[1916] 2 K.B. 177; *M'Gregor* v. *Ross & Marshall*, 1883, 10 R. 725, *per* Lord Young at p. 729, 20 S.L.R. 462. It was not averred that the defender was responsible for the tumult, and the danger was just as obvious to the customer as to the shopkeeper. The duty of the defender under the licensing laws was quite a different question from the present one and was not a relevant ground of fault in a civil action. (2) The injury was not a reasonable and probable consequence of the disturbance, and accordingly the defender was not liable—*Hadley* v. *Baxendale*, 1878, 3 Q.B.D. 525. That, no doubt, was a case of contract, and the law there laid down extended to such acts as the present. If the defender were liable here he would also be liable if an intoxicated customer went out into the street and injured someone there.

Argued for the pursuer—The duty of a person who kept a public-house or an inn amounted to a warranty to customers not only as regards structural defects but as regards an assault by one customer on another — Bevan on Negligence, p. 857; *Maclenan* v. *Segar*, [1917] 2 K.B. 325. The only qualification to this rule was that there must be knowledge in the case of assault that a danger was threatening the guest—*Brannigan* v. *Harrington*, 1921, 37 T.L.R. 349. In the cases of *Pounder* v. *North Eastern Railway Company*, *cit. sup.*, and *Cannon* v. *Midland Great Western Railway Company*, *cit. sup.*, no reasonable precautions could have been taken. [The Lord Justice-Clerk referred to *Scott* v. *Shepherd*, 1773, 1 Smith's Leading Cases, 2 W.B. 892]. In the present case riotous conduct had been going on for some time before the pursuer entered. It was, therefore, the duty of the defender to take some precaution to prevent people entering, or at any rate to call in the police. A member of the public was entitled to assume that business would be conducted in terms of the certificate — Bevan on Negligence, p. 858. In the present case the liability of the defender arose under common law.

Lord Justice-Clerk — In this case the Sheriff-Substitute allowed a proof, and the pursuer has had the case remitted for jury trial. If an issue is to be allowed at all, no objection is taken to the issue proposed. The defenders, however, maintain that the statements of the pursuer are irrelevant. I confess I do not think that this is a case that should be disposed of on relevancy, to the effect of excluding inquiry. I think that the facts must be inquired into. If so, the tribunal to investigate the facts must, it appears to me, be a jury. It seems, therefore, to me that we must approve of the issue and remit the case for trial by a jury. Difficult questions of fact and of law may arise, but these are questions to be decided by the jury and the judge.

Lord Dundas—I have considerable difficulty in this case. I confess I am not easy in my mind about sending it to a jury. It seems to me typically a case that should be disposed of by proof before answer. That, however, we could not do without the consent of the pursuer, which was withheld. In the circumstances I do not think we could throw the action out upon the pleadings as being irrelevant. Therefore, but with very little goodwill on my part, it must go to a jury.

Lord Ormidale — I concur with your Lordships.

Lord Salvesen did not hear the case.

The Court approved of the issue for the trial of the cause.

Counsel for the Pursuer and Appellant—Morton, K.C. — Crawford. Agents — Gardiner & Macfie, S.S.C.

Counsel for the Defender and Respondent —Constable, K.C. — Keith. Agent — Peter Clark, S.S.C

Friday, March 11.

SECOND DIVISION.

[Sheriff Court at Lanark.

COLTNESS IRON COMPANY, LIMITED *v.* BAILLIE.

Master and Servant—Workmen's Compensation — "Arising out of and in the Course of the Employment"—Breach of Statutory Rule — Added Peril — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Explosives in Coal Mines Order, dated 1st September* 1913, *sec.* 3 (*a*).

Paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913 provides — "If a shot misses fire the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

In a mine to which the above regulation applied a shot missed fire and a miner who was not the person who had lit the fuse returned to the working face for the purposes of his work within the time prohibited by the Order and was injured in consequence of the shot then going off. *Held* that the prohibition did not apply to him in respect that he was not the person firing the shot, and that in so returning he had not added a peril so as to take him outside the sphere of his employment.

In an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court at Lanark between John Baillie, miner, Douglas Water, *respondent*, and Coltness Iron Company, Limited, *appellants*, the Sheriff - Substitute (Harvey), sitting as arbiter, found the company liable in compensation, and at their request stated a case for appeal.

The Case stated—"The following *facts* were established, viz.—1. On 5th April 1920, and for a number of years prior thereto, the

respondent was employed by the appellants as a miner in their Douglas Colliery, Douglas, and on the date mentioned he was engaged along with his sons William and John Baillie getting coal in the Stoney Seam of said colliery and at a part thereof known as Baillie's Level, by pick and blasting. 2. The said Colliery is one in which the use of safety lamps is not required, and in which, subject to certain conditions, a shot may be fired by means of a naked light applied to a fuse and by a person not appointed a shot firer. 3. Paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913 is in force in said colliery, and by said paragraph it is provided as follows:—'If a shot misses fire the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means.' 4. On the morning of the day in question the respondent's son William Baillie bored a shot-hole, the respondent placed explosives and a detonator in said shot-hole, and 'stemmed' the hole with packing, leaving the fuse attached to the detonator projecting from said shot-hole for the purpose of firing the shot. 5. In the said Stoney Seam it was the practice of the miners to fire their shots at the same time in order that work should be interfered with as little as possible by the accumulation of smoke and reek. 6. The respondent's neighbours at the working face at the time were Robert Muncie, Robert Brown, and a boy, who were getting coal by the same methods at an adjacent part of the face known as 'Muncie's Heading,' separated by about 20 feet of clear space (from which the coal had been removed) from Baillie's Level, and these neighbours had on the morning in question prepared a shot for firing at Muncie's Heading, the intention being that the two shots should be fired at the same time. 7. The said Robert Brown having intimated to the respondent that their shot at Muncie's Heading was ready for firing, and that their fuse was running, the respondent's son William Baillie applied his open light to the fuse at Baillie's Level for the purpose of firing their own shot. 8. On the light being applied the fuse showed no signs whatever of being ignited and the respondent, his son William, and the said Robert Brown, all of whom were present when the attempt was made, were under the *bona fide* belief that the said fuse at Baillie's Level had not been lighted. 9. The respondent and the other workmen named then left the face and retired to a safe distance pending the explosion of the shot at Muncie's Heading. 10. After Muncie's shot had exploded the respondent, in the honest belief that his fuse had not been lighted and within the statutory limit of one hour from the time when the attempt (successful or unsuccessful) was made to light his own fuse, went back to the shot-hole at Baillie's Level with the intention of cutting off the end of the fuse and lighting it at a new point. Just as he had reached the shot-hole with this intention the shot exploded in his face inflicting serious and permanent injuries. 11. As the result of said accident the respondent's right eye was destroyed, his left eye damaged, and shock, and other injuries sustained by him. 12. The respondent's average weekly earnings prior to said accident were £5, 15s., and as the result of said injuries he has been since said 5th April 1920, and still is, totally disabled for work. 13. The explosion of said shot at Baillie's Level was due either to the inner section of the fuse having been ignited by the application of William Baillie's lamp, or to a spark of flame from the shot fired at Muncie's Heading having reached the explosives in the charge at Baillie's Level.

"From these facts I found in law (1) that the shot fired or attempted to be fired by the respondent did not 'miss fire' within the meaning of the regulation in question; (2) that his exposure of himself to danger and his presence at the working face when the shot exploded was caused by mistake and inadvertence and by accident; (3) that in so exposing himself to danger he was not guilty of serious and wilful misconduct, since his contravention of the regulation—if there was a contravention—was unintentional; and (4) that he was injured in the manner stated by accident arising out of and in the course of his employment by the appellants within the meaning of the said Act. I therefore awarded the respondent compensation as for total incapacity at the rate of 20s. a-week (with war additions) from said 5th April 1920 until further order under said Act, and found him entitled to expenses."

The *questions of law* for the opinion of the Court were—"1. Was I right in the above finding in law, holding that the shot which caused the respondent's injury had not missed fire within the meaning of paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913? 2. Were the remaining findings in law well founded? 3. On the foregoing facts was I entitled to find that the accident to the respondent arose out of and in the course of his employment with the appellants?"

In the course of the argument in the Division it was conceded that the shot had missed fire in the sense of paragraph 3 (*a*) of the Order quoted *supra*.

Argued for the appellants—On a proper interpretation of the rule the respondent was the person firing the shot. The maxim *qui facit per alium, facit per se*, applied. If, however, the rule did not apply, the man's exposure was deliberate and not accidental, and constituted an added peril which took him out of the sphere of his employment—*Fife Coal Company, Limited* v. *Colville and Others*, 1920, 58 S.L.R. 85; *Smith* v. *Archibald Russell, Limited*, 1921, 58 S.L.R. 284; *Brown* v. *Baton Colliery Company, Limited*, 1921, 58 S.L.R. 268.

Argued for the respondent—The respondent was not the person firing the shot, because he did not apply the light, and the rule therefore did not apply—*Kerr* v. *William Baird & Company, Limited*, 1911

S.C. 701, 48 S.L.R. 646; *Smith* v. *Fife Coal Company, Limited*, 1914 S.C. (H.L.) 40, 51 S.L.R. 496. Further, the fact that the respondent went back within the hour did not constitute an added peril, because assuming that the prohibition did not apply to him he had not done anything unreasonable in going back. The case of *Costello* v. *Robert Addie & Sons (Collieries), Limited*, 1921, 58 S.L.R. 286, was also referred to.

LORD JUSTICE-CLERK — Questions have been raised in this Stated Case which are not altogether easy to answer by reason of developments of the law in recent decisions, but I have come to be of opinion that some of the difficulties do not necessarily arise in the disposal of the case before us. The first question is — "Was I right in the above finding in law holding that the shot which caused the respondent's injury had not missed fire within the meaning of paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913?" The paragraph begins — "If a shot misses fire — (*a*) the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than an hour." It is now conceded that the shot did miss fire, and the only question which was argued before us was whether the terms of paragraph 3 (*a*) applied to the injured workman. It was maintained that the injured workman was not "the person firing the shot." It seems to me quite plain on the facts stated in the Case that the injured workman was not "the person firing the shot," because the Case states—"The said Robert Brown having intimated to the respondent that their shot at Muncie's Heading was ready for firing, and that their fuse was running, the respondent's son William Baillie applied his open light to the fuse at Baillie's Level for the purpose of firing their own shot." John Baillie was the workman who was injured. It seems to me plain that the person firing the shot in the sense of the paragraph in question was William Baillie and was not the injured workman John Baillie.

Paragraph 2 of the Order says—"(*e*) The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter," and shall also perform various other duties; and the same paragraph also says—"(*g*) The person firing the shot shall, after the shot has been fired, make a careful examination of the place." The Order contemplates that the vicinity should be cleared of all but one individual, and should not be resorted to again until that same individual had examined the place. That individual is determined by being the person firing the shot. Now it was the respondent's son William Baillie who applied the open light to the fuse. Mr Moncrieff referred us to the cases of *Kerr* (1911 S.C. 701) and *Smith* (1913 S.C. 662, 1914 S.C. (H.L.) 40), both decisions of this Division. *Smith's* case followed *Kerr's* case, but was reversed by the House of Lords because they held that the circumstances of *Kerr's* case were different from those in *Smith's* case, so that the workman was not the firer of the shot in the one case though he was in the other. It seems to me that having regard to these decisions and the facts of this case William Baillie and not John Baillie must be taken as "the person firing the shot."

I quite appreciate the argument that this result may affect to a large extent the importance and applicability of the paragraph in question, and may be said to deprive it of much of its beneficial effect. But if it is thought that the scope of the paragraph is unduly limited by the decision which I propose we should give, that is a matter that can be quite easily remedied, because the provision is not in an Act of Parliament but in a Departmental Order, which can be altered at any time by the Secretary of State. Therefore that objection to taking this view has not the same force as it would have had if we had been construing an Act of Parliament. But even if the provision had been in an Act of Parliament I should have been of opinion that it did not apply to anyone except the person actually firing the shot. Accordingly, as regards the first question we must, as a matter of concession, answer that the arbitrator was wrong in holding that the shot had not missed fire.

But if so, then there was no prohibition affecting the injured workman and preventing him from returning. He was honestly in the belief that the shot with which he had been concerned, and of which his son had attempted to fire the fuse, had not been ignited. The only reason for his returning therefore was his desire to get on with his employers' work or with work in the interest of his employers, and he believed that there was no reason on the ground of danger to himself or others why he should not do so. There was no prohibition affecting him, and I cannot hold therefore that he was doing anything that was contrary to the requirements of good sense and propriety in returning as he did. The argument therefore to the effect that he had added a danger or a risk to his employment must be rejected. I think he may have made a mistake or acted inadvertently; but he certainly in my opinion cannot be held to have acted in such a way as could be characterised as breach of any prohibition, either statutory or other, and I do not think that he added such a risk as took him outwith the terms of his employment. The result is that the third question should be answered in the affirmative.

If these two questions, the first and the third, are answered as I have indicated, I think that is enough for the disposal of the case.

LORD DUNDAS—I agree with your Lordship on all points. In the first place, it is plain that we must answer the first question in the negative. It seemed clear, and indeed was admitted by Mr Moncrieff, that on the facts stated and in view of the recent decisions there was here a misfire within the meaning of paragraph 3 of the Order. Next, on a construction of the language of that paragraph I think that the words "the

person firing the shot" must be read as meaning exactly what they say, and I do not see my way to extend them so as to include others than the actual firer. If that is not what is intended or desired, the course would seem to be, as your Lordship has said, that the paragraph should be altered or amended so as to remedy the supposed defect. It seems to me therefore that the paragraph does not apply to the respondent at all. It was suggested that he had been guilty of adding a peril by going back to the face as he did within the hour. I am unable to reach that conclusion. As the paragraph does not in my judgment apply, there was no actual prohibition against his returning, and as he appears to have acted in the *bona fide* belief that all was clear, I cannot say that he was acting outside his employment.

It seems to me therefore that we should answer the first question in the negative, the third in the affirmative, and that it is not necessary to deal with the somewhat obscure findings referred to in question 2.

LORD ORMIDALE—We do not require to decide the question whether or not there was a misfire, because it was admitted that there was a misfire. The first disputed question is whether paragraph 3 (*a*) is applicable or can be held to apply to any other person than he who actually applied the light to the fuse. Now that paragraph speaks of "the person firing the shot." It seems impossible to me to extend the meaning of these words so as to include not only the man whose hand applied the light but all those persons who might be present when he did so. I think it is easy to understand why this paragraph applies only to the individual, because the presumption and provision is that all other persons should have been cleared out of the way, leaving only, when the shot is actually fired, the shot-firer present on the spot. Therefore I agree with your Lordships that we cannot hold that the respondent was in any sense the firer of the shot.

Holding as we do that the prohibition does not apply to the respondent, I think we can come to only one conclusion on the question whether or not he was guilty of adding a peril to his employment, or of acting outwith the sphere of his employment. It seems to me that if the prohibition does not directly affect him he would not be going outside the sphere of his employment if he returned within the time fixed by the Order merely because he knew that there was such a rule affecting the shot-firer. In those circumstances it was open to anyone who was not the shot-firer to exercise to some extent his own judgment. Now what we are told in the case is that the respondent did in point of fact believe that the fuse had not ignited, and on that assumption he came to the conclusion and belief that there was no danger, and it appeared to him that it was his duty to return to what was his ordinary work in the mine, and he did so. On that footing I cannot see that for so doing, although he met with the accident, it can be said that he was hazarding his safety in doing something he was not employed to do.

I therefore agree that the questions should be answered as proposed by your Lordship.

LORD SALVESEN did not hear the case.

The Court answered the first question in the negative, the third in the affirmative, and found it unnecessary to answer the second question.

Counsel for the Appellants — Graham Robertson — Gillies. Agents — W. & J. Burness, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Saturday, March 12.

SECOND DIVISION.

[Lord Anderson, Ordinary.

DAWSONS LIMITED *v.* BONNIN AND OTHERS.

Insurance—Misrepresentation—Warranty—Proposal—Untrue Answer to Question—Materiality.

Under a comprehensive policy a firm of contractors insured a motor lorry with certain underwriters against third party risks, damage by accident, fire, and theft. The policy provided that the proposal should be the basis of the contract and held as incorporated therein, and it provided further that material misstatment or concealment of any circumstances material to assessing the premium, or in connection with any claim, should render the policy void. In the proposal, in answer to the question "State full address at which the vehicle will usually be garaged," the proposers answered, "Above address," the "above address" being their ordinary business address in Glasgow, the buildings of which were stone and were known to the underwriters' agent. As a matter of fact the lorry was garaged at a farm steading within the municipal boundary but some miles away, in a shed built mainly of wood and accommodating, in addition to the car, petrol lorries belonging to the proposer, and some barrels of oil or petrol. A fire broke out and the shed and insured lorry were destroyed. In an action at the instance of the contractors against the underwriters for the amount of the insurance, *held*, after a proof, that even assuming that an express warranty was to be implied, that warranty was qualified by the condition in the policy that any breach complained of must be material, and on the facts that the misstatement in question was a material misrepresentation, and defenders *assoilzied.*

Opinions reserved as to whether a mere recital in a policy that the proposal is to be the basis of this contract