as I read it, was not decided upon any specialities of English law which do not apply to Scotland, but was based upon a common sense view of the situation—a situation which, I may add, their Lordships carefully reviewed in light of the motor traffic which to-day takes place upon public highways. I am unable to find any hint anywhere to the effect that the law of Scotland in this matter is different from the law of England. Mr Ingram was able, so far as I remember, to point to two passages only which even suggest that discrimination, the one a sentence in a dissenting judgment by Lord Johnston (*Milligan* v. *Henderson*, 1915 S.C. 1030, at p. 1045), which merely expresses a doubt in the matter, and the other a sentence in a judgment by Lord Benholme — *Clark* v. *Armstrong* (1862) 24 D. 1315, at p. 1320. In that judgment Lord Benholme was dealing with the case of a bull—a very different animal from a sheep. And while it is true that in one sentence his Lordship uses the word "cattle," I see that in the sentence before and the sentence after that in which he uses that word he carefully confines his observations to the case with which he was dealing, namely, the case of a bull. In any event I can find no case decided in Scotland in the sense which Mr Ingram suggests.

So far from the law of Scotland differing from the law of England, I find, on the contrary, in the case of *Milligan* v. *Henderson* mentioned by the Lord Ordinary, where a lady riding a bicycle on the public road was injured by a dog which ran out and collided with her bicycle, that the Judges are at pains to state that the law of Scotland and the law of England are the same. That doctrine is fully developed in several passages, and I observe that there was in that case a full citation of English law before the Court.

Accordingly the law of England being clear and being fatal to the pursuer's contention, and there being no reason why it should differ from the law of Scotland—the indications being the other way—I have no hesitation in reaching the conclusion that the Lord Ordinary was right in dismissing this action, and I suggest to your Lordships that this reclaiming note should be refused.

LORD ORMIDALE—The law of England would appear to be that the owner of sheep which have strayed on to the high road and by their presence there cause damage to users of the highway is not liable for the damage so caused. A Scots case is cited to us which affirms that there is no difference between Scots and English law in this matter, and Mr Ingram referred to no case in which there was even a suggestion that there was any distinction of importance between English law and our own. The principle seems to be that in the case of a sheep, which is an animal of a mild and peaceable nature, the owner is not bound to anticipate, if it should stray on to the public highway, at any rate in daylight, that it will, by obstruction or in any other way, bring about the downfall of a member of the public to his injury and loss, the reason being that that is not a natural consequence of a sheep being upon the public road. Therefore I entirely agree with what your Lordship has said, and also think that this reclaiming note should be refused.

I confess that I thought that there might have been some assistance to be got from the case of *Clelland* v. *Robb* (1911 S.C. 253), but apparently in the Inner House opinions were not delivered upon the general question, the decision depending entirely upon the view the Court took regarding the particular facts of the case.

LORD HUNTER—I concur.

LORD ANDERSON—I agree. I take it that nothing we are deciding in this case is to be taken as encouraging carelessness on the part of farmers in the discharge of their duty of taking all proper precautions to ensure that their gates and fences are sufficient to confine bestial to their grazings. And I do not think we are laying down any general rule applicable to all possible circumstances, because, speaking for myself, it seems to me that the result might have been different if this accident had occurred in the darkness by reason of the presence of a sheep on the highway; but that is not the case we have before us. The conclusion I reach in this case—and we are dealing with the averments in this case alone—is that assuming any duty on the part of the defender to prevent his bestial being on the highway, it is, I think, obvious on the pleadings that the accident was not the direct consequence of the breach of any such duty.

The Court refused the reclaiming note.

Counsel for the Pursuer and Reclaimer—Mitchell, K.C.—Ingram. Agent—George Meston Leys, Solicitor.

Counsel for the Defender and Respondent—Wilson, K.C.—Mackintosh. Agent—R. Cunningham, S.S.C.

Friday, May 25.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CONNELL *v.* JAMES NIMMO & COMPANY, LIMITED.

Reparation — Master and Servant — Employers' Liability Act 1880 (43 & 44 *Vict. cap.* 42), *secs.* 1 (1) *and* (2), 2 (1), *and* 8—*Failure to State that Person Entrusted with Superintendence was not Ordinarily Engaged in Manual Labour—Averments—Relevancy.*

In an action by a workman against his employer for damages at common law, or, alternatively, under the Employers' Liability Act 1880, in respect of injuries resulting from an explosion of gas in a pit, the pursuer, *inter alia*, averred that the explosion was caused by a dangerous accumulation of inflam-

mable gases which the ventilation was inadequate to dilute and render harmless; that defenders' fireman who was entrusted with superintendence in said pit was guilty of negligence in failing to inspect the place and section in which the pursuer was working; and that his (the pursuer's) injuries were thus caused by the fault of the defenders or of those entrusted by the defenders with superintendence and with the duty of seeing that the working-places of the defenders' workmen were safe. It was not, however, averred that the fireman, the person said to be entrusted with superintendence, was not ordinarily engaged in manual labour.

Held (in an appeal by way of Stated Case) that the pursuer had sufficiently averred a defect in the ways and works connected with or used in the business of the defenders in the sense of section 1 (1) of the Act of 1880, not discovered or remedied owing to the negligence of some persons in the service of the employers, and entrusted by them with the duty of seeing that the ways and works were in proper condition as provided for by section 2 (1) of the Act, and that accordingly both these grounds of liability had been sufficiently, though confusedly, pleaded.

Reparation — Master and Servant — Employers' Liability Act 1880 (43 & 44 *Vict. cap.* 42), *sec.* 1 (1) *and* 2 (1)—*Accumulation of Gas in Mine—Whether Constituting a Defect in the Condition of Ways and Works.*

In an action of damages by a workman against his employers at common law, or, alternatively, under the Employers' Liability Act 1880, it was proved that the pursuer was injured by an explosion in a mine caused by a dangerous accumulation of inflammable gas which the ventilation was inadequate to dilute and render harmless; that defenders' fireman whose duty it was to inspect the workings had failed to do so, and that it was a reasonable inference that if the fireman had fulfilled his duty he would have discovered the gas.

Held, on the facts found proved, that the accumulation of gas constituted a defect in the condition of the ways and works within the meaning of sub-section (1) of section 1 of the Employers' Liability Act 1880.

The Employers' Liability Act 1880 (43 and 44 Vict. cap. 42) enacts—"1. Where after the commencement of this Act personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; or (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence, . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work. 2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases—that is to say—(1) Under sub-section (1) of section 1, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition. 8. For the purposes of this Act, unless the context otherwise requires, the expression 'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

George Connell, brusher, brought an action in the Sheriff Court at Glasgow against James Nimmo & Company, Limited, coalmasters, concluding for £500 damages at common law, or, alternatively, under the Employers' Liability Act 1880, for £500 or such sum as might be found due to him in respect of injuries sustained by him as the result of an explosion of gas in a pit in the defenders' colliery.

The pursuer averred, *inter alia*—"(Cond. 4) The explosion which occurred and the injury sustained by the pursuer thereby were due to the fault of the defenders. It was the duty of the defenders to take all precautions for the safety of their workmen, and in particular of the pursuer. In particular, it was the duty of the defenders to produce constantly in said pit, and in the section thereof in which the pursuer was working, an adequate amount of ventilation to dilute and render harmless inflammable and noxious gases, and to make the roads, levels, and workings of the mine fit for working and passing therein. . . . It was also the duty of the defenders to have the said pit and the parts thereof and all machinery used therein carefully inspected by persons competent to carry out such inspection. These duties the defenders failed to perform. At the time when the pursuer was injured inflammable gases had been allowed to accumulate in such a quantity as to be dangerous, and as to make the place in which the pursuer and other workmen were working unsafe. The ventilation provided by the defenders was in fact inadequate to dilute and render harmless the inflammable gases given off in said pit, and to make the roads and workings in said pit fit for passing and working therein, and the gas which accumulated exploded and caused the injuries sustained by the pursuer. No inspection, or in any event no sufficient inspection, had been or was made of the machinery used in said pit or of the section of the pit in which the pursuer was working on the occasion when he sustained injury as above set forth. In particular, the defenders failed . . . to have the section of the pit in which the pursuer was working duly inspected during the shift during which the pursuer was working on said occasion.

(Cond. 5) The said pit in which the pursuer was employed was naturally gaseous or 'fiery,' and inflammable gas was likely to be present in such quantity as to be dangerous to the workmen, and to cause risk of explosion. This condition of the pit was well known to the defenders, and was such as made it necessary for the defenders to make special provision for adequate ventilation and to take special precautions to protect their workmen, of whom the pursuer was one, from danger, and to carry out careful inspection of the pit itself and of the machinery therein. The pursuer believes and avers that within a short period prior to the explosion occurring gas had been found in said section of the pit in such quantity as to be dangerous, and that the men working therein had to be removed owing to the danger arising therefrom. The existence of gas in such dangerous quantity had been reported to the defenders. The defenders, however, failed to take any steps to increase the amount of ventilation as they could and ought to have done, and to take adequate precautions to protect their employees from danger, and in particular from the danger of explosion of gas. (Cond. 6) By section 29 (1) of the Coal Mines Act 1911, to which reference is made, the obligation is imposed upon the defenders of providing an adequate amount of ventilation to render harmless inflammable gases, and to make the levels and workings safe for the workmen employed therein. As above stated, the defenders failed to provide an adequate amount of ventilation to render the gases harmless and to make the pit safe for the workmen, and were thus in breach of their statutory obligation. Had the defenders provided an adequate amount of ventilation the said explosion would not have occurred and the pursuer would not have sustained injury. Further, by section 65 of the said Act, it is provided that all parts of the mine beyond the station or each of the stations provided for in section 63 of the Act, and in which workmen are working or pass during that shift, shall be twice inspected during the shift by the persons appointed to inspect, and that in the case of a mine worked by a succession of shifts no place shall remain uninspected for an interval of more than five hours. At the period when the pursuer sustained injury, the mine in which he was working was being worked by a succession of shifts, and the pursuer was working beyond the station contemplated and provided for by section 53 of the Act. On the occasion when the said explosion occurred the place in which the pursuer was then working had not been inspected for an interval of more than five hours. The defenders were thus in breach of the obligation imposed upon them by said section of the statute. Had an inspection been carried out as provided for by the said section, the pursuer believes and avers that the presence of the inflammable gas which caused the explosion would have been detected, and that the explosion and the injuries to the pursuer would have been avoided. The provisions of the said Coal Mines Act 1911 apply to the defenders' said colliery. . . . (Cond. 7) In the section of the pit in which the pursuer was working on the occasion referred to a coal-cutting machine, driven by electric power, was being used to cut the coal. Owing to the likelihood of the presence of gas in dangerous quantity in said section, keeping in view the amount of ventilation actually provided by the defenders, it was necessary that precautions should have been taken to ensure that every part of the said machine was in proper order, and that there was no open sparking which could cause gas to ignite, and that the said machine should have been carefully examined and inspected by competent persons with electrical training. It was also necessary that careful inspection should have been made in the vicinity of the machine in order to ascertain whether gas was actually present in quantity likely to be dangerous. No precautions, however, were taken by the defenders, and no sufficient examination was made of the machine, and no sufficient inspection of the pit in the vicinity thereof. By section 66 of said Coal Mines Act 1911 it is provided that competent persons appointed by the manager for the purpose shall once at least in every week examine all machinery, gear, and appliances of the mine which are actually in use whether above or below ground. The said coal-cutting machine had been in use for a period much longer than a week, and no such examination as is provided for by said section had been made for a period of at least eleven days prior to the occurrence of the explosion. The defenders were thus in breach of the duty imposed upon them by the terms of said section of the statute. The pursuer believes and avers that if the said machine had been inspected by the defenders in accordance with the above provisions the defective condition of the machine would have been detected, and if the inspection had been carried out by a competent person the defect would have been remedied. . . . (Cond. 9) The force of the explosion was greatest at said coal-cutting machine, and the two men working therewith were killed. The pursuer believes and avers that the explosion took place at said machine, and was caused by the presence of inflammable gas in dangerous quantity there, and that said gas was ignited by an electric spark from said machine. Had the defenders fulfilled the duty they owe to their workmen, and in particular to the pursuer, and had they taken the usual and proper precautions, the pursuer believes and avers that the injuries he sustained would have been avoided. In particular, if the defenders had not been in breach of the statutory obligation imposed upon them as above set forth, and if the duties of inspection of the place at which the pursuer was working and of examination of the coal-cutting machine had been carried out, . . . the pursuer believes and avers that inflammable gas would not have accumulated in dangerous quantity, or, in any event, that the presence of the inflammable gas which caused the explosion and of open sparking of the said machine would have been discovered prior

to the explosion taking place, and that the explosion and the injuries to the pursuer would have been avoided.... (Cond. 10) Further, the coal-cutting machine was in a defective condition owing to the cover of the switch box not being securely attached. In consequence thereof there was open sparking in the machine which caused ignition of the accumulated gas. Said defect was a defect in the condition of the machinery and plant used in the defenders' business in the sense of the Employers' Liability Act 1880. The said machine, as above set forth, had not been duly examined, and the defect was not discovered or remedied in consequence of such failure to examine. John Hoey, the fireman of the shift in which the pursuer was working, was guilty of negligence in failing to inspect the place and the section in which the pursuer was working as above set forth. Said fireman was entrusted with superintendence, and on the occasion in question was in the exercise of superintendence in said pit. Further, the defenders' manager, William Dick, was guilty of negligence in not providing sufficient ventilation in the said pit and in the section thereof in which the pursuer was working, in failing to see that the machinery in the mine was duly inspected in accordance with the terms of the Coal Mines Act 1911. The pursuer's injuries were thus caused by the fault of the defenders or of those entrusted by the defenders with superintendence, and with the duty of seeing that the working-places of the defenders' workmen were safe, and that the plant was maintained in proper condition."

The pursuer pleaded, *inter alia*—"1. The pursuer having been injured in his person through the fault of the defenders is entitled to reparation from the defenders therefor. 2. Or otherwise, the pursuer having been injured through the negligence of persons in the employment of the defenders for whom the defenders are responsible under the Employers' Liability Act 1880, the pursuer is entitled to compensation therefor. 3. The pursuer having been injured through a defect in the condition of the machinery and plant connected with and used in the business of defenders, and said defect not having been discovered or remedied owing to the negligence of the defenders or of those in their employment and entrusted by the defenders with the duty of seeing that said machinery and plant were in proper condition under the Employers' Liability Act 1880, is entitled to compensation therefor."

The defenders pleaded, *inter alia*—"1. The pursuer's statements are irrelevant and insufficient to support his pleas-in-law. 2. The pursuer not having been injured through the fault of the defenders or of those for whom they are responsible, the defenders should be assoilzied, with expenses. 3. Pursuer not having been injured through the negligence of persons in the employment of the defenders for whom they are responsible under the Employers' Liability Act 1880, the defenders should be assoilzied, with expenses. 4. The accident to the pursuer having been caused through the fault or negligence of fellow-servants in a common employment, the defenders should be assoilzied, with expenses. 5. Pursuer not having been injured by reason of any defect in the condition of the defenders' said machinery or plant, defenders are entitled to decree of absolvitor, with expenses."

On 27th January 1922 the Sheriff-Substitute (FYFE) after a proof dismissed the action.

The pursuer appealed to the Sheriff (MACKENZIE), who on 9th August 1922 sustained the appeal, found that the defenders were liable to the pursuer under the Employers' Liability Act 1880 but not at common law, and assessed the damages at £325.

The defenders appealed by Stated Case under section 14 of the Workmen's Compensation Act 1906 to the First Division of the Court of Session.

The Case set forth, *inter alia*—"On 9th August 1922, after having considered the cause, I sustained the appeal, recalled the interlocutor of the Sheriff-Substitute dated 27th January 1922, and found the following *facts* proved, viz.—1. That about 4 a.m. on 1st June 1920 the respondent, while employed as a brusher in No. 3 section of No. 2 pit of the Auchengeich Colliery belonging to the appellants, was injured by an explosion of gas. That at the time of the accident the respondent was working at a place known as the 'Lye' in the intake airway of said section; 2. that Auchengeich Colliery is ordinarily a gassy mine in which naked lights are not used; 3. that the appellants had extended an old working by cutting through a whin intrusion and opening up the area beyond said intrusion and to the north thereof; 4. that prior to the explosion this area had been opened up by a cutting to the left known as the left cross cut, and a cutting to the right known as the right cross cut, and by a third cutting in line with the intake airway known as 'the heading' (a sketch which formed part of the Case was referred to); 5. that the air which ventilated the section passed along the intake airway through the whin intrusion, then along the right cross cut and round the face, and returned by another cutting through the whin intrusion. That the 'lye' at which the respondent was working was to the south of the said intrusion; 6. that within a fortnight prior to the explosion gas had been discovered in 'the heading' on several occasions, and on two of these occasions the gas had been found in such quantity as to lead to the withdrawal of the workmen from the heading; 7. that on the said two occasions the machinemen after referred to were working beyond the intrusion and were allowed to remain at their work; 8. that the mine was worked in a succession of shifts; 9. that the ignition of the gas was caused by a spark from an electric coal-cutting machine which was being used in the section; 10. that the coal-cutting machine was fitted with a switch box cover intended to prevent open sparking and the emission of flame to the outer air from the ignition of gas in the switch box, and effectual for that purpose if properly bolted

down; 11. that at the time of the explosion the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working-place in the vicinity of the top of the heading fit for working; 12. that the men operating the coal-cutting machine had negligently failed to screw down the cover properly, having used only one of the eight studs provided for that purpose; 13. that during the shift the machinemen had worked the coal-cutting machine, following the direction of the air from the right cross cut round the face to the top of the heading, at which point the explosion occurred; 14. that the fireman employed by the appellants to inspect the section on the respondent's shift negligently and without sufficient excuse failed to inspect the section, as required by the Coal Mines Act, within five hours of the previous inspection; 15. that it was a reasonable inference that if the fireman had fulfilled his duty in regard to inspection he would have discovered that there was a dangerous accumulation of gas, and could either have taken steps to clear it away or have withdrawn the workmen from the neighbourhood; and (16) that the said fireman was charged with the duties applicable to firemen laid down in the said Coal Mines Act and the general regulations thereunder.

"I found further on the evidence relative to the respondent's claim at common law that the respondent had failed to prove that his injuries had been caused by fault on the part of the appellants.

"I found in law in these circumstances that the accumulation of gas referred to was a defect in the condition of the ways and works connected with or used in the business of the appellants, that it had not been discovered or remedied owing to the negligence of a person in the service of the appellants entrusted by them with the duty of seeing that the ways and works were in proper condition, and that the respondent's injuries were caused by reason of said defect."

The *questions in law* for the opinion of the Court were—"1. Was I entitled, on the respondent's pleadings, to consider whether or not the presence of gas at the working-place constituted a defect in the ways and works connected with or used in the business of the appellants in the sense of subsection 1 of section 1 of the Employers' Liability Act 1880? 2. In the event of question 1 being answered in the affirmative, was I justified in holding that the presence of gas at the working-place constituted a defect?"

The Sheriff's *note* was in the following terms:— . . . "Before discussing the alleged grounds of liability it will be convenient to consider first how the explosion occurred.

"Now it is not matter of dispute that the explosion was caused by flame being brought in contact with explosive gas. Two factors were therefore necessary to produce it—first, a dangerous accumulation of gas, and second, a flame brought in contact with it. As regards the first factor, the section where the pursuer was working was known to be gassy. The presence of gas had been detected on several occasions during the fortnight preceding the accident, and on two occasions in such quantity as to lead to the miners being temporarily withdrawn from the face. Two days, however, before the accident, the ventilation had been improved by the completion of a tunnel through an intrusion of whinstone to provide a passage for the return air, and how gas came to accumulate in dangerous quantity on the night of the accident must be more or less a matter of conjecture. After the accident the return air passage was found to be obstructed by a fall of debris, and if this fall occurred before the explosion it might quite well account for the accumulation of gas. Another explanation might be that for some reason or other an increased quantity of gas had been released from the workings. With regard to the cause of ignition, it is not matter of dispute that the ignition of the gas resulted from the coal-cutting machine being operated without having the cover of the switch box securely belted down over the switch box. Sparking commonly occurs at the switch fingers when the electric current is switched on or off, and the cover of the switch box is provided for the express purpose of preventing explosions being caused by the ignition of gas by such sparking. Gas apparently cannot be prevented from finding its way into the switch box, but if the cover is properly screwed down the flame resulting from the ignition of gas in the switch box cannot escape into the outside air so as to cause an explosion. After the accident it was discovered that only one of the eight studs provided for securing the cover of the switch box was in position. As it was one of the unfortunate results of the accident that the men operating the coal-cutting machine were killed, there is no direct evidence as to how this happened, but there is evidence that the switch fingers occasionally required to be cleaned, and that it was within the scope of the machinemen's duty to remove the cover in order to get access to the switch box for that purpose, and it is a reasonable inference that the men, having had occasion to remove the cover, had not, on replacing it, taken the trouble to bolt it securely down. That this was the cause of the ignition of the gas is, as I have already said, not matter of dispute, and I may add that marks discovered on the machine after the accident indicated that flame had passed under the cover from the switch box to the outer air.

"I proceed to consider the grounds on which it is said that the defenders are responsible for the accident at common law. . . .

[*After dealing with the various grounds of common law liability alleged against the defenders, and finding that the evidence was insufficient to support them, the Sheriff proceeded:*—]

"I pass now to the grounds on which it is said that the defenders are liable under the Employers' Liability Act, and take first the averment that the accident was caused by the fault of the fireman on the

shift—the witness Hoey—in failing to fulfil his statutory duty of inspecting section 3 within five hours of the previous inspection. The fact that he did so fail is, I think, *prima facie* evidence of negligence on his part, and the burden accordingly is on the defenders to prove that Hoey was prevented from fulfilling his statutory duty in the matter of inspection by causes beyond his control and which could not have been foreseen or provided against. In my opinion they have failed to discharge this burden. The evidence bearing on the point is that of Hoey himself. He acted as fireman and shot-firer, and the sphere of his duties was in sections 3 and 5 of the colliery. On the night of 31st May 1920, after testing the lamps, Hoey went to No. 5 section where he had some shots to fire. Before firing any shot he inspected the section. As a result he detected a 'sniff' of gas in a crosscut at the wallhead, and he renewed some screens. He then, at about 12·45 a.m. on 1st June, fired a shot. He observed that after the shot the 'reek' travelled slowly, but he did not at the time think that there was anything wrong, and went down to start the pump at the lye in No. 5 section. On his return, it being then nearly 2 a.m., he fired a second shot, and after this shot the smoke hung about half-an-hour so thickly that he could not examine its effect. He then became convinced that something was wrong with the air supply of No. 5 section, and suspecting that the regulating door at No. 3 section was not in position went to examine it. He reached the door of No. 3 section at about 2·45 a.m., found it much wider open than it should have been with the result that No. 3 section was getting air intended for No. 5, restored the door to its proper position, and returned to No. 5 where he found the air much clearer. The time was then about 3·15 a.m., and Hoey proceeded to fire another shot in No. 5 section, and after firing it to inspect No. 5 section before proceeding to No. 3. He was on his way to No. 3 to inspect it when he heard of the accident. I cannot, on this evidence, hold that Hoey had any reasonable excuse for failing to inspect No. 3 section before the time at which the explosion occurred. It cannot, I think, be too emphatically laid down that when a fireman is also employed as a shot-firer his duty as fireman comes first, seeing that it concerns the safety of the men working in the mine, and that it must have precedence of his duty as shot-firer which concerns only the progress of the work. Keeping that consideration in mind I think that Hoey ought to have proceeded to inspect No. 3 section after he fired the first shot in No. 5, in which case he would have complied with the statutory requirement, as the last inspection in the preceding shift had been made at 9·10 p.m., and there seems to me to be no sufficient excuse for his failure to do so. He suggests, at one part of his cross-examination, that after firing his first shot he noticed that something was wrong with the air current, but if so, his duty was to discover the cause of the defect in the air current and not to fire a second shot. In any case there seems to be no possible excuse for his failure to make the inspection at 3·15 a.m. after he found the air in No. 5 section to be clear. His explanation of his failure to do so amounts merely to this, that he was already too late to fulfil his duty of inspection under the statute and therefore made up his mind to miss out his first inspection of No. 3 section altogether, but his failure to comply with the statutory rule afforded no reason why he should delay still longer to perform a duty prescribed for the safety of the men.

"The next question is whether, if Hoey had inspected No. 3 section in accordance with his duty, the accident would have been prevented. The answer is that this can only be matter of inference, but in considering the question it must be kept in mind that one of the main reasons for requiring the regular inspection of mines by firemen is to provide a safeguard for the men employed against the danger of gas accumulating in dangerous quantities. And if a precaution provided against a particular danger has not been taken and an accident results by reason of that danger, it is not enough for the person responsible for taking the precaution to say that it is not proved that had he done his duty the danger would have been averted. The burden is on him to prove the contrary, and in the present case it cannot be said to be proved that if Hoey had performed his duty in the matter of inspecting No. 3 section the presence of gas in the heading would not have been detected and the accident prevented by steps being taken either to clear the gas away or to withdraw the men working at the coal cutter. On the contrary, I think it may be reasonably inferred that had Hoey made the inspection which he should have made, the presence of the gas would have been detected and the necessary steps taken to prevent untoward consequences.

"Another question then arises, whether Hoey's negligence can be regarded as the cause of the pursuer's injuries. It was argued that it could not, in respect that the presence of the gas would not have resulted in an explosion but for the interposition of another factor, namely, the communication of flame to the gas, and therefore, that the proximate cause of the accident was the negligence of the men operating the coal-cutting machine without securely bolting down the cover of the switch box. I cannot sustain this contention. I agree so far with the argument as to hold that the men operating the machine were in fault. They were bound to have known the danger to be apprehended from gas in a gassy mine and also the object for which the switch box cover was provided, and that it was their duty to keep the cover securely fastened, but I dissent from the contention that their negligence is alone to be regarded as the proximate cause of the accident. If it can be said that the gas would not have exploded without the flame, equally can it be said that the flame would not have caused the explosion had it not been for the accumulation of gas, and that but for the presence of the gas the spark of the switch fingers of the electric coal cutter would

have produced no flame. In my opinion both flame and gas were essential factors in causing the explosion, and I am therefore of opinion that the injuries sustained by the pursuer resulted from the combined negligence of Hoey and the men operating the coal-cutting machine.

"The next question is whether the defenders are responsible for Hoey's negligence under the Employers' Liability Act, and this question, I think, must be answered in the affirmative. In my opinion the accumulation of gas in the workings was a defect in the condition of the ways and works of the mine within the meaning of sub-section (1) of section 1 of the Act—*Black* v. *Fife Coal Company*, 1909 S.C. 152, especially *per* Lord Justice-Clerk Kingsburgh at page 162, 1912 S.C. (H.L.), *per* Lord Kinnear at page 40. I think also that the condition imposed by sub-section 1 of section 2 of the Act is satisfied in respect that the defect was not discovered or remedied owing to the negligence of the fireman Hoey, who was the person entrusted with the duty of seeing that the ways and works were in proper condition. It is argued that the accumulation of gas was not a defect of so permanent a character as to be a defect in the condition of the ways and works within the meaning of sub-section 1 of section 1. I am unable to accept that view. The presence of gas in the ways or works of a mine does not resemble a casual obstruction affecting the safety of ways, or a chance of escape of gas causing danger in a factory, for in the case of a mine, or at all events a gassy mine, gas is one of the dangers which requires to be provided against by special precautions, and I think it impossible to hold that the presence of gas in the ways or works is not a defect in the condition of the ways and works. I also refer to *Black's* case as an authority supporting my view.

"It was further contended that I was not entitled to entertain this ground of action, in respect that there was no foundation for it on record, and that additional evidence might possibly have been led by the defenders if notice that the question was going to be raised had been given. In my opinion this argument is not well founded. It is averred on record that Hoey was the person whose duty it was to inspect the section, and it is also averred that if he had carried out that duty the presence of gas would have been detected and the injuries to the pursuer prevented. All the averments, therefore, necessary to bring the case within sub-section 1 of section 1 of the Employers' Liability Act were made on record, and at the time proof was taken the record contained only a general plea under the Employers' Liability Act, and therefore the defenders' advisers cannot say that their attention was diverted from these averments by the special plea relative to the coal cutter, which was not inserted until after proof was taken.

"If I am right in the opinions I have expressed in the two preceding paragraphs, I think it follows that the defenders are liable to the pursuer in damages under the Employers' Liability Act. I cannot hold it to be a good ground of defence that the negligence of fellow servants of the pursuer for whom the defenders are not answerable contributed to the accident. The negligence of the fireman, for whose failure of duty the defenders are in the circumstances responsible, was also a contributory cause, and the right of the pursuer to claim from the defenders compensation for the injury resulting from the fireman's negligence is the same as if he had not been in their employment. The case appears to me to be one in which personal injury has been caused by the joint delinquency of two wrongdoers, and the rule in such a case is that the injured person may seek redress from either — *Matthews* v. *M'Donald*, 3 Macph. 506, *per* Lord President M'Neill at page 507.

"Having reached this conclusion, I do not find it necessary to consider whether Hoey was a superintendent within the meaning of the Employers' Liability Act, or to consider the other grounds on which it is maintained that the defenders are liable under the Act. It therefore remains only to consider the question of damages. . . ."

Argued for appellants—The pursuer had not relevantly averred nor proved a defect in the condition of the ways and works in the sense of the Employers' Liability Act 1880. This being a gassy mine, the accumulation of gas was not in itself a defect. If pursuer founded on section 2 (1), the averment that the fireman who had failed to inspect was entrusted with superintendence was clearly irrelevant; if he founded on section 1 (2), he should also have averred, following the definition in section 8, that the fireman "was not ordinarily engaged in manual labour." The following authorities were referred to—Beven on Negligence, vol. i, p. 690; *Black* v. *Fife Coal Company*, 1909 S.C. 152, 46 S.L.R. 191, 1912 S.C. (H.L.) 33, 49 S.L.R. 228; *M'Giffin* v. *Palmer's Shipbuilding Company*, 1882, 10 Q.B.D. 5; *Mitchell* v. *Coats Iron and Steel Company*, 1885, 23 S.L.R. 108; *M'Quade* v. *Wm. Dixon, Limited*, 14 R. 1039, 24 S.L.R. 727; *Willetts* v. *Watt & Company*, [1892] 2 Q.B. 92, *per* Lord Esher, M.R., at p. 97, and Fry, L.J., at p. 100.

Argued for respondents — A dangerous accumulation of gas even in a gassy mine was rightly described as a defect in the condition of the ways and works within the meaning of the Employers' Liability Act 1880. This view was supported by the terms of the Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50). Section 29 provided that "an adequate amount of ventilation shall be constantly produced . . . to dilute . . . noxious gases to such an extent that all shafts, roads, . . . shall be in a fit state for working and passing therein." The pursuer had clearly averred that Hoey was the person whose duty it was to inspect the section, and that if he had carried out that duty the defect would have been discovered and the accident avoided. These averments brought the action within section 2 (1). As regards section 1 (2), the objection taken that pursuer had omitted to state that Hoey was "not ordinarily engaged in manual labour"

was purely technical and should be disregarded. The following cases were referred to:—*Campbell* v. *United Collieries, Limited*, 1912 S.C. 182, 49 S.L.R. 140; *Ferris* v. *Cowdenbeath Coal Company*, 24 R. 615, 34 S.L.R 492; *Smith* v. *Baker & Sons*, [1891] App. Cas. 325; *Matthews* v. *M'Donald*, 1865, 3 Macph. 506; *Farnham* v. *New Bank Coal Company*, 23 R. 722, 33 S.L.R. 555; *Black* v. *Fife Coal Company* (*cit.*); *M'Quade* v. *Wm. Dixon, Limited* (*cit.*); *Willetts* v. *Watt & Company* (*cit.*).

LORD PRESIDENT—The workman raised an action in the Sheriff Court against his employers both at common law and under several of the provisions of the Employers' Liability Act 1880. The Sheriff decided in the workman's favour on the provisions contained in sub-section (1) of section 1 and sub-section (1) of section 2 of the Act; and the employers have appealed.

The findings of the Sheriff disclose, *inter alia*, that the explosion of gas which caused the accident was due to some part of the gas coming into contact with a spark from an electric coal-cutting machine (finding No. 8); that the ventilation provided at the time of the explosion did not dilute and render harmless the gas which was present in the workings near the coal-cutting machine to such an extent as to make those workings in a fit state for working therein (finding No. 11); that the men operating the coal-cutting machine had negligently failed to keep the switch-box cover closed so as to prevent sparks from igniting any gas which might be present (finding No. 12); that the fireman whose duty it was to inspect the workings in question had negligently failed to inspect them within five hours of the previous inspection (finding No. 14); and that it was a reasonable inference that if the fireman had fulfilled his duty of inspection he would have discovered the gas, and could either have taken steps to clear it away or have withdrawn the men. On these findings the Sheriff arrived at the conclusion that the injuries which the workman suffered by the explosion were caused by reason of a defect in the condition of the ways or works connected with or used in the employers' business (sub-section (1) of section 1), and that the workman was entitled to damages in respect that the defect had not been discovered or remedied owing to the negligence of the employers' fireman entrusted by them with the duty of seeing that the ways and works were in proper condition (sub-section (1) of section 2).

The two questions put to us are concerned with the same point, namely, whether the Sheriff was right in law in holding the presence of gas in the workings to be a defect in a condition of the ways and works within the meaning of sub-section (1) of section 1. The first question raises the point as one of pleading—had the workman relevantly pled such a defect? The second question raises it on the facts as found proved — did those facts constitute such a defect?

The employers asked that the case should be sent back for amendment by adding a third question, viz.—In the event of questions 1 and 2 being both answered in the affirmative, was the Sheriff entitled to hold that personal injury was caused to the workman by reason of the said defect? I think this additional question is unnecessary, because it is, in my opinion, clearly implied in the questions put to us. But the employers explained that the point they wished to bring out was that the true cause of the explosion, and of the workman's injuries, was the ignition of the gas by the negligent failure of his fellow workmen to keep the switch-box cover closed (finding No. 12 *supra*). If so, then the defence of collaborateur might be open to the employers.

There is no doubt on the Sheriff's findings that the workman's fellow employees at the coal-cutting machine did negligently cause the ignition of gas (findings Nos. 10 and 12). And if the accumulation of the gas in the workings had been the natural incident of a "gassy" mine (see finding No. 2), in connection with which no responsibility could be fastened upon the employers, either at common law (with special reference to the employers' duties under the Coal Mines Act 1911) or under the Employers' Liability Act 1880, the point which the employers wish to emphasise in the proposed additional question might have become very important. It appears from the Sheriff's note that he thought the employers had acquitted themselves of their responsibility under section 29 (1) of the Coal Mines Act 1911 by satisfying the heavy requirements of section 102 (8) of that statute. The Stated Case does not raise this point, and for the present, therefore, I assume the Sheriff rightly so held. That being so, I must take the case on the footing that the familiar but special ground of common law liability, which arises from the statutory imposition on employers of a duty to make some particular provision for the safety of their workmen (*Black* v. *Fife Coal Company*, 1912 S.C. (H.L.) 33, see *per* Lord Kinnear at pp. 44-45), is not in the circumstances available to the pursuer of the present action. But although the employers appear to have succeeded in shaking themselves free of this common law ground of liability by meeting the charge made against them under section 29 (1) of the Coal Mines Act 1911, with proof sufficient to satisfy the requirements of section 102 (8), it is still legitimate to consider whether an accumulation of gas in the workings, dangerous in character and extent, is not in fact "a defect in the condition of the ways or works" within the meaning of section 1 (1) of the Employers' Liability Act 1880, and, if so, whether the employers are not responsible in law under section 2 (1) in respect that such defect was not "discovered or remedied owing to the negligence . . . of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

I see nothing impossible in the view that an accumulation of gas which it was not reasonably possible to prevent by the best

practical appliances and system of ventilation — and which accordingly involved no breach of the Coal Mines Act 1911 — may none the less constitute a *de facto* defect —Employers' Liability Act 1880, sec. 1 (1)— in the condition of the ways or works, and if not discovered or remedied in time by the employers' servants charged with a duty in that regard, may infer legal responsibility against the employer—section 2 (1) of the Act of 1880. It was maintained on the authority of decided cases that the accidental presence of gas was not a defect in a "way." If the mine workings in the neighbourhood of the coal-cutting machine be regarded strictly as "ways" or passages I think there is much to be said for this argument, for although the cases referred to do not exactly cover the point, they undoubtedly proceed on a strict construction of the expression "the condition of the ways." But the mine workings in question are air conduits as well as "ways" or roads. They are part of the ventilation works of the mine, and the Sheriff has not confined his judgment to "the condition of the ways." He uses the more general description of "the condition of the ways *and* works." I think the Sheriff justly attributed a defect to the condition of the "ways and works" —regarding the ways as part of the ventilation works of the mine — when he found that they were filled with a dangerous accumulation of gas, however difficult or even impossible it may have been to prevent such an accumulation from taking place. It is quite plain on the Sheriff's findings that the defect could and should have been discovered in time to prevent disaster if the employers' fireman had not failed in duty (finding No. 15). It is also plain that the fireman was in fact a person of the kind defined in section 2 (1), whose failure infers liability against the employers under the Act of 1880 (finding No. 14).

The only question thus comes to be, whether the pursuer has relevantly pled these grounds of liability. The record is evidently meant to cover all possible grounds both at common law and under the Act of 1880. Unfortunately there is a considerable amount of confusion in the statement of them. Thus in the important condescendence 10 the position of the fireman is sometimes said to be that of a "superintendent," and sometimes that of a "person entrusted with superintendence and with the duty of seeing that the working-places of the defenders' workmen were safe." The necessary qualification of a superintendent —that he is not ordinarily engaged in manual labour—is nowhere stated, but the workman's case as sustained does not turn upon a fault of superintendence, but on the neglect of a person to whom special duties were entrusted. I think the averments as a whole gave the employers fair notice of the grounds which the Sheriff has sustained.

I am therefore for answering both questions put to us in the affirmative. If that is consonant with the opinions of your Lordships, it will be unnecessary to consider the motion made on behalf of the workman for a remit in order to have included in the case certain questions which only arise if the present appeal is disposed of adversely to him.

LORD SKERRINGTON—In support of this appeal counsel for the defenders and appellants presented an argument which seemed to me to be as hopeless as it was audacious. They maintained that an underground section of a coal mine could not be correctly described as having a defect in the condition of its ways and works within the meaning of the Employers' Liability Act 1880 although it was a proved fact that the ventilation had failed to dilute and render harmless the inflammable gases in such section as required by the Coal Mines Act 1911, but on the contrary had allowed these gases to accumulate to such an extent as to make the section unfit for working and passing therein. This argument appears to me to carry its own refutation with it, and I say no more about it.

The next point raised by the appellants' counsel was one of pleading. It fell within the first question of law stated by the Sheriff, though it may be more precisely expressed as follows, viz. — "Has the pursuer relevantly averred in his pleadings that the accumulation of inflammable gas in the underground roads and workings of the said coal mine was not discovered or remedied owing to the negligence of a person in the service of the defenders and entrusted by them with the duty of seeing that the said ways and works were in proper condition?" The pursuer's averments are undoubtedly clumsy, and suggest that his ground of action so far as based on the Employers' Liability Act was intended to be the negligence of a person (viz., a fireman) in the service of the defenders who had superintendence entrusted to him, while in the exercise of such superintendence, rather than the negligence of a person (viz., the same fireman) in the service of the defenders who was entrusted with the duty of seeing that the ways and works were in proper condition—in short, that the pursuer intended to found upon sub-section (2) and not upon sub-section (1) of section 1 of the Employers' Liability Act 1880. If this be the proper interpretation of the pursuer's averments, the defenders' counsel argued that his case was irrelevant, because he does not allege that the fireman was "not ordinarily engaged in manual labour," a qualification which forms part of the statutory definition (section 8) of "a person who has superintendence entrusted to him." This objection is a very technical one, and I think that the Sheriff was right when he held that condescendence 10 in its reference to the fireman may be construed as founding upon both sub-sections.

For these reasons I am of opinion that the two questions of law in the Stated Case ought to be answered in the affirmative. The result is that the Sheriff's finding that the appellants are liable to the respondent in £325 of damages under the Employers' Liability Act 1880, but not at common law, stands good. The appellants' counsel lodged a note requesting that a third and addi-

tional question of law, which they had timeously asked the Sheriff to insert in the Stated Case, should now be added to it in order to enable them to state more clearly their legal objections to the Sheriff's decision so far as based on the Act of 1880, but no such addition seems to me to be necessary. The appeal falls to be refused, not for any technical or formal reason, but because it is devoid of substance.

Counsel for the pursuer and respondent lodged a note moving that the Stated Case should be amended in various respects, but they explained at the bar that the motion was conditional on our being unable to affirm the Sheriff's judgment as it stands. The motion therefore falls, and it is unnecessary to consider whether it would have been possible for us to grant it.

The procedure which has taken place in the present and in similar appeals under section 14 of the Workmen's Compensation Act 1906 seems to me to indicate that the section has failed to accomplish what was presumably its object, viz., the abolition of unnecessary procedure and expense in actions of damages for personal injury raised in the Sheriff Court at the instance of workmen against their employers. It also seems to me to indicate that a form of appeal which works well enough in the case of arbitrations under the Workmen's Compensation Act may lead to a miscarriage of justice when applied to an ordinary action in the Sheriff Court, owing to the fact that actions originating in that Court (or for that matter in the Court of Session) are often so framed as not to raise the legal question which must be decided if justice is to be done. In an appeal by way of Stated Case the Court of Appeal has no power to amend the pleadings in the action or to decide questions of law which have not been determined by the Sheriff.

LORD CULLEN—With reference to the first question in the Stated Case, the pursuer's pleadings do not contain a plea specifically founded on the condition of the ways or works. There is, however, the second plea-in-law, which, although unsatisfactory in expression, is a plea on the Act of 1880. The Sheriff, taking that plea along with the averments on record and his knowledge of how the case was handled in the proof and other procedure before him, was of opinion that the question whether there existed a defect in the ways or works was fairly put in issue, and that the defenders were not placed at any real disadvantage through the absence of a more specific plea. The appeal comes here in the form of a Stated Case, and I think that the Sheriff was in a much better position than we are to appreciate how the pursuer's pleadings were understood and acted on by the defenders, whom they were intended to inform as to the nature of the case made against them. That being so, I should not be disposed to differ from the Sheriff on a question of this kind unless satisfied that the view taken by him was clearly contrary to the justice of the matter. I am unable so to regard it. On the contrary, I think it was a fair and reasonable view. I am accordingly of opinion that the first question should be answered in the affirmative.

As regards the second question, it is clear that the words "the presence of gas" used in it mean the presence of gas to the extent stated by the Sheriff in his preceding findings in fact. Now these findings come to this, that notwithstanding the ventilation provided, there was present inflammable gas to an extent which made the working-place in question dangerous and unfit for working in. I do not understand how it can be said that this state of matters did not constitute a defect in the condition of the works. The argument for the defenders was to the effect that the words of the Act fell to be read as limited to the case of what was called a physical defect, by which was meant, as I understood, a structural defect. No authority was cited for this general proposition, and it does not seem to me to be sound. I am accordingly of opinion that the second question should be answered in the affirmative.

With regard to the additional question which the defenders desire to have added on a remit, I agree with what your Lordships have said.

LORD SANDS—In this case the learned Sheriff, after certain findings, which infer that the explosion was caused by the ignition of an accumulation of gas by a spark escaping from a switch box, finds—(11) That at the time of the explosion the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working-place in the vicinity of the top of the heading fit for working. There is a surface ambiguity in this finding. It might imply that there was something defective in the ventilating equipment of the mine. The Sheriff makes it clear, however, in his note—and it is not in dispute—that this is not his meaning. The system was satisfactory. Its failure was due to the steps proper in the circumstances not being taken to have the men withdrawn and the mine cleared of gas.

The question arises whether the existence of a dangerous accumulation of gas in a properly equipped mine constitutes a defect in the condition of the ways or works connected with and used in the mine in the sense of sub-section (1) of section 1 of the Employers' Liability Act 1880. It appears to me to be a plausible construction of this provision that the employer escapes liability if his ways, works, machinery, and plant are properly constructed and equipped, and are provided with all the necessary appliances in good working order. If one takes the analogy of a house which an architect sent to inspect it found well equipped and with all proper means of ventilation, I think that the architect would describe it as without any defect in its condition as regards its arrangements for ventilation, although at the time of his visit the rooms might be stuffy owing to the windows not having been opened for some time. Again,

if one figures a car properly equipped with brakes, which are not being applied during the descent of a steep hill, in one sense doubtless that car is in a defective condition at the moment. It is a car descending a steep hill without the protection of an applied brake. But if that car came into collision nobody would attribute the accident to a defect in the condition of the car.

On considering the statutory provisions as a whole, I have come, however, to be of opinion that the construction relied upon by the appellants, which I have above indicated, is too narrow. It seems to me that though the appliances are sufficient and in perfect order, if a static condition of danger in connection with the ways and works has arisen and has not been detected or remedied through carelessness in inspection, the defence of common employment is not open to the employer. I say static conditions, for I exclude the case where the source of danger in the ways or works is a careless manner of working by an employee which it is the duty of a fellow employee to observe and check. If a way were perfectly constructed but some casual water had frozen upon it, which the person charged with the duty of inspecting it had failed to observe, I think that this would be a defect in the condition of the ways or works within the meaning of the Act, and a source of danger in the atmosphere seems to be on a similar footing.

I am accordingly of opinion that on the facts stated by the learned Sheriff he was warranted in his finding that the accumulation of gas which ought to have been discovered and remedied constituted a defect in the condition of the ways and works. I am further of opinion that though the record is not altogether satisfactory, there is sufficient to warrant this ground of judgment.

The appellants desired a remit to the Sheriff with instructions to state another question, viz. : — Whether, on the facts proved, the injury to the workman was caused by the defective condition of the ways and works? As it seems to me, the cause of the accident is sufficiently brought out by the facts stated, and a remit would be idle, as the matter is really covered by the questions submitted. In most cases of accident connected with a defect in the condition in the ways, works, machinery, or plant, there is some other fortuitous concomitant. Here the concomitant was a spark. But when there are two simultaneous mischances the coincidence of which causes an accident, there is, in my view, a direct causal relation between each of them and the accident occasioned.

I accordingly concur in the proposal of your Lordship in the chair as to the manner in which the questions stated in the case should be answered.

The Court answered both questions in law in the affirmative.

Counsel for the Appellants — Dean of Faculty (Sandeman, K.C.) — Carmont. Agents—W. B. Rankin & Nimmo, W.S.

Counsel for the Respondent — Morton, K.C. — Fenton, K.C. — G. R. Thomson. Agents—Simpson & Marwick, W.S.

Friday, May 25.

FIRST DIVISION.

ANDERSON AND ANOTHER *v.* STODDART AND OTHERS.

Process—Interdict—Breach—Petition and Complaint—Designation of Respondents —Misnomer — Incorrect Address — Misdescription.

In a petition and complaint against three respondents for breach of interdict, which had been obtained in absence, objections were taken on the grounds (1) that one of the respondents was incorrectly named "Stodart" instead of "Stoddart"; (2) that the address of another respondent was wrongly stated; and (3) that each of the three respondents was incorrectly described as respectively "merchant," "crofter," and "small holder." The respondents did not deny that they knew they were the persons referred to in the interdict proceedings, or that they had deliberately done what the Court had prohibited. *Held* that the objections fell to be repelled—the first, in respect that there was no averment that confusion or injustice had been caused; the second, in respect that there was no averment that the place where the respondent in question lived had not been sufficiently identified; and the third, in respect that there was no averment that any doubt had been caused as to who the parties called as respondents were.

On 11th January 1923 Neil Stodart junior, merchant, residing at 16 Torrin, Broadford, Isle of Skye, Neil M'Innes, crofter, 14 Torrin, Broadford, and Donald Grant, smallholder, Uilead, Kilbride, Broadford, were interdicted in absence at the instance of John Anderson and Roderick Anderson, joint tenants of the farm of Kilbride and Kilchrist, Broadford, Isle of Skye, from trespassing upon the complainers' farm, and from molesting or interfering with the complainers in the peaceable enjoyment and possession thereof.

On 23rd April 1923 the complainers brought a petition and complaint against the said Neil Stodart, Neil M'Innes, and Donald Grant alleging breach of interdict. The petition narrated the presentation of the note of suspension and interdict and the statement of facts contained therein, the interlocutor granting the interdict, and the intimation thereof to the respondents by letter under registered cover, to which, it was alleged, no answer had been made, and specified a number of acts committed by the respondents, and alleged to be in breach of the interdict.

The respondents lodged answers, in which they stated, *inter alia*—"The respondent