himself, but those raised by the specified relations after his death.

The present action is raised by the father of a deceased workman in his own right, and under the Act of 1906 he could not in my opinion have removed it to the Court of Session for jury trial or otherwise than by appeal on point of law.

But then the Sheriff Courts Act of 1907 steps in and incautiously uses the word employee in place of workman, and gives no definition extending it beyond its natural meaning. It provides (section 30) that in causes originating in the Sheriff Court, when the claim is more than £50 in value, the case may be removed to the Court of Session for jury trial, but with the exception of claims by employees against employers in respect of injury—in fact, with the exception of just those cases which were specially provided for under the Act of the previous year 1906, section 14, only that the term "employee," without any extending definition, replaces the term "workman" with one.

This is just another instance of the haste and want of comprehensive care of which the Sheriff Courts Act of 1907 has already shown so many instances. But it has got to be applied as it stands. Section 31, then, in the excepted cases—again using the definite term "employee" without any extending definition—provides to either party an optional right to require a special kind of jury trial in the Sheriff Court, and excludes appeal for jury trial to the Court of Session. And so the employee himself is debarred from appealing to the Court of Session for jury trial, but is given the option of a Sheriff Court jury trial. The relative suing in his own right, not being an employee, expressly or by definition, is on the other hand impliedly excluded from demanding a Sheriff Court jury trial on the new model. But appeal for jury trial is open to him unless his case is still governed by section 14 of the Act of 1906.

I should have held this to be so but for the repeal clause (section 52) of the Sheriff Courts Act of 1907, which repeals all statutes *per aversionem* "now in force so far as the same are inconsistent with the provisions of this Act." Section 14 falls, I think, under this repeal.

The present appeal, which was in my opinion incompetent in 1906, is therefore made competent in 1907. I therefore agree in the result at which your Lordship has arrived.

LORD MACKENZIE—I agree with the opinion delivered by your Lordship in the chair.

LORD KINNEAR was absent.

The Court repelled the objection and ordered issues.

Counsel for Pursuer (Appellant)—Watt, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders (Respondents)—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Thursday, March 9.

FIRST DIVISION.

[Sheriff Court at Linlithgow.

CONWAY AND ANOTHER *v.* PUMPHERSTON OIL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (1)—"*Arising Out of and in the Course of the Employment*"—*Disobedience of Order by Entering Forbidden Area.*

C., a drawer employed in a coal mine, along with a companion S., was working in a level from which they were driving an "upset." On the morning of the day of the accident the fireman discovered an outbreak of gas in the "upset," and accordingly placed a board across the entrance, chalking upon it, "No road up here," such a board or fence being the usual mode of warning persons that it was dangerous to enter the place so fenced. Both C. and S. understood what the putting up of the board meant, and that it was dangerous to work in the "upset." C. and S. were working that morning at a different part of the mine. C. required a pick, and knowing that S. had left one in the "upset," went to get it. S., who had been warned by the fireman earlier in the day not to go into the "upset" for the pick, but to get one from another place which he named, called out to C. that he was to go to this other place, but C. did not apparently hear what he said. C. entered the "upset," passing over or under the fence with a naked light in his cap, an explosion took place, and he was killed.

Held that as at the time of the accident C. was acting within the sphere of his employment, the accident was one arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906.

This was a Stated Case, on appeal, in an arbitration under the Workmen's Compensation Act 1906, between John Conway, labourer, Caldercruix, Airdrie, and another, *claimants*, and the Pumpherston Oil Company, Limited, *defenders*.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, in which I was asked by the appellants to award them compensation on the narrative that they were partially dependent on the earnings of their son Maurice Conway, who died on 19th January 1910, in consequence of personal injury by accident arising out of and in the course of his employment as a drawer with the respondents.

"In the course of the arbitration the following *facts* were admitted or proved to my satisfaction:— . . . 5. The accident to the deceased occurred on 17th January 1910 in the respondent's No. 3 Starlaw

shale mine, where he had for the two previous years been employed by them as drawer to a miner named John Sneddon. The deceased was twenty-eight years of age, was well acquainted with the general and special rules in force at the mine, and had the reputation of being a careful and experienced workman. 6. Sneddon and the deceased worked in the No. 36 level, and they were driving an 'upset' therefrom. At the date of the accident this upset had been driven up from the level 63 feet, and the upset has a rise in 1 in 3. 7. About seven o'clock on the morning of the accident, as Sneddon and the deceased arrived at the mine-head at slightly different times, each of them was told by the respondents' fireman not to enter the upset until he came down to them later. The fireman had on his first round of inspection that morning discovered a dangerous accumulation of gas in the upset, and had at once duly placed at the mouth of the upset a proper and well-recognised fence as a warning to everybody that it was dangerous to enter the upset beyond the fence. The fence consisted of a 'tree' placed diagonally across the mouth of the upset at a point 6 feet up from the line of the level; and there were written with chalk on the side of the tree next the level the words 'No road up here.' Neither to Sneddon nor to the deceased did the fireman say at any time before the accident in so many words that gas was the danger which had caused him to fence the upset; but from what the fireman did say to them they both perfectly understood that he had found a dangerous accumulation of gas which would require to be removed before they could enter the upset. As it happened, Sneddon and the deceased had not intended to work that day in the upset, as there was work in the level which had to be done by them. Accordingly on the morning in question they worked in No. 36 level until nine o'clock, when they left the level and went a short distance away to a place where they were in use to eat breakfast. 8. While Sneddon and the deceased were away at breakfast, the fireman made his second inspection of their upset with his safety lamp, and finding that there was no diminution in the quantity of gas therein, he determined in his own mind to fan the gas out if Sneddon or the deceased desired to work in the upset that day, or to re-erect the fence at the mouth of the upset (which he had temporarily taken down shortly before beginning his second inspection of the upset for a purpose which had no bearing on the merits of this case) if neither Sneddon nor the deceased proposed to spend any part of their shift in the upset. 9. When the fireman returned from the face of the upset he found the deceased at the mouth of the upset, and having ascertained from the deceased that neither he nor Sneddon desired to work in the upset that day, the fireman at once and in the presence of the deceased re-erected the fence exactly as he had erected it that morning after his first inspection of the upset. 10. The fireman on re-erecting the fence did not repeat in spoken words to the deceased his previous order not to enter the upset, but the deceased (*a*) stood watching the fireman re-erecting the fence (which had the aforesaid warning in chalk —see paragraph 7 hereof—written thereon) at the mouth of the upset, and (*b*) perfectly understood that he was thereby excluded from the upset beyond the fence for all purposes. 11. The fence was re-erected about 9·30, whereupon the deceased proceeded from the mouth of the upset along the level a short distance to resume his work in the level, while the fireman proceeded from the mouth of the upset, also along the level but in the other direction, and met Sneddon at a point on the level about 66 feet from the mouth of the upset. The fireman then (not content with having just before asked the deceased concerning the intentions of the deceased and Sneddon as to work for the rest of that day), asked Sneddon whether he or the deceased desired to work in their upset that day, and Sneddon replied that the only thing he would want in the upset that day was a pick which he had left there. The fireman told Sneddon that he was not to go into the upset for a pick, and also told him of a safe place (MacFadyen's place), only a little more distant, where he could get a suitable pick. At the close of this conversation between the fireman and Sneddon (which was not heard by the deceased) they separated, and Sneddon proceeded along the level and joined the deceased at his work therein. 12. Almost immediately after Sneddon joined the deceased at work, the deceased left his work to get a pick which would be sharper and more suitable for his work than any of those which they had in the level. Sneddon had not told the deceased to go for a pick, but the deceased's errand of going somewhere for a pick was in itself quite a proper one connected with his work. It was on his own initiative that the deceased left the place where he had been working, but he did so because he knew that Sneddon wanted a pick to be got. The deceased knew that Sneddon had left a suitable pick in the upset, and he left his work without asking Sneddon where he should go for one, and indeed without telling Sneddon that he was going away at all. Sneddon, however, seeing that deceased was proceeding along the level, and guessing that he was going for a pick, called out after him to know where he was going. The deceased, continuing his journey, replied that he was going for a pick. Sneddon then called out after the deceased that he was to go to MacFadyen's place for a pick, but by that time there was a distance of 50 feet between them, and it is now evident that the deceased did not hear Sneddon's direction that he was to go to MacFadyen's place. 13. When the deceased reached the mouth of the upset (which is some 60 or 70 feet from the spot where he had left Sneddon), he went up to the fence and deliberately passed through it, either by stepping over it, or by stooping under it. When he had proceeded more than half

way up the upset, an explosion of gas was caused by the naked light in his cap about 9·45 (15 minutes after the fence had been re-erected in his presence by the fireman), by which explosion he was so injured that he died in the Royal Infirmary, Edinburgh, on 19th January 1910. 14. Special rule 100 (*vide infra*) was well known to the deceased, and the remarks which he made after the accident do not enable me to affirm with certainty what induced him to run the risk which proved fatal to him, but probably he hoped to reach the pick before he reached the gas. 15. In the course of different conversations after the explosion the deceased (*a*) stated that he knew that he had done wrong in passing through the fence; (*b*) stated that he did not know what he had been thinking about when he passed through the fence; (*c*) said it was a pity he had not been told not to go up the upset; and (*d*) explained that he thought the upset was clear, because he had seen the fireman using a naked light while re-erecting the fence. 16. While the fireman was re-erecting the fence, the fireman did have a naked light in his cap, but while so engaged the fireman was always standing on the safe side of the fence, *i.e.*, on the side of the fence next the level, where it was the proper and workmanlike thing for all to use a naked light."

The Sheriff-Substitute further stated—"On the foregoing facts, I inclined in law to the view that although the deceased was in the upset to get a pick for his work, yet as the respondents had forbidden the deceased to enter the upset for any purpose whatever, and had thus to his knowledge entirely removed the upset from the scope of his employment, the accident which the deceased himself caused by entering and being in the circumstances above set forth in the upset, did not arise out of and in the course of his employment with the respondents, and having so decided, I assoilzied the respondents with expenses on the higher scale. Had I felt myself entitled to make an award of compensation I would have awarded to the male appellant the sum of £78 with expenses on the higher scale, but I would not have made any award to the female appellant, in respect I inclined in law to the view that a wife living in family with her husband could not in such circumstances as the present be competently conjoined with him as a claimant."

The *question of law* was—"Whether in the foregoing circumstances I was justified in deciding that the deceased's accident did not arise out of and in the course of his employment with the respondents?"

Special rule 100 was as follows—"All workers are prohibited from entering or remaining in any place throughout the whole mine where not absolutely required by duty to be at the time, and on no account shall they proceed through any fence, or pass any notice erected to indicate that danger exists."

Argued for appellants—It was irrelevant to say the deceased had been guilty of misconduct where as here the injuries had resulted in death. Nor was it sufficient in any case to prove merely disobedience; it must be shown that the workman was acting for his own purposes and not in his master's interests at the time he met with the accident—*Whitehead* v. *Reader*, [1901] 2 K.B. 48, *per* Collins, L.J., at 51; *M'Nicolas* v. *Dawson & Son*, [1899] 1 Q.B. 773, *per* Collins, M.R., at 778; *Logue* v. *Fullerton, Hodgart, & Barclay*, June 26, 1901, 3 F. 1006, 38 S.L.R. 738; *Sneddon* v. *Greenfield Coal and Brick Company, Limited*, 1910 S.C. 362, 47 S.L.R. 337. The cases of *Smith* v. *Lancashire and Yorkshire Railway*, [1899] 1 Q.B. 141; *Smith* v. *South Normanton Colliery Company*, [1903] 1 K.B. 204; and *Reed* v. *Great-Western Railway*, [1909] A.C. 31, were distinguishable, for there the injured men were not engaged in any act of service at the time they met with their respective accidents. Here the deceased was acting in his master's interest, for he was going for a suitable pick, and to an area which was only temporarily closed, and which was only 60 feet off. He was therefore in the course of his employment when he met with the accident.

Argued for respondents—There was evidence here on which the Sheriff-Substitute might reasonably find as he did, and that being so the Court would not interfere with his decision. The accident in question could not be said to have arisen in the course of the deceased's employment, for the arbiter had found that the deceased knew he was forbidden to enter the "upset." An employer was entitled to exclude his workmen from dangerous areas so as to place men going there outwith the scope of their employment—*Losh* v. *Richard Evans & Company, Limited*, [1902], 19 T.L.R. 142. To be within the Act the workman must have met with the accident at a place where he was reasonably entitled to be—*Moore* v. *Manchester Liners, Limited*, [1910] A.C. 498, *per* Loreburn, L.C., at p. 500, and here the workman was not. The case of *Jackson* v. *General Steam Fishing Company, Limited*, [1909] A.C. 523, was distinguishable, for there the *locus* of the accident was within the area of the duty of the deceased. A workman was not entitled to enter on an area where danger to life was involved and which his employer had marked off so as to protect his employees against such danger. It was irrelevant to say he had gone there in his master's interests. The question of *locus* was one of importance, for a master was entitled to define the kind of work, the area of the work, and the hours of work—*Moore* (*cit. sup.*). Reference was also made to *Anderson* v. *Fife Coal Company, Limited*, 1910 S.C. 8, 47 S.L.R. 3.

At advising—

Lord President—The appellants here are the dependants of Maurice Conway, a drawer employed in a coal mine, who lost his life while working in the mine. The facts set forth by the Sheriff are briefly these. Conway, with a companion, Sneddon, was working in a level from which

they were driving an "upset." One morning dangerous gas was discovered in the "upset" by the fireman, and he accordingly took steps to prevent their working there. This he did by putting a board across the upset and chalking upon it "No road up here"; such a board or fence being the usual mode of warning persons that it was dangerous to enter the place so fenced. I need not go into further details, because it seems to be perfectly certain that both Conway and his companion understood what the putting up of the board meant, and that it was dangerous to work in the "upset." On the morning in question they had not intended to work in the "upset," and they worked at another place upon the level. While they were away at breakfast the fireman made a second inspection, and before the second inspection he took down the fence temporarily, but after the inspection he put it up again. On re-erecting the fence he did not say anything to the deceased, but I think we must take it that the deceased was perfectly aware of the meaning of the erection of the fence.

The fireman did not take immediate measures to get rid of the gas. He had a conversation with Sneddon, in which he asked him if he wanted to go to the "upset" for any reason, and Sneddon said the only thing he would want in the "upset" was a pick which he had left up there. The fireman told Sneddon that he must not go into the "upset" for the pick, and that he could get a suitable pick at another place, not in the dangerous neighbourhood, which was known by the name of "MacFadyen's place." The fireman then went away, and after the work began Conway needed a pick, and went to get one. He also knew that this pick had been left in the "upset," and he proceeded to go there. Sneddon seems to have called out to him that he ought to go to "MacFadyen's place," but it seems probable that Conway did not hear what Sneddon was saying. Conway went to the "upset," passing over or under the fence with a naked light in his cap. An explosion ensued, and he was killed.

Now the learned Sheriff-Substitute, after setting forth these facts which I have briefly summarised, continues—"I inclined in law to the view that although the deceased was in the 'upset' to get a pick for his work, yet as the respondents had forbidden the deceased to enter the 'upset' for any purpose whatever, and had thus to his knowledge entirely removed the 'upset' from the scope of his employment, the accident which the deceased himself caused by entering and being in the circumstances above set forth in the 'upset' did not arise out of and in the course of his employment with the respondents." And having so decided, he of course assoilzied the respondents.

The learned Sheriff-Substitute has thus admittedly put his judgment upon what he calls a legal view. I am not able to agree with him in that legal view. I think that one of the best statements of the law on this point may be found in the judgment of Lord Justice Collins in the case of *Whitehead* v. *Reader*, [1901] 2 K.B. 48 at 51, where he says this—"I agree in what has already been pointed out, that it is not every breach of a master's orders that would have the effect of terminating the servant's employment so as to excuse the master from the consequences of the breach of his orders. We have to get back to the orders emanating from the master to see what is the sphere of employment of the workman, and it must be competent to the master to limit that sphere. If the servant acting within the sphere of his employment violates the order of his master, the latter is responsible. It is, however, obvious that a workman cannot travel out of the sphere of his employment without the order of his employer to do so; and if he does travel out of the sphere of his employment without such an order, his acts do not make the master liable either to the workman under the Workmen's Compensation Act 1897, or to third persons at common law."

I think that the word "sphere" which his Lordship uses is probably as convenient as any other word, although being more or less metaphorical it is perhaps not appropriate for the purpose of an absolute definition. It is obvious, I think, that there are two ways in which a servant may be outwith the sphere of his employment. One way—and in these cases the question is generally of easy solution—is where a servant does some other sort of work than that for which he is engaged. To take a very simple and obvious instance—if the footman on the box of a carriage, with the assent of the coachman, took it into his head to drive the horses, there would be no question, I think, that if any accident happened to him it would not be in the course of his employment, for it is not part of a footman's business to drive, although it is part of his business to sit upon the box.

Then the other class of cases which raises more difficult questions is where a servant goes into what I may call a territory with which he has nothing to do. An illustration of that may be got from the case of *O'Brien* v. *Star Line Limited*, 1908 S.C. 1258, where a seaman was found in the wrong part of the ship, having fallen down into the hold from a quarter of the ship to which he had no right to go for anything connected with his work. On the other hand, so long as the servant is not outside the sphere of his employment it is perfectly settled, not only by the case of *Whitehead* v. *Reader*, which I have cited, but by many other cases, that mere disobedience to an order does not place the servant outside the sphere of his employment. Disobedience might or might not have been, under the law as it stood on the earlier Act, serious and wilful misconduct; but owing to the provisions of the later Act we have nothing to do with that matter in a case like the present where death has ensued from the accident.

With this general statement, which I

quite admit is not a definite statement, but is merely a statement of the considerations with which one must approach the facts of each case, I come to the facts of this case.

Now the important facts of this case seem to me to be these. Conway was at the moment acting within his employment. He was not doing any job of his own, as the footman in the case I have put would be doing, for he would really be amusing himself, or as the seaman in the other case to which I have referred, who was certainly not engaged on his master's work. The man here was fetching a pick for the work on which he was engaged. Doubtless in fetching the pick he controverted an order —because I think it must be held to be quite clear that he knew that he had no right to go up the "upset"—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 conclusion, therefore, to which I have come is that the view which the Sheriff-Substitute took of the question in law is wrong, and that the case ought to be remitted to him to award compensation.

LORD KINNEAR—I agree with your Lordship. I think that the question is a fine one, but I have come without hesitation to the same conclusion as that at which your Lordship has arrived. I think the other point of view is presented very clearly in the Sheriff-Substitute's statement of his decision, where he says that "On the foregoing facts"—which are exactly the facts which your Lordship has narrated—"I inclined in law to the view that although the deceased was in the upset to get a pick for his work, yet, as the respondents had forbidden the deceased to enter the upset . . . and had thus . . . removed the upset from the scope of his employment, the accident . . . did not arise out of and in the course of his employment with the respondents."

Now I do not think it doubtful that the accident arose "out of" the employment in the sense in which these words have been interpreted by the highest authority, inasmuch as the risk to which the workman was exposed was a risk which in its own nature is incidental to the service of a miner. Whether it was "in the course of" his employment is a different matter, and I think that the considerations which must be satisfied in order to enable us to say that it was, are laid down by the Lord Chancellor in the recent case of *Moore* ([1910] A.C. 498), in which his Lordship says that there are three questions which must be considered in order to answer that general question. In the first place, Was he doing one of the things which he might reasonably do while in his employment? Secondly, Did the accident occur within the time covered by his employment? and thirdly, Did it occur at a place where he might reasonably be while in the employment? Now, it is only the third of these questions that raises any difficulty in the present case.

The workman here, while he was engaged in actual work in one part of the mine, left that part to fetch a pick which he required from another part. That he did so in the course of his employment is not disputed. But then the learned Sheriff-Substitute finds—and I think this was the point argued by the appellants—that the accident occurred at a place where the workman could not be in the course of his employment, because the particular place where the accident occurred had been marked out as a special area cut off from the general area in which he might be employed, and that he knew this and went to a place where he was specially forbidden to go, inasmuch as it had been cut out of the area of employment.

I think the general rule by which that question has to be decided is that which I understand your Lordship to adopt. That the deceased was working within the general area of his employment is beyond all question; but then in carrying out his work within that general area he disobeyed a particular order and put himself in danger by so doing. Now, if it were a defence under the Workmen's Compensation Act that death was caused by negligence which exposed the workman to injury or by wilful disobedience to orders, I think there might have been a different question to determine; but negligence is not in question in this case, and in the case where a man has died in consequence of an accident, even serious and wilful misconduct is not an answer to his claim. Therefore we must assume that if the man satisfied the general conditions of being engaged within the sphere of his employment and went for the ordinary purposes of his employment to a different place, the fact of his disobedience does not in itself take him out of the benefit of the statute.

On the whole matter I agree with your Lordship for the reasons you have given.

LORD JOHNSTON—The workman in this case, on the facts stated by the Sheriff, was working on a level where work was perfectly safe. He was specifically debarred by the orders of his superiors from entering upon an upset, where he had been working the day before, by reason of the discovery of an accumulation of firedamp. He not only was apprised of the reason of the order, but the upset was closed in his presence by a fence which had a well-recognised meaning.

The deceased was at the time of his fatal injury actively engaged in the work of his employment. A pick was required, and he was on his way to get one. Had an explosion occurred at the entrance to the upset as he was passing it and going elsewhere for a pick, there would have been no question but that liability attached to his employers. He would have been in the course of his employment, and the accident would have arisen out of his employment.

I do not think that he ceased to be within the scope or the sphere, which is only another way of saying within the course of his employment, because his serious and wilful misconduct took him with a naked light in his cap into the upset, not for his own purpose, but in prosecuting his work—that is, into a place which was beyond the area of his employment, and was indeed a forbidden area. The case bears to be thus distinguished from *Reed* v. *Great Western Railway Company* ([1909] A.C. 31).

LORD MACKENZIE—I agree with your Lordship that the question which has to be determined in this case is whether at the time that the accident happened the servant was acting within the sphere of his employment, and one passage in the findings of the Sheriff-Substitute states that the deceased was going for a pick at the time he was injured, and that this was quite a proper thing to do in connection with the work on which he was engaged. He was therefore not going to the upset for any purpose of his own, and was not idling, but was engaged in his work. The only defence stated is that there was a standing order that he was not to go to the particular place to which he went for the pick.

Now in certain circumstances I think that it may be taken that forgetfulness may be the real explanation of what is done in such a case as the present. I notice that it is stated that after the accident the deceased stated he did not know what he had been thinking about when he passed through the place. If that be the explanation, it seems to me that it is impossible to hold that he was outside the spere of his employment. But then, even if it were not forgetfulness, and he went there because he thought it was necessary for him to do so, I do not think that even if he disobeyed an order in his doing so that would deprive him of benefit under the Act.

In the case of *Whitehead* Lord Justice Romer refers to the case of a workman's disobeying orders on the impulse of the moment, and says that in certain circumstances "It may well be regarded as a venial act." I am of opinion with your Lordships that the appellants are entitled to compensation.

The Court answered the question of law in the case in the negative, recalled the determination of the Sheriff-Substitute as arbitrator, remitted to him to award compensation to the appellants, and to proceed as accords.

Counsel for Appellants—Morison, K.C.—Kirkland. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Respondents—J. R. Christie—Crawford. Agents—R. & R. Denholm & Kerr, Solicitors.

Thursday, March 16.

SECOND DIVISION.

[Lord Cullen, Ordinary.

WIGHT *v.* NEWTON.

Lease—Constitution—Draft Lease—Clause Relating to Repairs not Finally Adjusted—Rei interventus.

A farmer offered to take a lease of a farm. At a meeting of parties on 31st August 1906 a draft lease was adjusted, save a clause which bound the landlord to put the housing in a state of repair, and the tenant, subject to such repair, to accept the housing, "dykes, fences, gates, hedges, drains, ditches, watercourses, and others" on the farm as in good habitable and tenantable condition and to maintain them. Both parties being under the impression an agreement had been arrived at, the farmer entered into possession at Martinmas 1906, took over the outgoing tenant's stock and crop, cultivated the land and paid the rent as provided in the draft lease, and expended a considerable sum of money on the farm. In July 1909 the draft lease, which had been retained by the landlord's agent, was sent to the farmer's lawyer, who altered the clause objected to by taking the landlord bound to put in repair not only the housing but also the "dykes, fences, gates, hedges, drains, ditches, watercourses, and others," which was as originally desired by the farmer. The landlord proposing to treat the farmer as possessing on yearly tenancy only, the latter sought declarator that the former was bound to execute a formal lease in the terms desired by him or in such terms as the Court might adjust.

Held that a valid contract of lease had been constituted, and the landlord *ordained* to execute a formal lease in terms of the draft founded on, omitting the clause dealing with the obligations both of landlord and tenant as to fences and drains.

George Wight, farmer, Longnewton, Haddington, brought an action against W. D. O. Hay Newton, of Newton, Haddington, in which he concluded for declarator that the defender had let to him the farm of Longnewton and Latch for nineteen years from Martinmas 1906, "all in terms of and under the conditions specified in the draft lease to be produced at the calling," and it being so found and declared that the defender should be ordained to execute a lease in pursuer's favour, in terms of and under the conditions specified in said draft lease, "or in such terms as shall be fixed and determined by our said Lords."

The pursuer pleaded—"(1) The pursuer having entered into possession of the subjects of let at Martinmas 1906, and possessed the same since that term, and having expended considerable sums on the faith of the lease condescended upon, and having