that case. I find myself in special agreement with the judgments of the Lord Justice-Clerk and Lord Skerrington, who I think share my view that circumstances like the present constitute a *casus improvisus* for which the Shops Act provides no remedy. I therefore agree that the question should be answered as your Lordships have proposed.

The Court answered the question of law in the affirmative.

Counsel for the Appellant — Macmillan, K.C.—Keith. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—Macdonald. Agents—Warden, Weir, & Macgregor, S.S.C.

COURT OF SESSION.

Tuesday, January 9, 1923.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

RODGER *v.* FIFE COAL COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Arising out of and in the Course of the Employment—Breach of Statutory Rule—Miner Performing Duties Exclusively Reserved to Shot-firer—Explosives in Coal Mines Order, 1st September* 1913, *Rule* 2 (*h*).

The Explosives in Coal Mines Order of 1st September 1913 provides—Section 2 (*h*)—"Where shots are fired electrically, they shall only be fired by a person authorised in writing by the manager for the purpose. The authorised person shall not use, for the purpose of firing, a cable which is less than 29 yards in length. He shall himself couple up the cable to the fuse or detonator wires, and shall do so before coupling the cable to the firing apparatus. He shall take care to prevent the cable coming into contact with any power or lighting cables. 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 authorised shot-firer, instead of himself coupling the cable to the fuse-wire, handed the cable to a miner, thereby signifying his desire that the latter should couple it to the fuse-wire. While the miner was in course of coupling the cable with the fuse-wire by twisting them together, the shot-firer fired the charge, as a result of which the miner was injured. *Held* that the accident did not arise out of the workman's employment as a miner.

Smith v. *Fife Coal Company*, 1914 S.C. (H.L.) 40, (1914) A.C. 723, 51 S.L.R. 496, *distinguished.*

David Rodger, miner, Kelty, *appellant*, claimed compensation under the Workmen's Compensation Act 1906, from The Fife Coal Company, Limited, Leven, *respondents*, in respect of personal injury sustained by him while in their employment on 5th September 1921.

The matter was referred to the arbitration of the Sheriff-Substitute of Fife and Kinross at Dunfermline (UMPHERSTON), who refused to award compensation, and at the request of the claimant stated a Case for appeal.

The Case stated—"The following *facts* were admitted or proved:—1. On 5th September 1921 the claimant and appellant was employed as a miner by the defenders and respondents in the Aitken Pit, Kelty. The Coal Mines Act 1911 and the Explosives in Coal Mines Order of the 1st September 1913 apply to said pit, and were duly posted at the pithead. 2. The Explosives in Coal Mines Order of the 1st September 1913, provides, *inter alia*—'2 (*h*) (*quoted supra in rubric*).' 3. At the place where the claimant and appellant worked, shots were fired electrically, and a shot-firer named William Jenkinson was duly appointed for the purpose. 4. The claimant's and appellant's working-place was in a heading running off a dook. On said date he had prepared a shot-hole, and William Jenkinson the shot-firer was in attendance for the purpose of firing the shot. 5. The shot-firer handed to the claimant and appellant a detonator or fuse with its attached wires, and the claimant and appellant inserted the detonator into the shot-hole which he stemmed. This was his duty as a miner. 6. The shot-firer then threw one end of the cable to the claimant and appellant. The shot-firer did not say anything, but the claimant and appellant understood that the shot-firer wished him to couple the cable to the detonator, and he proceeded to do so. He had done this on one occasion previously. 7. The shot-firer went out of the heading into the dook, where he coupled the cable to the electrical firing apparatus. He did so without having previously coupled the cable to the detonator wire. While he was thus engaged, two persons passed him, going in a direction where they would be in safety. He called to them, asking if it was all right, and one of them said 'yes.' The shot-firer assumed that these persons were the claimant and appellant and his drawer. He thought they were the only persons in the vicinity. The two persons were the claimant's and appellant's drawer and a boy who had been in the dook beyond the heading. 8. The shot-firer then turned the handle of the firing apparatus in order to generate the current and make the necessary contact to complete the electric circuit and thereby explode the shot. The shot did not go off. Thinking there might be something wrong at the terminals on the firing apparatus, he drew out the cable wires and examined them, but they were correct. He again attached the wires of the cable to the firing apparatus and turned the handle, when the shot exploded and the claimant and appellant was injured by the explosion. 9. The injury sustained by the claimant and appellant was not serious and permanent. 10. After the shot-firer left the claimant and

appellant in his working-place, the latter coupled one of the wires of the cable to one of the wires of the detonator or fuse. He did this in the usual and recognised manner of twisting the two wires together. He was in the act of coupling the other wire of the cable to the corresponding wire of the detonator or fuse by holding the wires in conjunction and twisting them together, when the shot-firer made his second attempt to explode the shot. Had the second pair of wires not been in conjunction there would not have been an electrical circuit, and the shot would not have exploded. 11. The firing apparatus used by the shot-firer was operated by turning a handle sharply. The effect of turning the handle was (1) to generate a current of electricity, and (2) to make firing contact automatically at the end of its travel. On release of the handle the firing contact was automatically broken. In order that a shot may go off it is essential (*a*) that the two cable wires shall have been connected at one end to the detonator wires, and at the other to the terminals of the firing apparatus, and (*b*) that the handle should be turned to the end of its travel. There must be a complete electrical circuit before any current will flow from the firing apparatus by the turning of the handle to the end of its travel, and this is made by having the wires of the cable in contact simultaneously with the terminals of the firing apparatus at one end and the wires of the detonator at the other end. If only one cable wire is connected with one detonator wire and the handle of the firing apparatus is turned to the end of its travel and then released there will be no circuit and no explosion. If the second cable wire is then put in contact with the second detonator wire and the handle of the firing apparatus is turned to the end of its travel there will be a circuit.

"On 28th January 1922 I held (1) that the personal injury by accident which the claimant and appellant sustained on 5th September 1921 did not arise out of his employment, and (2) that it was attributable to his serious and wilful misconduct; and I refused to award compensation."

In a note the Sheriff-Substitute, *inter alia*, stated—". . . Coming to the application of the statutory provisions to the facts, two preliminary observations may be made. The pursuer was entitled to be where he was at the time of the explosion, and one of the risks incident to his employment as a miner was that of injury by shot-firing. On the other hand his action in coupling the cable to the detonator was serious and wilful misconduct—*Smith* v. *Archibald Russell, Limited*, 1921 S.C. 335, and many other decisions—and any injury which he sustained through doing the work of a shot-firer did not arise out of his employment as a miner —*Kerr* v. *William Baird & Company, Limited*, 1911 S.C. 701; *Burns* v. *Summerlee Iron Company, Limited*, 1913 S.C. 227.

"The pursuer's claim was based on the decision in *Smith* v. *Fife Coal Company, Limited*, 1913 S.C. 662, *rev.* 1914 S.C. (H.L.) 40. And the facts in that case are in all relevant particulars identical with those in the present case, with one exception. In *Smith's* case the miner had completed the coupling of the cable to the detonator, and was in course of making his way to a place of safety when the shot-firer exploded the charge and injured the pursuer. And it was held that although the miner had gone outwith the sphere of his employment, and thereby incurred an additional risk which did not arise out of that employment, this act was concluded, and the cause of the injury which he sustained was the shot having been fired before the pursuer had taken proper shelter.

"The difference between this case and *Smith's* case is the smallest conceivable. Measured by time, one or two seconds would have put the pursuer in the same position as Smith. The cause of the pursuer's injury was the double contravention of the Explosives Order by the shot-firer, just as it was in the case of Smith. But here there is added the fact that what the shot-firer did would have had no ill effect had not the pursuer been at the moment assisting him by pressing together the wires of the cable and detonator, thereby completing an electrical circuit, and taking an active and essential part in the shot-firing. I am therefore of opinion that this case should be decided on the ratio of *Kerr* v. *William Baird & Company, Limited* (*cit. supra*), and not on that of *Smith* v. *Fife Coal Company, Limited* (*cit. supra*). The difference in the results between *Smith's* case and the present seems artificial in the extreme, and entirely lacking any human element or reason in common sense. But as the whole Workmen's Compensation Act is artificial in conception, it is inevitable that similar results should follow in its interpretation.

"There is, however, one important difference between this case and that of *Smith*. Smith sustained serious and permanent injury, and the defence of serious and wilful misconduct by breach of the Explosives Order was therefore not open to his employers. The present pursuer's injury was, in the circumstances, remarkably slight, and he has now practically recovered. The hardship in refusing him compensation, if it can be called a hardship, when he brought it on himself, is by no means what it would have been in the case of *Smith*."

The *questions of law* were—"1. Was there evidence on which I was entitled to hold that the personal injury by accident sustained by the claimant and appellant on 5th September 1921 did not arise out of his employment as a miner by the defenders and respondents? 2. Was there evidence on which I was entitled to hold that the personal injury by accident sustained by the claimant and appellant on 5th September 1921 was attributable to his serious and wilful misconduct?"

Argued for the appellant—The appellant was only doing a part of the shot-firer's work. He was entitled to be at the spot where he was until the shot-firer had satisfied himself that no one was near the danger zone. The shot-firer, thinking that he had done so, exploded the charge, thus causing

the injury to the appellant. The shot-firer's negligence resulting in the explosion and consequent injury was the only fault proved. The present case was ruled by *Smith* v. *Fife Coal Company*, 1914 S.C. (H.L.) 40, (1914) A.C. 723, 51 S.L.R. 496. Counsel also referred to *Phillips* v. *Estler Brothers*, 1922, 91 L.J., K.B. 470, 127 L.T. 73; *Sneddon* v. *Glasgow Coal Company*, (1905) 7 F. 485, 42 S.L.R. 365.

Argued for the respondents—The Explosives in Coal Mines Order, 1st September 1913, clearly provided that the shot-firer should himself couple up the cables to the fuse-wires. The appellant had contravened these regulations in arrogating to himself duties which he should not have performed. The fact that the appellant here was in the act of coupling up the wires when the explosion took place sufficed to distinguish the present case from that of *Smith* (*cit.*). He was therefore outwith his employment. Further, the appellant was guilty of serious and wilful misconduct, and on that ground also he was disentitled to compensation. The following cases were also referred to:—*Donnelly* v. *A. G. Moore & Company*, 1921 S.C. (H.L.) 41, (1921) 1 A.C. 329, 58 S.L.R. 85; *Kerr* v. *William Baird & Company*, 1911 S.C. 701, 48 S.L.R. 646; *Smith* v. *Archibald Russell, Limited*, 1921 S.C. 335, 58 S.L.R. 284; *George* v. *Glasgow Coal Company*, 1909 S.C. (H.L.) 1, 46 S.L.R. 28.

LORD PRESIDENT—This case arises out of a contravention of paragraph 2 (*h*) of the Explosives in Coal Mines Order of 1st September 1913. By that paragraph shots are allowed to be fired electrically only by a person who has written authority for that purpose, and the person so authorised is required to do the work of coupling the cable to the fuse-wire with his own hands—a job which must be completed before the end of the cable is coupled to the firing apparatus. In the present case a duly authorised shot-firer instead of himself coupling the cable to the fuse-wire handed the cable to the appellant, a miner, thereby signifying his desire that the appellant should couple it to the fuse-wire. The appellant proceeded to do so. This was a contravention of the plainly implied prohibition in paragraph 2 (*h*) of the Order. The accident was caused by the firing of the charge by the shot-firer while the appellant was in course of coupling the cable with the fuse-wire by twisting them together.

Fortunately there has arisen in this case no question as to the character of the implied prohibition in paragraph 2 (*h*). Parties were agreed in regarding it as one which belongs to the first of the two categories defined by Lord Dunedin in *Plumb* v. *Cobden Flour Mills* ([1914] A.C. 62)—that is to say, as one which limits or restricts the appellant's employment so as to exclude from it the job of coupling the cable to the fuse-wire. I say "fortunately," because it appears from the recent decision in the House of Lords of the case of *Phillips* v. *Estler Bros.* (1922, 91 L.J., K.B. 470, 127 L.T. 73), to which our attention was drawn, that some of the difficulties which the judgments previously pronounced in the three cases of *Donnelly* v. *A. G. Moore & Company*, *Colville* v. *Fife Coal Company*, and *Gordon* v. *Fife Coal Company* (1921 S.C. (H.L.) 41, [1921] 1 A.C. 329) appeared to have removed may still embarrass this department of the law.

The real question on which the present case turns is whether it is distinguishable from the case of *Smith* v. *Fife Coal Company*, 1914 S.C. (H.L.) 40, [1914] A.C. 723. The reason why the point in the case takes that form is that the circumstances in *Smith's* case and the circumstances in the present case are identical except in one particular. That one particular is that in *Smith's* case the workman who (not being an authorised person) performed the operation of coupling the cable to the fuse-wire had just completed it and was in the act of leaving the scene when the explosion occurred, whereas in the present case the workman had just not completed it, but—according to the finding of the learned arbitrator—was still in the act of twisting the wires together when the explosion occurred. In *Smith* the House of Lords took the view (reversing the Second Division of this Court) that the workman was not at the moment of the explosion outside the sphere of his employment because he had actually completed the prohibited act when the explosion occurred, although a second or two immediately before that occurrence he had undoubtedly been acting outside the sphere of his employment. The continuity which in many cases is rightly regarded as inseparably uniting the incidents which contribute to a single event was held to have been definitely broken the moment the workman completed the twisting of the wires together and turned to leave the scene. The contravention of the prohibition on the part of the workman was accordingly held to have played only an historical part in the occurrence of the explosion, and to have had no causal relation with it sufficiently direct as to bring the accident within the class of accidents which arise outwith the workman's employment. If the facts in the present case had been identical with those of the case of *Smith* it would have been our duty to follow the authority of that case. But they are not. In the present case the breach of the prohibition by the workman was in active progress at the time the explosion took place, and it cannot in my opinion be regarded as anything else than a direct and immediate cause of the accident. It is, of course, perfectly true that the mere completion of the coupling between the cable and the fuse-wire apart from the turning of the handle of the firing apparatus by the shot-firer would have produced no effect, but neither would the turning of the handle by the shot-firer have produced any effect unless at the same time the workman had been in the course of completing the very connection upon which depended the transmission of the electric spark to the fuse.

The first question put to us is whether there was evidence on which the learned

arbitrator was entitled to hold that the injury did not arise out of the workman's employment as a miner. In my opinion that question ought to be answered in the affirmative. With regard to the second question, which raises the issue of serious and wilful misconduct, I think it is unnecessary that we should answer that question, inasmuch as no question of misconduct can arise if the workman is not acting within the sphere of his employment.

LORD SKERRINGTON—I think that the arbitrator came to a sound conclusion when he decided that the facts proved or admitted in the present case were materially different from those upon which the House of Lords adjudicated in the case of *Smith* v. *Fife Coal Company*, 1914 S.C. (H.L.) 40, [1914] A.C. 723. In the case of *Smith* the injured workman had undoubtedly done a piece of work which he had no right to perform and which he was not employed to do, but the arbitrator took the view that this act of disobedience to the statutory order might be regarded as historical and incidental, and that in point of fact it was not one of the causes of the accident. In the present case it is enough, so far as I am concerned, to point out that at the moment of the explosion the injured workman was actually engaged in making the electrical connection. In view of that fact it seems to me that the arbitrator was entitled to decide that the injury to the workman did not arise out of his employment, but that it arose out of his doing something which he was not employed to do and which he had no right to do. Accordingly I agree with your Lordship that the first question of law should be answered in the affirmative, and that it is unnecessary to answer the second question.

LORD CULLEN—According to finding 10 of the Stated Case the workman when the accident happened was in the act of coupling the wire of the cable to the corresponding wire of the detonator or fuse by holding the wires in conjunction and twisting them together. In acting in this manner the appellant was doing work which under the Explosives in Coal Mines Order 1913 it was illegal for him to do, and which was exclusively the work of the shot-firer. That being so, it appears to me to be quite clear that the accident did not arise out of the workman's employment. It essentially arose in part from his illegally doing an act which was alien to his employment. I accordingly agree with your Lordships in thinking that the first question should be answered in the affirmative, and that it is unnecessary to answer the second.

LORD SANDS—The question which we have to consider in this case is whether it is distinguishable from the case of *Smith* v. *Fife Coal Company*, 1914 S.C. (H.L.) 40, [1914] A.C. 723. Now the cause of the accident in *Smith*, as in the present case, was in my humble opinion the confusion and misunderstanding occasioned by a miner undertaking the duties of a shot-firer—a course of procedure recognised by the rules as a source of danger which these rules are accordingly meant to guard against. The case of *Smith*, however, proceeded upon a strict view of the immediate causal relation. In applying or distinguishing the case of *Smith* I think we must proceed upon the same principles as that case itself proceeds upon, and proceeding upon these strict principles with regard to the causal relation I think we must come to the conclusion that this case, for the reasons your Lordships have stated, is distinguishable from the case of *Smith*. Accordingly I am of opinion that the question should be answered in the manner your Lordships propose.

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

Counsel for the Appellant—Moncrieff, K.C.—Scott. Agents—Alex. Macbeth & Company, S.S.C.

Counsel for the Respondents—Robertson, K.C.—Mitchell. Agents—Wallace & Begg, W.S.

Wednesday, January 10.

SECOND DIVISION

[Sheriff Court at Hawick.

JACKSON *v.* M'KAY.

Process—Sheriff—Evidence—Objection to Question—Objection Sustained by Sheriff-Substitute—Failure to Appeal to Sheriff—Motion for Further Proof in Connection with Questions Disallowed—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *First Schedule, Rule* 75—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 72.

In a proof in the Sheriff Court certain questions put to the pursuer in cross-examination were objected to and the objections were sustained by the Sheriff-Substitute. No appeal to the Sheriff was taken against the ruling as provided for by Rule 75 of the Sheriff Courts (Scotland) Act 1907, but on the case being appealed to the Court of Session on the merits the defender at the hearing moved that further proof should be allowed in connection with the questions excluded, and founded on the power conferred on the Court by section 72 of the Court of Session Act 1868 to order additional proof. *Held* that the defender having failed to avail himself of the appropriate remedy provided by the Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 75, could not invoke section 72 of the Court of Session Act 1868.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, enacts—Rule 75—"On the proof being declared closed, or within seven days thereafter, if the Sheriff-Substitute has not in the interval pronounced judgment, it shall be competent by leave of the Sheriff-Substitute to appeal to the Sheriff upon objec-