It does not appear to me that this finding can be sustained on the facts as stated, whatever might have been the case had a considerable time elapsed between the respondent's act and the explosion.

But the respondent argued that if the Sheriff's ground of judgment was wrong, and if the respondent's act was the cause of the accident, the accident still arose out of and in the course of his employment, because he was entitled, as a condition of his employment, to assume that no explosive would be fired until he was out of the zone of danger. This contention seems to me inconsistent with the case of *Kerr* v. *Wm. Baird & Company, Limited* (1911 S.C. 701).

On the whole matter I think the question must be answered in the negative.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law in the negative, recalled the award of the arbitrator, and remitted to him to dismiss the claim.

Counsel for the Appellants—Horne, K.C.—Strain. Agents—Wallace & Begg, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Tuesday, February 25.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

MACKIE *v.* DAVIDSON.

Process—Sheriff—Remit for Jury Trial—Substantial Character of Cause—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

In an action of damages at common law in the Sheriff Court for £300 for personal injury and injury to property the pursuer required the cause to be remitted to the Court of Session for jury trial. The Court *refused* a motion to remit the case back to the Sheriff, and ordered issues, on the ground that *ex facie* of the record the action was not unsuitable for jury trial in the Court of Session, the injuries averred being serious and the damages sought substantial.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30, enacts—"In cases originating in the Sheriff Court . . . where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof . . ., it shall, within six days thereafter, be competent to either of the parties who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a Judge of the Division before whom the cause depends."

William Thomas Mackie, commercial traveller, Aberdeen, *pursuer*, brought an action in the Sheriff Court at Aberdeen against Duncan Davidson, landed proprietor, Inchmarlo, Banchory, Kincardineshire, *defender*, for £300 damages in respect of injuries sustained by the pursuer to his person, motor cycle, and clothes, through the fault of a motor car driver, an employee of the defender, who on 5th October 1912, while driving a motor car belonging to the defender in Queen's Road, Aberdeen, ran down the pursuer, who was riding a motor cycle.

The pursuer averred, *inter alia*—"(Cond. 4) As the result of the pursuer being run down as aforesaid he sustained severe injury, and his motor cycle of the value of £40 was completely destroyed and his clothing ruined. He was knocked insensible, and did not recover consciousness until after he had been conveyed to the Aberdeen Royal Infirmary. The front of the motor car struck him a severe blow on the head, causing a wound of several inches in length. He was thrown to the ground with great violence and sustained numerous bruises on the arms, legs, and body. The wound on his forehead will leave a large permanent disfigurement. The result of the said accident will probably leave a