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

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

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

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

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

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

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

Thursday, March 16.

SECOND DIVISION.

[Lord Cullen, Ordinary.

WIGHT *v.* NEWTON.

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

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

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

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

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

implemented said lease in so far as incumbent upon the pursuer, an effectual contract has been concluded between the parties which both are bound to implement and give effect to, and decree of declarator should be pronounced as concluded for. (2) The draft lease condescended upon having been prepared by the defender's agents and factors, communicated to and revised by the pursuer, and the terms of the lease adjusted between the parties, both landlord and tenant are bound by this draft of the lease and their actings with reference to the subjects let, and the pursuer is entitled to have the defender ordained to enter into a formal lease to him of the subjects let, in terms of said draft, or otherwise in such terms as may be adjusted at the sight of the Court."

The defender pleaded—"(3) The pursuer not having possessed the subjects let on the faith of the draft lease condescended on, and no agreement as to the conditions of the lease having been concluded between pursuer and defender, the pursuer is not entitled to decree of declarator as concluded for."

The following narrative is taken from the opinion of Lord Salvesen—"On 21st July 1906 the pursuer, who is a farmer, made offer for Longnewton farm and policy parks as then possessed by Mr Wright at an annual rent of £550, the duration and general conditions in the lease as might be arranged. The offer was transmitted to Messrs Guild & Guild, who act as agents and factors for the defender, the owner of the farm in question, and who conducted the whole correspondence on his behalf. The offer was favourably entertained, and a draft lease containing the clauses which the landlord proposed was prepared by Messrs Guild and communicated to the pursuer on 28th August. The pursuer was at the same time informed that he might regard the transaction as substantially completed, and that he might make arrangements on the footing of obtaining entry to the farm in November. When submitting the draft lease Messrs Guild wrote requesting a meeting, at which they state "We think it can easily be finally adjusted." The meeting took place on 31st August 1906, at which certain alterations were admittedly agreed on, and at which the pursuer called attention to a clause in the defender's lease which was in the following terms—"The proprietor hereby binds and obliges himself to put the farmhouse, steading, and outhouses into a suitable condition of repair; and, subject to such repairs, the tenant hereby accepts of the whole houses, buildings, dykes, fences, gates, hedges, drains, ditches, watercourses and others on the said farm . . . as in a good habitable and tenantable condition, and binds himself to maintain and uphold them, as well as any additions thereto, all the years of this lease, and to leave them so at the expiry hereof, ordinary wear and tear excepted." The pursuer pointed out to Mr Guild that this clause was in a very unusual form, in respect that it put no obligation on the landlord to put the dykes, fences, &c., into tenantable condition at the commencement of the lease, while it imposed upon the tenant the duty of leaving them in such condition at its termination; and he proposed either that the landlord should undertake to put them into tenantable condition, or, if he did not do so, that he, the tenant, should not be bound to leave them in a tenantable condition at the expiry of the lease. Some discussion took place, to which I shall afterwards refer, and a meeting was subsequently held between the parties on 9th October at the farm. Both parties understood that they had come to an agreement; and the tenant entered upon the farm and took over the crop, stocking, &c., from the outgoing tenant at a cost of £900, the price fixed in a submission between him and Mr Wright, the outgoing tenant. The submission was prepared and carried through by Mr Guild. Since 1906 the pursuer has remained in possession of the farm, has cultivated the same in terms of the provisions in the draft lease, and has regularly paid the stipulated rent. No formal stamped deed, however, was executed; but on 30th July 1909, in response to an application by Mr Stirling, the pursuer's solicitor, to have the draft lease adjusted, it was sent to him by Messrs Guild. Its terms were brought into harmony with the alteration that the pursuer had demanded on 31st August 1906, and the draft as so revised returned to Messrs Guild. The draft lease, as revised, lay in Messrs Guild's possession from 11th August 1909 until 3rd November, without any observation being made by them as to the addition proposed by Mr Stirling or revisal. Meanwhile a dispute had arisen between the pursuer and defender as to the pursuer's right to cross a private avenue with his farm carts, in order to convey the crops from a field on the one side to the steading on the other, and an interdict had been brought by the defender against the pursuer so using the avenue. It was not until this dispute had been disposed of adversely to the defender's contention that on 3rd November 1909 Messrs Guild, without making any attempt to complete the adjustment of the lease, wrote—"In so far as regards the draft it does not seem to be possible for us to adjust a lease; and Mr Wight's occupancy of the farm must have to stand as at present under his missive offer to us of 21st July 1906. That is the document upon which he is now possessing the farm, and by which Captain Hay Newton's rights fall to be regulated." The pursuer's agent protested against this contention, maintaining that the terms of the lease, as revised in August 1906, had been adjusted; but the defender, through his agents, adhered to the view expressed in the letter from which I have quoted. Subsequently the agents took up the position that the pursuer was possessing on a yearly tenancy, and on this footing they gave him notice to quit the farm at Martinmas 1910."

On 26th November 1910 the Lord Ordinary (CULLEN) after proof assoilzied the defender from the conclusion of the summons.

Opinion.—[*After setting forth the conclusions of the action*]—"The draft tabled by the pursuer in order to formulate *in extenso* the terms of the lease which he seeks to establish is No. 6 of process. It is a draft of a formal lease, complete in all its clauses.

"It will be observed that this is not the case of a tenant seeking to establish that a contract of lease has been made *quoad* the substantials of subject, rent and duration, and asking that his landlord should be ordained to execute a formal lease with all "the usual and necessary clauses." The pursuer demands a lease in terms of his draft No. 6, and nothing else. This makes an important difference, because the dispute between the parties has come to be one as to a particular obligation laid on the landlord in the draft No. 6, which the pursuer deems to be essential and indispensable. The defender attaches an equal degree of importance to it, and says he never agreed to undertake the obligation.

"By letter, dated 21st July 1906, quoted on record, the pursuer offered for the farm a rent of £550, 'the duration and general conditions of lease as may be arranged.' On 28th August 1906 the landlord's factor, Mr Guild, W.S., sent him a 'rough draft' lease (No. 12 of pro.), and proposed a meeting at which he said he thought it could easily be finally adjusted. In terms of this draft the landlord bound himself to put the farmhouse, steading and outhouses into a suitable condition of repair, and, subject to such repairs, the tenant was to accept the whole houses, buildings, dykes, fences, gates, hedges, drains, water-courses, and others on the farm as in good habitable and tenantable condition, and to maintain and leave them in such condition at the ish. The pursuer went over this draft and made certain notes, and on 31st August 1906 he, along with one of his sons and a friend, Mr Shiels, had a meeting with Mr Guild with a view to adjusting the draft. A variety of matters were discussed. One of these was the part of the above clause whereby the tenant was to accept the dykes, fences, gates, hedges, drains, &c., as in good and tenantable repair. Certain notes were made by Mr Guild on the draft. The pursuer did not see these notes. On the margin of the draft, opposite the clause above referred to, there was written in pencil 'Meet at farm.'

"The pursuer entered to the farm at Martinmas 1906, and incurred substantial expenditure which, it is not disputed, would amount to *rei interventus* sufficient to set up an informal lease duly proved *scripto*. Unfortunately nothing was done after the meeting of 31st August in the way of having a formal lease executed. The draft (No. 12 of process) was left in Mr Guild's hands, and apart from the meeting of 26th May 1908, after referred to, the pursuer did not again see it until July 1909. By that time a good deal of friction had arisen. The pursuer's agent Mr Stirling wrote to Mr Guild for the 'adjusted draft lease.' On 30th July Mr Guild sent the draft (No. 12 of process). He wrote—'As regards the lease of Longnewton, we some time ago went over the draft with Mr Wight and adjusted it, but for some reason or other it has never been written out. We, however, send the adjusted draft herewith, in order that you may adjust it for Mr Wight, and we shall be glad to have it back at your convenience, as it is better that the lease should be signed.'

"The draft so sent (No. 12 of process) contained certain alterations made by Mr Guild subsequent to the meeting of 31st August 1906. When precisely they were made is not shown. One alteration extended the duration from five to nineteen years, with breaks. No question arises on this head. There were other alterations, mainly in the direction of making express exception of certain small and special portions of the lands which had not been possessed by the previous tenant Wright. As, however, the pursuer's draft lease (No. 6), makes Wright's possession the measure of the let, these are not material. The matter of importance in the present case is that the clause as to the tenant accepting the dykes, fences, gates, hedges, drains, &c., as in tenantable repair stood just as it did in the draft when originally sent to the pursuer, and when the meeting of 31st August 1906 took place.

"Mr Stirling having received the draft, made certain deletions and additions. He returned it to Mr Guild on 11th August 1909 with the explanation 'The alterations I have made are in red ink and these have been made in order to restore the lease to the precise condition in which it was after the meeting between you, on the one hand, and Mr Wight and his son and a friend on the other hand. Since the meeting some additions and amendments have been made on the lease which were not mentioned at the meeting, and on the other hand you had omitted to add the words "dykes, fences, gates, drains, &c." after the word "outhouses" at the foot of page 5. Mr Wight and his son are absolutely clear that you at the meeting agreed to treat the fences and ditches on the same footing as the farmhouse and steading. Surely this was only reasonable.'

"About this time a serious dispute arose between the pursuer and the defender with regard to the pursuer making use of the private avenue leading to the mansion-house, and on 26th October 1909 the defender presented a note of suspension and interdict against the pursuer. The matter of the draft lease lay over until 3rd November, when the defender, having apparently made up his mind that he should get quit of the pursuer, took up the position that there was no concluded lease. This was a complete change of front, because Mr Guild's letter of 30th July 1909 clearly acknowledged the existence of a lease. There is no doubt, indeed, from the correspondence that both parties proceeded up to November 1909 on the footing that there was an 'adjusted lease.' The difficulty is

as to what the terms of the lease were, and in particular whether it laid the defender under obligation to put the dykes, fences, &c., in repair, or bound the tenant to accept them as they stood. Mr Guild's 'adjusted draft' was the draft No. 12 as sent to Mr Stirling on 30th July 1909, which made the tenant accept the dykes, fences, &c. The pursuer's 'adjusted draft' was No. 12 on the assumption of its being altered to the effect of deleting his acceptance of the dykes, fences, &c., as in tenantable repair and of inserting an obligation on the defender to put them in such repair.

"Towards this clause the attitude of both parties is that it is of essential importance. The pursuer demands a declarator in terms of the draft lease tabled by him (No. 6) which puts the defender under obligation to repair. He depones that he would not have taken a lease without such an obligation.

"The alleged lease must be proved *scripto*. The pursuer adduces the draft No. 12 of process. On record he avers (Cond. 4) 'At this meeting (31st August 1906), and in the presence of said parties, the various clauses in the draft lease were gone over, certain alterations on and additions thereto were made, and the terms thereof were finally adjusted and agreed to.' This seems to mean that the draft, in the terms in which it actually stood when the meeting ended, recorded the final agreement of parties. There is no doubt that a draft lease, although it begins its life by being tentative in character and a mere vehicle of negotiation, may afford good written evidence of a concluded contract of lease for a term of years if it be shown by the actings of parties to have reached the stage of being an adjusted draft, that is to say, of being a record of the parties' concluded intentions. (*Bathie* v. *Lord Wharncliffe*, 11 Macph. 490.) It will not serve this purpose, however, if it has not got beyond the stage of passing between the parties for the adjustment of essential conditions. The pursuer accordingly tables the draft No. 12 as an adjusted draft. The difficulty, however, which confronts him is that, having tabled it as adjusted, he is under necessity at once to reject it in so far as it relates to the clause dealing with the dykes, fences, &c., because if that clause be taken as it appears in the draft—that is to say, as it stood before altered in red ink by Mr Stirling on the eve of the rupture between the parties—it negatives the pursuer's case. The pursuer must seek his evidence elsewhere if at all. Cases have often occurred where the evidence of a concluded lease has been collected from various sources. But where, as here, there is a draft lease formally complete in all its clauses, which is tabled as an adjusted draft, it is an extremely difficult course to proceed to throw it over and to contradict its terms *quoad* one of its important, and as the parties here agree essential provisions. It would certainly require at least some very distinct and unequivocal evidence outside the 'adjusted draft' to enable the pursuer to succeed on this line.

"The first position which the pursuer takes up is that the adjusted draft should be held to be draft No. 12 as altered by Mr Stirling and returned to Mr Guild in August 1909. This, in my opinion, will not do, because the alterations were never accepted. I do not think that Mr Guild's delay to take the matter up until 3rd November can reasonably be held to be a tacit acceptance of them. During the interval the dispute about the avenue arose.

"The pursuer's next position is that the correspondence between the parties supplies evidence which is sufficient to show that the agreement of parties as to the dykes, fences, &c., was not that appearing in the 'adjusted' draft (taken without Mr Stirling's alterations), but was that expressed in the pursuer's draft No. 6. He points to various letters from him and from Mr Stirling complaining of the state of fences and drains, and of the defender's failure or delay to put them in order, and to the fact that the defender made some small effort at repairs. There is, however, no letter or writing of any kind under the hand of the defender or his agent, expressing or conceding the existence of an obligation on the defender, such as the pursuer seeks to establish. No doubt the writ of a tenant may, under certain circumstances, be available as evidence against his landlord, *e.g.*, an offer received by the landlord and acted on. Tenants, however, sometimes make ill-founded claims through mistake as to their rights or otherwise, and the question here is whether the letters in question are to be held as displacing the clause in the 'adjusted' draft, and superseding it by one quite different, merely because the defender did not, in writing, repudiate them, and because he did some improvements which might be due to goodwill, as Mr Guild alleges they were. I do not think the pursuer himself interpreted the defender's position and actings as implying a recognition by him of the obligation in question, because he became uneasy on the subject and went with his wife to call on Mr Guild on 26th May 1908, on which occasion Mr Guild read to him from the draft No. 12 the clause relating to the dykes, fences, &c. Shortly thereafter (8th July) Mr Stirling, his agent, wrote Mr Guild saying—'Mr Wight would like if his lease could now be adjusted and the improvements or repairs which the proprietor was to make be carried out. He says that certain expenditure is still necessary on the buildings, fences, and drains, and he asks me to express the hope that you will be able to carry out the work at an early date." There was no written reply to this letter, and the matter was allowed to drop for a year until the draft was sent to Mr Stirling on 30th July 1909, and he made his alterations on it.

"On the whole, while I do not think that the defender's attitude towards the pursuer's letter was wholly satisfactory, I do not see my way to read into the otherwise adjusted draft, a clause reversing the position of the landlord as it actually stands on the draft.

"The pursuer, however, contends that *esto* he has not proved the obligation by writing, he is entitled to prove it by parole evidence. He advanced the proposition that if there be writing to prove the three primary essentials of a lease—subject, rent, and duration—it is competent to prove any condition of the lease, however important, by parole. No authority was adduced, and I do not think the proposition well founded. (*Paterson* v. *Earl of Fife*, 3 Macph. 423). It is not a question of filling in the 'usual and necessary' clauses, but of proving a part of the contract which the parties here unite in esteeming of first-rate importance. It is true that the pursuer's clause represents what would be the landlord's common law obligation in the absence of special compact. But then it is clear that the matter here was made the subject of special compact. The draft lease No. 12, tabled by the pursuer as an adjusted draft, contains a special compact which negatives the pursuer's case, and I do not think he can displace it by parole evidence. In a case of this kind it is difficult, as the parole evidence is being led, to draw the line between evidence bearing on the terms of the alleged agreement and evidence which is admissible to show the history and treatment of the draft lease, which is appealed to as having ultimately become a record of the parties' concluded intentions, and the whole evidence tendered was received under reservation of the defender's objections to its competency.

"Had the pursuer sought to establish a lease in the terms of No. 12, it may be that he would have succeeded. As it is he will not have No. 12. The only question therefore is whether he has proved a contract of lease in terms of his draft No. 6, and as in my opinion he has failed to do so *quoad* one of its important conditions, it follows that the defender is entitled to absolvitor."

The pursuer reclaimed, and argued—The four essentials of a lease, viz., the parties thereto, the subject, the duration, and the rent, had, as was undisputed, been agreed on. If the four essentials were agreed on, there was a concluded lease. It was not necessary to prove any of the conditions of the lease over and above the main four by writ. Subsidiary conditions could be proved by parole. In one case the Court had even allowed parole proof of the endurance of a lease for special reasons—*M'Leod* v. *Urquhart*, May 25, 1808, Hume's Decisions 840. Certainly parole proof was competent where there was ambiguity in any of the subsidiary conditions. The actings of the parties were referable only to an agreement, and showed clearly that the clause had been agreed to. There was proof here *rebus et factis*. The landlord had repaired the fences, and drains had been put right. The landlord had acted exactly as if the clause in dispute formed part of the contract. In these circumstances the clause could be proved by parole—*Bathie* v. *Lord Wharncliffe*, March 5, 1873, 11 Macph. 490 (Lord President at 496, and Lord Deas at 498), 10 S.L.R. 308; *Earl of Mansfield* v. *Henderson*, June 5, 1856, 18 D. 989 (Lord Deas at 993); *Carron Company* v. *Henderson's Trustees*, July 15, 1806, 23 R. 1042 (Lord Kyllachy at 1048), 33 S.L.R. 736. But if proof by writ were necessary the pursuer had what was equivalent to ample proof *scripto*. The tenant's view of the contract was put in letter after letter by him to the landlord. The landlord never on one occasion repudiated the position the tenant took up in the correspondence. It was idle for him now to say that he did not agree to the conditions. It might be that they were never expressly acceded to, but acceptance was in the circumstances to be inferred, there being no repudiation. The pursuer had acted on the footing that they were agreed to—*Colquhoun* v. *Wilson's Trustees*, March 6, 1860, 22 D. 1035; *Forbes* v. *Wilson*, February 22, 1873, 11 Macph. 454; *Dowling* v. *Henderson & Son*, June 11, 1890, 17 R. 921, 27 S.L.R. 738; *Cornish* v. *Abington*, 1859, 4 H. & N. 549 (Pollock, C.B., at 556). If, however, the Lord Ordinary was right in his view that the pursuer was not entitled to have this clause inserted in the lease, then he was entitled to have a remit to a man of business to insert the usual and necessary clauses. The law implied provisions with regard to certain things as to which the contract was silent—*Bathie* v. *Lord Wharncliffe* (*sup. cit.*), Lord Deas at 11 Macph. 497; *Erskine* v. *Glendinning*, March 7, 1871, 9 Macph. 656, 8 S.L.R. 410. Tenantable condition meant fit for the purpose for which it was let. The clause with regard to fences and drains was a usual and necessary clause—Bell's Prin., 1253-1255; Erskine, ii, 6, 39; *Haining & Douglas* v. *Grierson*, February 18, 1807, Hume's Decisions, 829. All styles going back to 1826 contained this clause—Juridical Styles, 3rd ed. 1826, i, 688. In any event it was absurd to suggest that the clause could be cut into two halves. If the landlord's obligation to put fences, &c., in repair went out, the tenant's obligation to leave in repair must also be struck out. There was either acceptance of the clause by both parties or no *consensus* on the matter.

Argued for defender—The pursuer had only concluded for a lease in terms of the draft which he tabled. As his action was laid, he was entitled to that or nothing. If he failed in his contention the defender was entitled to absolvitor. The clause in question was not one of the usual and necessary clauses—Juridical Styles, 6th ed., i, 419. Both parties all along regarded the fences condition as an essential one. They were accordingly never *ad idem*, and there being no consensus the contract of lease must fall—*Buchanan* v. *Duke of Hamilton*, March 8, 1878, 5 R. (H.L.) 69, 15 S.L.R. 513. The pursuer averred that it was agreed that the clause in question should be put in. He could only prove that averment by writ or oath of the defender—*Paterson* v. *Earl of Fife*, January 27, 1865, 3 Macph. 423; *Walker* v. *Flint*, February 20, 1863, 1 Macph. 417 (Lord Justice-Clerk at 421). Failure to repudiate timeously the pursuer's letters

did not amount to agreement *scripto* to the clause. It would have taken much longer time to make the failure to repudiate develop into acquiescence. There could not be a remit to a reporter except for the purpose of adjusting a formal clause.

At advising—

LORD ARDWALL—In this case the Lord Ordinary apparently came to be of opinion that on the summons as laid he could only competently grant a decree in the pursuer's favour "in terms of and under the conditions specified in the draft lease to be produced at the calling hereof," that lease being the lease No. 6 of process which was produced with the summons, and which contained what was referred to throughout the discussion as the "red ink clause," which is printed in the proof, and under which the proprietor bound himself to put "dykes, fences, gates, hedges, drains, ditches, water-courses and others" into a suitable condition of repair, and that if he thought that the pursuer was not entitled to a lease in these terms, the only alternative was that decree of absolvitor should be pronounced.

I am unable to read the summons so strictly. It appears to me that the real object of the first conclusion was to have it declared that a lease existed, and the pursuer, as is usual, produced with the summons the draft lease which he asked should be granted. But when we turn to the next clause, which is the executive clause of the summons, we find that the decerniture asked for is that the defender should execute in favour of the pursuer a formal lease of said lands and farm in terms of and under the conditions specified in said draft lease, "or in such terms as shall be fixed and determined by our said Lords." Now reading these two conclusions together I have no hesitation in holding that it was competent for the Lord Ordinary to find and declare a lease generally, and yet to make such alterations in the details of it as should turn out to be needful or proper in the course of the process; and I do not think that the terms of the summons confine the Court to granting a lease in the precise terms of No. 6 of process, or otherwise to granting absolvitor to the defender, though I am not surprised, considering the way in which the importance of the red ink clause was argued to this Court, and presumably to the Lord Ordinary, it may have appeared to him that the pursuer stated his case as if he was entitled to either that or nothing. The view I have stated derives much support from a consideration of the position of the parties immediately before the action was raised. In the first place, on 3rd November 1909 the defender's agents write to the pursuer's agent to the following effect, that the pursuer's occupancy of the farm "must continue to stand as at present under his missive offer to us of 21st July 1906." Then upon 6th December 1909 the defender's agents make the following statement:—"As regards Mr Wight's position at Long Newton, he is simply a yearly tenant with no lease, and there are no obligations resting on the proprietor which he can ask to be fulfilled"; and lastly, on 16th December 1909 the defender's agents make this statement—"Mr Wight is unquestionably, in the absence of an adjusted lease, simply a yearly tenant." It needs very little consideration to show how important it was for Mr Wight that he should be declared to be a tenant under a lease of some duration, and not merely a yearly tenant. The stipulations regarding his rights on leaving the farm and many others all depended on his being a tenant under a lease. It is not surprising, accordingly, that on 20th December 1909 he raised the present action, and as it appears to me, the leading object of this action was, as I have said, to have it declared that there was a contract of lease between the pursuer and the defender, and that he is not to be debarred from getting that remedy even although he does not succeed in obtaining a lease with all the terms and conditions in the lease which he tabled with the summons.

As it happened, the parties were practically agreed as to the terms of the lease which should be granted by the defender to the pursuer. Indeed, the only clause regarding which there was any dispute either before or in the course of this action was what has been called the red ink clause which I have quoted above. I may say that there is not a word said about this clause in the record, making it very clear, I think, that the real question between the parties was lease or no lease. As things turned out at the proof mainly due to concession forced from the landlord by the raising of the action, the only point of controversy left was this red ink clause, and hence it has been dealt with by the Lord Ordinary as the most important point in the case, which it certainly is not. In the proof the pursuer states that at a meeting with Mr Guild, the defender's agent, in his office on 31st August 1906, he called Mr Guild's attention to the clause relating to the repairs on the buildings and fences, and said to him that he could not take the farm with the clause drawn as it was, because it bound him to leave in repair what was not to be put into repair and what was not in repair at his entry. The pursuer's account of this matter is confirmed by his notes, in which he had made a note to have the words in red ink added to the clause, or failing that, the next clause altered in so far as it bound the tenant to leave these in repair; and he says that Mr Guild agreed to the alteration shown in red ink. Mr Guild, on the other hand, says he did not there and then agree to the alteration, but I think it very plain that the reason he did not do so, as indeed he stated in almost so many words himself, was that he did not wish to give an unconditional and unlimited obligation about fences and drains in favour of the tenant, and accordingly that he put in pencil on the margin of the draft lease opposite the clause the words "meet at farm."

So far there is no serious discrepancy between the parties, and I think Mr Guild's action as described by himself was just the action that a prudent factor would take, namely, he would see what required to be done to the drains and fences and either specify what particular drains and fences the landlord undertook to put in order, or otherwise limit the amount of the expenditure to a certain agreed-on figure. The pursuer and Mr Guild did afterwards meet at the farm on or about 9th October 1906, and Mr Guild's case is that Wight agreed that there was nothing to do to the fences or drains, and did not press anything about the clause. Wight, on the other hand, says that the clause was there and then agreed to, Mr Guild having, according to him, found that it did not imply any serious obligation against the landlord either as regards houses, fences, or drains. Mr Wight, however, never took care to see that the clause was put in the draft lease, and Mr Guild took the draft lease away with him and kept it till some months before the raising of this action, when the red ink clause was inserted by the pursuer's agent, the defender's agent on the other hand refusing to accept it as part of the adjusted lease, and the question now is whether it is to go in as part of the lease, which the pursuer is entitled to get, or is to be left out, and if so, on what terms as regards the other conditions of the lease.

It was argued for the pursuer that the four essentials of a lease, namely, the parties thereto, the subjects, the duration, and the rent, having been proved or admitted to have been agreed to between the parties, he was entitled to ask the Court to remit to a man of skill to determine whether the particular clause should be inserted in the lease as one of the usual and necessary clauses of such a lease. It is not uncommon in this Court to have actions brought for the purpose of having a party ordained to execute a formal lease in such terms as may be adjusted at the sight of the Court when once the four essentials above specified have been agreed on. But I do not think that the parties are in the same position in the present case, because they are in this position, that a draft lease was drawn out and approved of by them in all its details with the exception of what has been referred to as the red ink clause, and that upon the faith of that draft lease the pursuer entered upon the farm, has possessed it since Martimas 1906, has taken over the stock and cropping of the last tenant, and has besides expended a considerable amount in liming the land and otherwise. Accordingly I think this draft lease followed by entry and abundant *rei interventus*, must be taken to constitute a valid contract of lease between the parties, the only matter requiring to be adjusted being in regard to this red ink clause, the pursuer maintaining that it was agreed that it should go in, and the defender denying that.

With regard to the law on the subject, I have no doubt that where parties have omitted to insert in a draft lease any particular clause, the party averring that it was agreed that such clause should be put in can only prove that averment by writ or oath of the other party, unless indeed it can be proved to be a verbal alteration upon a written draft or a written lease, which has been validated, *rei interventu*, by being acted upon by both parties. Now I do not think that the pursuer's right to have this clause inserted has been competently established by habile evidence. On the other hand, I think it is proved by the writ of the defender, namely, the words, "meet at the farm," that the consideration of this clause (and by this clause I mean this clause and the relative clauses occuring at the same part of the deed) were left over for consideration when the rest of the draft was adjusted, as Mr Guild had reported to his client it had been.

That being so, this clause and the clause containing the corresponding obligation on the tenant must be written out of the lease, and the parties left to their rights at common law just as if no part of these conditions had ever appeared in the draft lease upon which the pursuer entered into the possession of the farm. Now I take it that the common law rights of parties are these. In the first place, it would appear that the landlord is under an implied obligation to put the houses, offices, and fences on a farm at a lessee's entry into what is known as tenantable repair. But it would appear that there is no such obligation on the landlord with regard to drains. See Bell's Principles, sec. 1253; Erskine, ii, 6, 39; Rankine on Leases, 2nd edition, page 233 And as is suggested by Mr Guild in the present case, it may be inconvenient for the landlord to undertake to put the whole drains on a farm into good tenantable order and condition for want of money or other reasons. Even with regard to houses and fences it may be a difficult question in some cases to say what is tenantable repair. But the usual course followed is that the parties inspect the houses and fences, agree as to whether they are in good tenantable order, and if not, what will be required to make them so, and the tenant thereupon accepts them in the lease as in such good repair, and obliges himself to leave them in the same tenantable condition. But where there are no special obligations one way or the other with regard to houses, fences, or drains, the tenant's only obligation is to leave them in such condition as he received them, less ordinary tear and wear. Now in the present lease, if the red ink clause is deleted there is no obligation on the landlord to put the dykes, fences, gates, hedges, drains, ditches, water-courses and others into a suitable condition of repair and yet the tenant is made to accept them as in a "good habitable and tenantable condition," and binds himself to leave them so at the expiry of the lease. And one thing is perfectly clear about the clauses regarding these matters in the present lease, and that is that Mr Wight never agreed to the obligation as to maintenance and leaving the drains and fences in good condition

unless the landlord undertook to put them into that condition at his entry; and I am therefore of opinion that in the present case we should hold that it has not been proved that both parties agreed that the proprietor should bind himself to put the dykes, fences, gates, hedges, drains, ditches, water-courses and others into a suitable condition of repair, and that accordingly the red ink clause must be struck out of the draft lease, and that, on the other hand, the words 'dykes, fences, gates, hedges, drains, ditches, water-courses and others' should be deleted from the clause containing the tenant's acceptance of these subjects as in a good habitable condition and binding him to leave them so at the expiry of the lease, tear and wear excepted, and that the words 'dykes and others' should be deleted from the next clause containing a declaration as to what is to be done in the event of the tenant neglecting to keep the houses and others in good tenantable repair, and that the landlord should be ordained to execute a formal lease in terms of the draft No. 6 of process, subject to the above alterations, and be found liable to the pursuer in expenses.

LORD SALVESEN—[*After giving the narrative of facts above quoted*]—The present action was brought on 20th December 1909 to have it found and declared that the defender had let to the pursuer the farm in question on the conditions specified in the draft lease, and to have the defender ordained to execute in favour of the pursuer a formal lease of the lands in terms of said draft lease, "or in such terms as shall be fixed and determined by our said Lords." The defender pleaded that no agreement as to the conditions of the lease had been concluded, and that accordingly the defender fell to be assoilzied from the conclusions of the action, and to this defence the Lord Ordinary has given effect. The result is that standing this interlocutor the pursuer has no title of possession at all, and there are no clauses which regulate the rights of parties on the pursuer's removal from the farm.

In the earlier part of his opinion the Lord Ordinary says—"The pursuer demands a lease in terms of his draft No. 6 and nothing else," and he distinguishes the case from one where a contract of lease has been made *quoad* the *essentialia*—subject, rent, and duration—on which possession has followed, and where the landlord is asked to execute a formal lease with all the usual and necessary clauses. I cannot, however, reconcile this view with the pursuer's summons. It is true that his primary demand is for a lease in terms of the draft No. 6; but he does not so limit himself, but expressly leaves it open for the Court to fix the terms of the lease. In order to entitle the pursuer to get a formal lease executed in terms of the draft No. 6 he must, by competent evidence, prove that all the conditions it contains were assented to by the defender. But it by no means follows that if there were no agreement upon one of the clauses the alternative is that the Court should hold that no contract was ever entered into, although that seems to be the legal basis of the Lord Ordinary's judgment.

Before I consider the law applicable to the case I shall indicate briefly my opinion as to the facts with regard to which the parties are at variance. I think there can be no question that at the meeting on 31st August 1906 the pursuer definitely objected to the clause with regard to the dykes, fences, &c., as it stood in the draft lease then discussed. He and his son say that they understood Mr Guild assented to the alteration which the pursuer proposed. On the other hand, Mr Guild says that he refused to give the tenant a clause in open terms until he saw what was actually wanted, and that he arranged that parties should meet on the farm on some fixed date and then decide what was to be done—"The whole clause was held over until we should meet at the farm." In this Mr Guild is supported, in the first place, by the fact that opposite the clause there is a pencil note in his handwriting, "Meet at farm;" and by a passage in the cross-examination of Mr Shields, one of the pursuer's witnesses, who was present at the interview in question, who was asked—"(Q) Was it arranged that, before that clause was definitely fixed, Mr Guild should go out with Mr Wight and have a meeting at the farm?—(A) Yes, I remember that quite well."

On this evidence I am unable to assent to the pursuer's first contention, which is that Mr Guild there and then unreservedly accepted the clause which the pursuer proposed. On the other hand, I think he led the pursuer to believe that there would be no difficulty in adjusting it, and that he might be able to concede it after he had a meeting at the farm and had seen the state of the fences, &c., along with the pursuer. Such a meeting took place on the 9th of October, and according to Mr Guild's own evidence it then appeared that very little required to be done; that the fences, drains, and ditches were in fair condition and did not require to be repaired; that he told the pursuer at the farm that he would not be expected to leave anything in a different condition than that he got it in, giving full allowance for all damage by wear and tear. If this be so, there seems no reason whatever why the clause as proposed by the pursuer should not have been granted by the defender, and if the matter depended on the parole evidence I should have no difficulty in coming to the conclusion that on the 9th of October Mr Guild gave the pursuer to understand that the clause with regard to the fences, ditches, &c., was conceded on behalf of the landlord. It is, I think, not possible otherwise to explain why the fences have since been regularly repaired at the expense of the landlord, that drains passing through the steading but draining fields beyond have been put right, and that Mr Guild has acted exactly as if the clause now in dispute formed part of the contract between

the parties. Nor is it possible on any other footing to understand why, when repeated demands were made by the pursuer for repairs on drains, &c., Messrs Guild should never have repudiated them as falling to be executed by the tenant and not by the landlord, which is now the contention put forward by the defender.

It was, however, settled by the case of *Paterson* (3 Macph. 423) that it can only be proved by the defender's writ or oath that the addition to the clause desired by the pursuer formed part of the constitution of the lease. But even if it were held that no agreement was come to with regard to the clause on which the whole dispute turns, I am of opinion that that would not result in a declaration that no binding contract for a lease had ever been entered into. The tenant here was invited to enter on the possession of the farm on the footing that parties were substantially at one as to the main terms of the lease, and that any minor details which had not been carried out were left over for subsequent adjustment. It would be a strange result if, after the tenant had expended large sums on the faith of the contract, the landlord was entitled to take up the position that, no agreement having been arrived at on such matters, there was no concluded bargain. I do not think that that is the law. It is quite well settled that, if the essentials of a lease have been agreed on and possession has followed, if parties cannot agree on the clauses to be inserted in the formal lease, the Court will remit the adjustment to a man of business to settle the usual and necessary clauses; and it does not appear to me to make the matter worse for the tenant that all these clauses except one have been made matter of express agreement before possession was taken. It would, of course, have been different if before possession the landlord had definitely taken up the position that unless the tenant agreed to a particular clause he held himself free of the bargain. In such a case, if the tenant thereafter entered on the farm he would be held to accept the clause as proposed by the landlord. These, however, are not the facts of this case. The tenant was given to understand, at the meeting of 31st August, that there would be no difficulty in adjusting the clause to his satisfaction; and assuming that no agreement was thereafter arrived at, I see no difficulty in the Court settling the dispute according to the ordinary rules of the common law. Now on that footing I think the clause as proposed by the tenant in the alternative form would have been just one of the usual clauses which an expert conveyancer asked to adjust the lease would have made part of its constitution. It is noteworthy that in a subsequent clause in the defender's own draft the tenant was taken bound to perform all cartages necessary for repairs or improvements on fences and others during the currency of the lease, which implies that these repairs were otherwise to be performed by the landlord. In this respect the facts differ entirely from those in *Paterson's* case, because the conditions which the tenant desired to have declared binding upon the landlord were outside of the usual and necessary clauses of a lease of agricultural subjects. The Lord Ordinary holds that the fact that the pursuer deponed that he looked on this clause as important, and indeed indispensable, took it out of the category of cases in which the usual and necessary clauses may be supplied on an application to the Court. I cannot see that this makes any difference. All the usual and necessary clauses which are implied at common law are of importance to the parties, and many of them are of equal importance with the one under discussion.

On the whole matter, therefore, I have come to the conclusion, differing from the Lord Ordinary, that it is impossible to affirm, in the circumstances of this case, where there has been already four years' continuous possession of the farm by the pursuer, that no binding contract was ever made between him and the defender; and as only one clause falls to be adjusted, I think we may do that ourselves without remitting to a man of business. The lease will thus be as contained in the draft No. 6 of process, but deleting the red ink alteration and the corresponding words in the clause immediately following.

LORD JUSTICE-CLERK—I concur with the opinions your Lordships have given. It has long been settled that where possession is given of a farm it may be held that the tenant holds under an agreement for lease proved *scripto*, although no formal lease has been adjusted in every minute particular, and no terms of lease have been formally signed. That this is a case in which there is proof *scripto* of a lease seems to me to be in consistence with the decisions which have been pronounced in similar cases, and which are numerous. I think that the pursuer is entitled to a declarator to that effect. The fact that there may be certain details, of which the red ink clause and the relative words referring to cognate matters form a good instance, which have not been adjusted, will not exclude the person alleging tenancy from his declarator that he has a lease, the adjustment of the usual and necessary clauses being a matter which can be carried out with the aid of an adviser versed in such matters, if this is necessary. Having had an opportunity of studying your Lordships' opinions, they so fully express what I consider should be the right decision in the case, that I content myself with expressing my entire concurrence in what your Lordships have expressed with such fulness in the opinions delivered.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"Recal the . . . interlocutor reclaimed against: Find and declare in terms of the declaratory conclusion of the action to the effect that the pursuer is entitled to a lease from the defender in terms of the draft lease

No. 6 of process, with the omission therefrom of (1) the words 'dykes, fences, gates, hedges, drains, ditches, water-courses, and others' occurring in the 27th and 28th lines of page 6 and in the first line of page 7 thereof; (2) the same words occurring in the 3rd and 4th lines of page 7 thereof; (3) the words 'including march fences' occurring in the 7th and 8th lines of page 7 thereof; (4) the words 'dykes and others' occurring in the 14th line of page 7 thereof; (5) the clause commencing 'and in regard to march fences' in the 23rd and 24th lines of page 7 thereof, and ending with the words 'after said repairs so made' in the 2nd line of page 8 thereof; and (6) the words 'fences and others' occurring in the 7th line of page 8 thereof; and appoint the pursuer to lodge such an amended draft lease in process, and that by the first box day in the ensuing vacation, and meantime continue the cause," &c.

Counsel for the Pursuer—Murray, K.C.—MacRobert. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Sandeman, K.C.—Guild. Agents—Guild & Guild, W.S.

Thursday, March 16.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

KERR *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising "Out of and in the Course of the Employment"—Miner Acting Outwith the "Sphere" of Employment.*

The rules of a pit, worked in terms of the Explosives in Coal Mines Order of 21st February 1910, provided that explosives capable only of being fired by detonators should be used; that the detonators should be securely kept and issued only to shot-firers; and that every charge should be fired by a competent person appointed in writing to perform the duty. On the occasion in question, after the shot-firer had left the pit, a miner who had a detonator in his possession—which, however, he had not received from the shot-firer—started to fire a shot. In the course of the operation an explosion occurred whereby he was killed.

Held that the accident did not arise out of and in the course of the deceased's employment within the meaning of the Workmen's Compensation Act 1906.

Mrs Elizabeth Buchanan or Kerr, Leggat House, Catrine, widow of the deceased Andrew Kerr, miner, Catrine, as an individual and as tutor and curator for her child Alexander Kerr, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from William Baird & Company, Limited, coalmasters, Hurlford, in respect of the death of the said Andrew Kerr. The Sheriff-Substitute (MACKENZIE), acting as arbitrator, having awarded compensation, a case for appeal was stated.

The *facts* were as follows:—"(1) That the deceased Andrew Kerr was a miner in the employment of the defenders in their Number One Gilminscroft Colliery; (2) that on 20th August 1910 the said Andrew Kerr was killed by the explosion of a shot in said pit in the circumstances hereinafter detailed; (3) that the said pit was unsafe, and was accordingly wrought in terms of the Explosives in Coal Mines Order of the 21st February 1910, by which, *inter alia*, it is ordered with regard to the explosives and the method of firing shots, section 1 (*a*), that only permitted explosives shall be used, and section 2 (*a*) that every charge shall be fired by a competent person appointed in writing for this duty, and section 4 (*a*) and (*b*) that detonators shall be under the control of some person specially appointed in writing, and shall be issued only to shot-firers or other persons specially authorised in writing, and that all detonators shall be kept in a securely locked box; (4) that the explosive used in this pit was that known as samsonite, and that the firing was effected by means of an igniter fuse and detonator; (5) that a witness, John Rennie, pit fireman, Catrine, was appointed in writing by the defenders as the person authorised to fire shots and to have the custody of detonators; (6) that the course of proceedings in this pit was that when a miner had a shot ready for firing, the said John Rennie gave him a detonator which was affixed to the fuse, that the hole was then charged with the detonator end of the fuse among the explosive, that a portion of the fuse with the igniter end extended out of the hole, which was stemmed, these things being normally all done by the miner, and that Rennie then fired the shot by using a pair of pliers, which had the effect of breaking a small glass globe inside the igniter and so liberating a chemical substance in the tube which kindled the fuse, and travelling at a rate of from 18 inches to 2½ feet per minute, caused the explosion; (7) that while miners were supplied with the explosive and with fuses, they were not allowed to have detonators, which were issued to Rennie and kept by him in a locked box, and that miners were not allowed to fire the shots, that shots could not be fired by means of explosive and fuse except with the aid of a detonator; (8) that on the said 20th August, between two and three o'clock p.m., after the shot-firer Rennie had left the mine, the deceased proceeded to bore a hole in the face for the purpose of blasting, which was part of his employment with the defenders, in making a passage in the mine through stone and metal; (9) that having bored the hole, the deceased called his fellow-