agent whom the pursuer had appointed in his stead.

I do not entertain any doubt that a summary order can be competently pronounced against an agent acting for a litigant before this Court, or that if the order were disobeyed it could be enforced—disciplinarily at any rate—without the necessity of petition and complaint. A number of authorities defining and illustrating the wide powers of the Court in this matter are collected in chapter 25 of the late Mr Henderson Begg's work on Law Agents. Objections were taken to the competency of the present reclaiming note, but these were not pressed, and it is therefore unnecessary to refer to them further. The only question is whether the order pronounced by the Lord Ordinary was warranted by the circumstances of the present case. The argument in support of the order was that all decrees for interim expenses involve a special appropriation of the sums decerned for to outlays only. For the reasons already given I do not think this proposition is maintainable. If the agent had been allowed to continue to act for the pursuer he would, no doubt, have conserved the money for further outlays in connection with the case until it was exhausted. But the pursuer chose to deprive him of his employment when only half performed. The balance then remaining in his hands was the subject neither of any special appropriation to outlays nor of any trust limiting the disposal of the money to disbursements on that head, and there is therefore no reason why the agent should be prevented from paying his taxed fees *pro tanto* out of the balance in hand. The order must accordingly be recalled.

LORD MACKENZIE—I concur.

The LORD PRESIDENT stated that LORD SKERRINGTON, who was absent at advising, concurred in his opinion.

LORD CULLEN did not hear the case.

The Court recalled the interlocutor reclaimed against and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuer—Wilton, K.C.—Maclaren. Agent—W. Marshall Henderson, S.S.C.

Agents for the Defender—Simpson & Marwick, W.S.

Counsel for the Compearer and Reclaimer—Morton, K.C.—Guild. Agent—John Baird, Solicitor.

Saturday, February 25.

FIRST DIVISION.

[Sheriff Court at Lanark.

SLOAN *v.* SHOTTS IRON COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Out of and in the Course of the Employment*"—*Breach of Statutory Rule—Miner who had Fired Three Shots and Heard Two Explosions Returning to Shot-hole within Prohibited Time—Miner Honestly Believing that Two of the Shots had Exploded Simultaneously—Explosives in Coal Mines Order, 1st September* 1913, *Rule* 3 (*a*).

The Explosives in Coal Mines Order of 1st September 1913 provides—Rule 3 (*a*)—"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 miner was firing shots by applying a naked light to the fuses. Having fired three shots his lamp gave out, and he retired a short distance up a road-head to refill his lamp and await the three explosions in safety. While in the road-head he heard two separate explosions and concluded that two of the three shots fired by him had exploded simultaneously. Having come to this conclusion, honestly and in good faith, he returned to the face within four minutes of having fired the shots, whereupon the third shot exploded, injuring him severely. *Held* that the workman had committed a breach of the Order in approaching the shot-hole within an hour, and that accordingly the accident did not arise out of his employment.

Henry Sloan, shot-firer, Carluke, claimed compensation under the Workmen's Compensation Act 1906 from the Shotts Iron Company, Limited, coalmasters, Carluke, in respect of injuries sustained by him while in their employment on 23rd December 1920.

The matter was referred to the arbitration of the Sheriff-Substitute at Lanark (HARVEY), who awarded compensation, and at the request of the company stated a Case for Appeal.

The *facts* proved were as follows:—"1. On and prior to 22nd December 1920 the respondent was employed by the appellants as a repairer in their No. 6 Castlehill Colliery, Carluke, and he held a certificate as shot-firer from the manager of said colliery. 2. He commenced work as a repairer at 11 p.m. on 22nd December 1920 in said colliery, and at 3 a.m. on 23rd December he was instructed by the fireman in charge of the shift to take on the duties of shot-firer in No. 4 section of said colliery. 3. 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. The Explosives in Coal Mines Order of 1st September 1913 is in force in said colliery, and by paragraph 3 (*a*) of said Order 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. Under the system of shot-firing adopted in said No. 4 section the shot-holes were previously prepared for the reception of the charges by the miners working on the face, and formed a series, to the number of seventy or eighty, arranged at regular intervals of 6 or 7 feet along the whole length of the face. 5. The respondent's duty, according to said system, was to prepare the necessary charges, detonators, and fuses, to stem or pack them into the shot-holes already prepared, to apply his naked light to the several fuses in succession (without waiting for any shot, of which the fuse had been lighted, to explode before lighting the next) advancing for this purpose against the air current, and, lastly, to see that all the shots fired by him exploded, and this work he was expected to complete before the end of the shift at 6 a.m. 6. The fuses for firing the shots were cut by the shot-firer from a hank and were of slightly different lengths, varying from 2 feet 9 inches to 3 feet, shorter lengths being selected for the shallower shot-holes and longer lengths for the deeper shot-holes, and the normal time for the running of the fuse was one minute per foot. 7. On the morning in question the respondent proceeded with his work, at 3 a.m. prepared the charges and stemmed them into the shot-holes in the coal face, leaving the fuses projecting from the shot-holes. He applied his naked light to these fuses in succession, and he had in this way fired and effectively exploded all but six or seven of the shots, and had fired three of these remaining shots when his lamp gave out. He then retired a short distance up a road-head to refill and retrim his lamp, and to await in safety the explosion of the three shots he had fired. 8. While in the road-head the respondent heard two separate explosions, and came to the conclusion that two of the three shots fired by him had exploded simultaneously, and that the two separate reports he had heard accounted for the three shots. 9. When two or more shots are fired by means of fuses at or nearly at the same time, it is a common but not every-day experience with shot-firers that two shots should explode together, giving only one report, and the respondent on the occasion in question had this general experience in view, and also a similar experience of his own when he worked as a miner. On that occasion, however, the respondent waited for nearly an hour before returning to the place where the shots had been fired. 10. The respondent in coming to the conclusion that the three shots fired by him had exploded committed an error of judgment, but did so honestly and in good faith. 11. Having come to this conclusion the respondent immediately, and within four minutes after he had fired the shots, returned to the coal face, and while looking for the break made by the last of the shots fired by him this shot exploded in his face, destroying the sight of his right eye, damaging the sight of his left eye, and inflicting on him minor bruises and shock. 12. By said injuries the respondent was totally disabled for work from 23rd December 1920 till 18th May 1921. Since the latter date he has been and still is partially disabled, being fit for light surface work only, and his disablement by said injuries is serious and permanent. 13. The respondent's average weekly earnings prior to said accident were £4, 17s. 9d. The average weekly wage he could have earned at light surface work on said 18th May 1921 was £3, 3s., and the average weekly wage he could now earn at such work is £1, 19s. 6d."

The Case further stated—"I found further that it was part of the respondent's duty under his contract of employment to see that all the shots fired by him had exploded before the miners were permitted to return to the coal face at 6 a.m., or alternatively to see that an hour had elapsed after he had fired the shot; and in law (1) that it was therefore left to his discretion to determine whether any shot fired by him had or had not exploded within the hour, (2) that having honestly arrived at the conclusion that the three shots fired by him had so exploded he was not acting in breach of said paragraph 3 (*a*) of the Explosives Order in approaching the shot-hole when he was injured, and (3) that said accident accordingly arose out of as well as in the course of his said employment. I therefore awarded compensation as for total disablement to the respondent at the rate of £1 a-week (with war additions) from 23rd December 1920 till 18th May 1921, and thereafter awarded compensation as for partial disablement at the rate of £1 a-week till further order, and found the respondent entitled to expenses."

The *question of law* was—"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?"

Argued for the appellants—The fact that the respondent honestly believed that three shots had exploded did not absolve him from blame. There was no reasonable ground for his belief that two of the shots had exploded simultaneously. The respondent had contravened the express rule as laid down in the Order by returning to the face within an hour after firing the shot. These rules having been very carefully framed with the particular object of safeguarding miners fell to be very strictly construed. Counsel referred to the following cases:—*Coltness Iron Company, Limited* v. *Baillie*, 59 S.L.R. 118; *Smith* v. *Archibald Russell, Limited*, 1921 S.C. 335, 58 S.L.R. 284; *Costello* v. *Robert Addie, Limited*, 59 S.L.R. 116; *Dailly* v. *John Watson, Limited*, (1900) 2 F. 1044, 37 S.L.R. 782; *George* v. *Glasgow Coal Company, Limited*, 1908 S.C. 846, 45 S.L.R. 686.

Argued for the respondent—By the terms of rule 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913 it was obviously left to the discretion of the shot-firer as to whether a shot had been fired or exploded or not. He might exercise his judgment erroneously, but that did not affect the question of his liability or involve him in a breach of the Order so long as he entertained an honest belief and acted in good faith. The greater the number of shots involved, the greater the chances of a workman exercising his judgment erroneously. It was no test of the matter to ask whether the workman who fired the shots drew an unjustifiable inference from the two explosions he had heard. The whole matter resting as it did on the judgment of the respondent he could not be said to have contravened the statutory rule, and accordingly the present action arose out of and in the course of his employment. The following authorities were referred to:—*Lancashire and Yorkshire Railway Company* v. *Highley*, 1917 A.C. 352, *per* Lord Dunedin at p. 364; *Sanderson* v. *Henry Wright, Limited*, (1914) 7 B.W.C.C. 141; *M'Kenna* v. *Niddrie and Benhar Coal Company, Limited*, 1916 S.C. 1, 53 S.L.R. 1.

At advising—

LORD PRESIDENT—The workman had fired three shots within the meaning of paragraph 3 (*a*) of the Order—that is to say, he had ignited the fuses of all three by applying to them a naked light. Having retired to await the result in safety he heard two reports. It sometimes happens that two shots, though not simultaneously fired, go off simultaneously, producing a single report. The workman had experienced such an occurrence on a previous occasion. By an error of judgment (as the learned arbitrator has found), committed honestly and in good faith, the workman concluded that two of the three shots had gone off at the same moment and that the two reports accounted for all three shots. So he went back to the face within four minutes of the time when he had fired the shots, and the last of the three then exploded injuring him seriously in the face. Any breach committed by the workman of this statutory Order will in accordance with the judgment of the House of Lords in *Colville* v. *Fife Coal Company* ([1921] 1 A.C. 329) remove his mishap from the category of accidents arising out of his employment, and so disentitle him to compensation. The only question is, Did he commit a breach of the Order in the circumstances just explained? The prohibition contained in the Order takes effect in the event of a shot "missing fire," and a shot "misses fire" when and so long as it fails to explode after the brief interval ordinarily required to enable the spark in the ignited fuse to reach the charge. During that brief interval the workman has to take shelter in terms of paragraph 2 (*e*) of the Order, and by paragraph 3 (*a*) he is forbidden, so long as the shot continues in the state of "missing fire," to approach the shot-hole again until at least one hour after the time when the shot was fired, that is, when the fuse was ignited. In the present case the shot whose explosion was delayed by some cause or other after the other two had gone off was undoubtedly in fact a shot in the state of "missing fire" at the time when the workman approached it. The conclusion the workman had formed—to the effect that the shot had gone off—was unfortunately based on pure conjecture, for the fact that he had heard two reports, while it might mean that all the shots had gone off (two having exploded simultaneously), was at least equally consistent with the real position of affairs (namely, that one was "missing fire"). There is nothing in the findings of the learned arbitrator to suggest that either of the two reports presented any special feature of loudness or otherwise indicative of a double explosion. I cannot see that the workman's action was any the less a breach of the prohibition because it was taken in consequence of this error of judgment, though committed ever so honestly and in good faith. It was argued that the Order leaves it in the discretion of the workman to decide whether the event upon the occurrence of which the prohibition comes into play has actually happened, and that if he applies his discretion honestly and in good faith a breach of the Order is avoided. But the Order deals with the various stages in the performance of a practical process, each of which is highly dangerous unless approached and carried out, not merely carefully and without negligence, but subject to the exact observance of the very high precautions laid down in it, and the fact that two reports were heard, coupled with the possibility that one of them represented a double explosion, fell far short of entitling the workman to feel certiorated that all three shots had gone off. It was held in *Smith* v. *Archibald Russell, Limited* (1921 S.C. 335) that a workman who had made such application of a naked light to the fuse as would in ordinary circumstances cause the fuse to light must be held to have "ignited the fuse,'—*i.e.*, "fired the shot"—within the meaning of the Order, however confidently convinced he may have been that he had failed to set light to it. So here I think the workman must be held to have been dealing with a shot which was in a state of "missing fire" within the meaning of the Order because the ordinary and reliable test of a triple explosion was not satisfied. If in the absence of that or other equally reliable means of certioration the workman was held entitled to exercise the discretion contended for by the respondent, the efficiency of the Order as a preventive of accidents would be destroyed.

LORD MACKENZIE—I concur.

LORD CULLEN—I concur. The normal evidence of a shot having fired is the occurrence of the explosion to be expected therefrom, and where two or more shots have been ignited in succession the normal evidence of their having all fired is the occurrence of an equivalent number of explosions. In the present case the workman did not have such evidence. He had

ignited three shots and there were only two explosions. What he did was to assume that there had occurred the exceptional case of two shots firing simultaneously so as to produce only one explosion. There were, however, no special circumstances before him leading to the conclusion that such exceptional case had *de facto* occurred. He merely assumed that it had, and rashly acted on this unwarranted assumption instead of fulfilling the statutory requirements applicable to the situation which was normally indicated by the occurrence of only two explosions following on three shots ignited. This under the regulation he was not, in my opinion, justified in doing.

LORD SKERRINGTON did not hear the case.

The Court answered the question of law in the negative.

Counsel for the Appellants—Sandeman, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Solicitor-General (Murray, K.C.)—Fenton. Agents—Simpson & Marwick, W.S.

Tuesday, March 7.

FIRST DIVISION.

GLASGOW EDUCATION AUTHORITY *v.* SCOTTISH EDUCATION DEPARTMENT.

Education — Education Authority — Expenses of Members—Allowances in respect of "Time Necessarily Lost from Ordinary Employment in Attending . . . Meetings" —Education (Scotland) Act 1908 (8 *Edw. VII, cap.* 63), *sec.* 3—*Education (Scotland) Act* 1918 (8 *and* 9 *Geo. V, cap.* 48), *sec.* 32 (2), *and Fifth Schedule, par.* (5), (*b*), (*ii*).

The Education (Scotland) Acts 1908 and 1918 provide that an education authority may make payments at uniform rates to the members of the authority in respect, *inter alia*, of time necessarily lost from ordinary employment in attending meetings of the authority or of any committee thereof. *Held* that this provision applied only to such loss of time as necessarily involved irrecoverable sacrifice of remuneration in some ordinary employment.

A Special Case was presented to the Court by the Education Authority of the Burgh of Glasgow, constituted under the Education (Scotland) Acts 1872 to 1919, *first party*, and the Scottish Education Department, constituted under the said Education Acts and the Secretary for Scotland Act 1885, *second party*, as to whether the first party was justified in making certain payments to certain of their members out of the school fund.

The Case set forth as follows:—"1. By section 3 of the Education (Scotland) Act 1908 it is provided as follows—'(3) It shall be lawful for a school board, if they think fit, in addition to any powers already vested in them, to incur expenditure, and to defray the same out of the school fund, in carrying out or in combining with one or more school boards to carry out the following objects (that is to say) — . . . . . (7) In paying such reasonable expenses incidental to the proper discharge of the duties of the school board as may be sanctioned by minutes of the Department: Provided that no such minute shall come into force until it has lain for not less than one month upon the table of both Houses of Parliament.' Further, by section 32 (2) of the Education (Scotland) Act 1918 it is provided—'(2) The provisions set out in the Fifth Schedule to this Act with respect to the adaptation of Acts shall have effect for the purpose of adapting the law to the provisions of this Act'; and by section 5 of the said Fifth Schedule it is provided — '5. In the Education (Scotland) Act 1908 — . . . . . (*b*) The expenses which may be sanctioned by minutes of the Department under paragraph (7) of section 3 shall include — (*i*) Travelling expenses necessarily incurred in attending meetings of an education authority or any committee thereof or meetings of a local advisory council; (*ii*) an allowance at uniform rates to be prescribed by the Department in respect of other personal expenses necessarily incurred, and time necessarily lost from ordinary employment in attending such meetings.'

"2. In prescribing the rates referred to in said section 5 (*b*) (*ii*) of the said Fifth Schedule to the Education (Scotland) Act 1918, above referred to, the Department issued a minute, dated 8th April 1919, from which the following is an excerpt: — 'Minute of the Committee of Council on Education in Scotland, dated 8th April 1919, sanctioning the payment by education authorities out of the education fund of expenditure incurred for certain purposes. At Dover House, Whitehall, the 8th April 1919. By the Lords of the Committee of His Majesty's Most Honourable Privy Council on Education in Scotland. Read—Section 3, sub-section (7), of the Education (Scotland) Act 1908, as extended by paragraph 5 (*b*) of the Fifth Schedule to the Education (Scotland) Act 1918. Resolved—1. That an education authority may, subject to the conditions and limitations hereinafter specified, incur expenditure and defray the same out of the education fund for the following purposes:— . . . . . (2) In making payments to the persons mentioned in the preceding subsection' (*i.e.*, members of the authority or of any committee thereof, and members of any local advisory council appointed by the authority) 'in respect of (other personal expenses (*i.e.*, expenses other than travelling expenses) necessarily incurred), and time necessarily lost from ordinary employment in attending such meetings, at the following rates:— . . . . . (*b*) In respect of time necessarily lost from ordinary employment, at the rate of seven shillings and sixpence for each half-day and fifteen shillings for each full day necessarily so lost.' The said minute was duly laid upon the table of both Houses of Parliament.