I am slow in referring to what I think were the mischances of the case before the learned arbitrator. When the medical referee was called in, what he appears to have done only requires to be quoted. He saw the applicant on the 14th July, and next day he wrote to the Sheriff-Clerk this letter:—"Dear Sir,—James Corsar appeared before me yesterday. I regret, however, that I am not in a position to give a decision regarding the certificate of disablement given him by Dr J. H. Murray on the 3rd July 1919. The certificate bears that Corsar is suffering from ulceration of the corneal surface of the eye, but as his right eye (the one affected) has been removed by operation, I cannot, of course, say whether the enucleation was performed for ulceration of the cornea. It seems to be a matter for proof.—Yours faithfully, (Signed) A. Maitland Ramsay."

The letter was communicated to the parties, and on the 11th August the medical referee dismissed the appeal. He had had the injured man before him; he had Dr Murray's certificate before him, and then he says—"I cannot, of course, say whether the enucleation was performed for ulceration of the cornea. It seems to be a matter for proof." I cannot understand why when this doctor had the man before him he did not simply inquire how he lost his eye. There was nothing to debar him from that, or to preclude him from making sensible inquiries, say, at the hospital or elsewhere. He, however, did not do so, and appeared, so to speak, to remit the case for proof to the Sheriff, and then he dismissed the appeal. I cannot hold that that procedure was in furtherance of the statute.

When, however, the case reached the Sheriff that learned judge did not ask the medical referee to get to the bottom of the truth of the case and help the Court, but he made findings that Dr Murray's certificate was not a certificate as required by the Act, and consequently that the medical referee's decision did not make it effective. By this process the procedure got entirely out of hand. It is not necessary to dwell upon the subject, for I agree with your Lordships in holding that the construction of the Act upon which the learned arbitrator proceeded is erroneous.

With reference to the case of *Mapp*, I desire to say that in my own opinion it is not a judgment which should be followed, lending, as it does, support to the view of that defeating of the Act which I think its true construction should avoid.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for the Appellants — Condie Sandeman, K.C. — Harold W. Beveridge. Agents—W. P. Craig, Glasgow—W. & J. Burness, W.S., Edinburgh — Beveridge & Company, Westminster, Solicitors.

Counsel for the Respondent — Macquisten, K.C.—T. Scanlan. Agents—Thos. Scanlan & Company, Glasgow — R. D. C. M'Kechnie, Edinburgh—Herbert D. Deane, London, Solicitors.

Friday, December 17.

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

(1) A. G. MOORE & COMPANY *v.* DONNELLY.

(2) FIFE COAL COMPANY, LIMITED *v.* COLVILLE AND OTHERS.

(3) FIFE COAL COMPANY, LIMITED *v.* GORDON AND ANOTHER.

Their Lordships' judgment, which dealt in succession with these three cases, is reported *infra* at p. 87.

(1) A. G. MOORE & COMPANY *v.* DONNELLY.

(In the Court of Session April 1, 1920, 57 S.L.R. 380.)

Master and Servant—Workmen's Compensation—Arising out of and in the Course of the Employment—Breach of Statutory Rule—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1) *and* (2) (*c*)—*Coal Mines Act* 1911 (1 *and* 2 *Geo. V, cap.* 50), *sec.* 86—*Explosives in Coal Mines Order, dated 1st September* 1913, *sec.* 3 (*a*).

A miner whose duty it was to fire a shot lit the fuse and retired to a place of safety. The shot missed fire. In direct contravention of section 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913 he returned to the place of the shot in question in less than an hour, when the shot blew off in his face and permanently disabled him. *Held* (*rev.* the judgment of the First Division) that the accident did not arise out of and in the course of his employment.

Bourton v. *Beauchamp*, [1920] A.C. 1001, *followed.*

Conway v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632, *overruled.*

The case is reported *ante ut supra.*

A. G. Moore & Company appealed to the House of Lords.

Their Lordships' judgment is reported *infra* at p. 87.

(2) FIFE COAL COMPANY, LIMITED *v.* COLVILLE AND OTHERS.

Master and Servant—Workmen's Compensation—Arising out of and in the Course of the Employment—Breach of Statutory Rule—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1) *and* (2) (*c*)—*Coal Mines Act* 1911 (1 *and* 2 *Geo. V, cap.* 50), *sec.* 86—*Explosives in Coal Mines Order, dated 1st September* 1913, *sec.* 3 (*a*).

Two miners who were engaged in driving a road through sandstone in a pit were directed to bore two shot-holes and to charge and fire the shots. Each of them took the usual steps to fire his shot. One of them saw that his strum or fuse had caught fire and said it was lit. The other said he had failed to light his strum. To avoid the explosion of the former's shot they left their working-place. After it had gone off they

waited ten minutes, and then, in direct contravention of section 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913, returned to the face. While they were searching for the missing strum, which had been covered by the debris, the shot exploded and one of the men was killed. *Held* (*rev.* the judgment of the First Division) that the accident did not arise out of and in the course of his employment.

In this arbitration Mrs Christina Sharp or Greenwood or Colville, widow of John Colville, stone-miner, Dunfermline, claimed compensation from the Fife Coal Company, Limited, for behoof of herself and such of the respondents as might be found to be dependants of the deceased John Colville.

The Sheriff-Substitute at Dunfermline (UMPHERSTON) having awarded compensation the Company appealed.

The *facts* admitted or proved as stated by the arbiter were as follows:—"1. John Colville was on 2nd September 1919 a stone-miner in the employment of the Fife Coal Company, Limited, in their No. 1 Pit, Lumphinnans. 2. On said date he was employed along with Thomas Canavan driving a road in said pit through sandstone. They were directed by Patrick Canavan, the man for whom they worked, to bore two shot-holes in the sandstone face of their working-place and to charge and fire the shots. The holes were about seven feet apart and a short distance above the pavement. 3. Colville and Thomas Canavan each bored, charged, and stemmed one of said shot-holes. The charge consisted of gelignite, and the method of firing was to apply a light to a fuse or strum which protruded from the shot-hole. It was the intention of Colville and Thomas Canavan to fire their two charges simultaneously. When the shots were ready to be fired as described, the strum of Colville's shot hung down on to the pavement; Thomas Canavan's strum did not reach the pavement. 4. Each of the two men then took his lamp from his cap for the purpose of applying a light to the end of his strum in order to fire his shot. Thomas Canavan saw that his strum had caught fire and said to Colville that it was lit. Colville said that he had not got his strum lit. Thomas Canavan said they had better clear out till his shot went off. Colville and Thomas Canavan thereupon left their working-place, but had only got about 30 yards from it when Thomas Canavan's shot went off. 5. The two men waited for a few minutes to allow the smoke and dust to be cleared from the face and then returned. They found that Thomas Canavan's shot had exploded in such a way as to throw the debris over the place where the strum of Colville's shot was hanging. They both proceeded to grope among this debris for Colville's strum when Colville's shot exploded and Colville was killed. The time which elapsed from the men's departure from their shot-holes to their return and the explosion of Colville's shot did not exceed ten minutes. Neither Colville nor Thomas Canavan had any advantage to gain by getting the shot off at once. Thomas Canavan's shot went off at the end of the shift, and neither workman would have lost anything by leaving over the firing of the second shot until the following morning. 6. The Coal Mines Act 1911 applies to said pit, and both it and the Explosives in Coal Mines Order of 1st September 1913 made thereunder were posted at the pit head. Section 3 (*a*) of that Order provides as follows, viz.—'If a shot misses fire (*a*) the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than 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. 7. There was also posted by the first-named respondents (appellants) at the pit head a notice printed in large letters on an enamel plate, which was periodically cleaned. Said notice was in the following terms, viz.—'Workmen's Compensation Act 1906. *Notice.*—The attention of all workers in this colliery is called to section 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913, made by the Home Secretary, which provides that if a shot misses fire no person shall approach the shot-hole until an interval has elapsed of not less than 10 minutes in the case of shots fired by electricity, and not less than an hour in the case of shots fired by other means, and it is hereby directed that the above-mentioned provisions shall apply to all cases where an attempt has been made to light a shot and the men have retired, and no person shall in such circumstances, on any pretext, return to the place before the expiry of the above-mentioned periods respectively from the attempt to light the shot. The management will, where allowable, found on any breach of the provisions of the section above quoted and of this notice, as "serious and wilful misconduct" on the part of the workman, or as being outwith his employment, in the event of an accident resulting therefrom.' 8. Although a strum has been effectually lighted, the shot does not necessarily explode within an hour. Cases have been known where the shot has hung fire and exploded after a much longer period. 9. Cases have also been known, but are of very infrequent occurrence, where all the gelignite in a shot-hole has not effectually exploded, but portions thereof have been thrown out and have been found fizzing or sparking on the ground.

"From the relevant facts above stated I drew the inference in fact that Colville had applied the light of his lamp to his strum but thought he had not succeeded in firing it.

"The *question of law* was—Was there evidence on which I was entitled to find that the death of John Colville resulted from personal injury by accident arising out of and in the course of his employment with the respondents, the Fife Coal Company, Limited?"

The following *note* was appended to the Stated Case:—". . . The Explosives in Coal Mines Order of 1st September 1913, made under section 31 of the Coal Mines Act 1911 provides (section 3 (a)) that 'if a shot misses

fire the person firing the shot shall not approach . . . the shot-hole until an interval has elapsed of . . . not less than an hour. . . .' This order was published by the respondents by posting it at the pit-head. There was also posted at the pit-head a notice printed in large type on an enamel plate which was periodically cleaned. This notice drew attention to section 3 (a) of the above regulations and stated that it would apply to all cases where an attempt had been made to light a shot. It further stated that the managment would, where allowable, found on any breach of the provisions of the section and the notice as serious and wilful misconduct on the part of the workman or as being outwith his employment. There was no evidence as to Colville's knowledge or ignorance of the regulations or notice.

"I do not think the notice added anything to the regulation, which has statutory effect. (*Waddell* v. *Coltness Iron Co., Ltd.*, 1912, 2 S.L.T. 301.)

"It was admitted that if Colville had attempted to fire his charge his action in going back when he did was serious and wilful misconduct within the meaning of section 1 (2) (*c*) of the statute. And I do not think this can be gainsaid. (*Waddell* v. *Coltness Iron Co., Ltd., cit. supra; M'Kenna* v. *Niddrie and Benhar Coal Co., Ltd.*, 1916, S.C. 1; *cf. M'Nicol* v. *Spiers, Gibb & Co.*, 1 F. 604.) But such misconduct is not a defence open to employers in a claim for compensation when the accident has resulted in the death of a workman. That is the reason for maintaining further that the accident did not arise out of the employment. As Cozens-Hardy, M.R., pointed out in *Weighill* v. *South Heaton Coal Co., Ltd.* (4 B.W.C.C. 141)—'If the evidence is that the workman was doing something outside the scope of his employment, the proof of serious and wilful misconduct does not bring the accident within the scope of the employment.'

"The Court of Appeal in England held in a recent case that an accident by which a workman was killed did not arise out of the employment when it was due to his breach of a similar rule to the present made under the Quarries Act 1894. (*Matthews* v. *Pomeroy*, 12 B.W.C.C. 136.) But the contrary was held by the Court of Session so long ago as 1899. (*M'Nicol* v. *Spiers, Gibb, & Co.*, 1 F. 604.) That decision has never been overruled, so far as I am aware. On the contrary, the grounds of the judgment have been followed both in this country and in England. (*Conway* v. *Pumpherston Oil Co.*, 1911 S.C. 660; *Harding* v. *Brynddu Colliery Co., Ltd.*, 4 B.W.C.C. 269.) In these circumstances I am bound to accept the decision of the Court of Session and to award compensation. In *M'Nicol's* case, in *Matthew's* case, and in the present case, it was not proved that the workman, as matter of fact, knew the rule; and in *M'Nicol's* case there was a finding that the rule was not generally observed by the miners in the pit. But in each case the rule was a statutory one, disobedience to which rendered the workman liable to a penalty. It appears to me that the Courts of Appeal in the two countries took different views of the effect of the rule on the scope of employment under the contract of service, and I am unable to reconcile these views."

On 1st April 1920 the First Division answered the question of law in the affirmative and dismissed the appeal. Their Lordships' opinions, as printed in the appeal to the House of Lords, were as follows—

LORD PRESIDENT (STRATHCLYDE)—I am unable to discover any material difference between this case and the case we have just decided (*Moore & Company* v. *Donnelly*). Accordingly, for the reason which I have given in that case, I move that we answer the question put to us here in the affirmative.

LORD MACKENZIE—It may be that there are specialties in this case which would render it unnecessary to deal with it on the question of general principle, but, as I understand, the case was argued as raising the same point as that which we have just decided in *Donnelly* v. *Moore*, and accordingly I agree with your Lordship.

LORD SKERRINGTON— I concur.

LORD CULLEN—I also concur.

The Fife Coal Company appealed to the House of Lords.

Their Lordships' judgment is reported *infra*.

(3) FIFE COAL COMPANY, LIMITED *v.* GORDON AND ANOTHER.

Master and Servant—Workmen's Compensation—Arising out of and in the Course of the Employment—Breach of Statutory Rule—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1) *and* (2) (*c*) *—Coal Mines Act* 1911 (1 *and* 2 *Geo. V, cap.* 50), *sec.* 86 *—General Regulations, dated* 10*th July* 1913, (4) *and* (9).

A miner searching for brattice nails which he required for his work passed through a fence marked "No road" into another part of the pit, in breach of regulation 9 of the General Regulations under the Coal Mines Act of 1911. The nails could have been got otherwise. While in the fenced-off area he was overcome by gas fumes and died. *Held* (*rev.* judgment of the First Division) that the accident did not arise out of and in the course of his employment.

The case is reported *ante ut supra*.

The Fife Coal Company appealed to the House of Lords.

LORD CHANCELLOR—It will, I think, be convenient if I read in succession the speeches I have prepared in these three cases, afterwards of course putting the questions individually from the Woolsack.

(1) *A. G. Moore & Company* v. *Donnelly.*

The facts in this appeal are as follows:—On the 26th March 1919, while the respondent was at work as a coal miner in the appellants' employment in Dalkeith Colliery, Dalkeith, he suffered personal injury

by accident. The accident happened in the following manner:—Two shots close together were being prepared and fired by means of detonators with fuses attached, one being prepared and fired by the respondent and another by a miner named Bell. When the fuses were lighted the respondent and Bell retired to a place of safety. Only one shot went off, and the respondent returned within ten minutes to the place of the other shot, and while there it blew off into his face. For the person firing a shot by means of a fuse to approach or allow anyone to approach the shot-hole within one hour of firing the shot if it has missed fire is an offence within section 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913, the exact terms of which I have cited in my judgment in the case of the *Fife Coal Company* v. *Colville*. In my opinion this case cannot be distinguished from that decision and the appeal must be allowed.

(2) *Fife Coal Company, Limited* v. *Colville and Others.*

This is an appeal from a judgment of the First Division of the Court of Session, Scotland, pronounced upon an appeal at the instance of the present appellants by way of a Stated Case under the provisions of the Workmen's Compensation Act 1906.

The facts are very short—One John Colville was on 2nd September 1919 employed as a stone-miner by the appellants in their No. 1 Pit, Lumphinnans. He was on that date in the company of one Thomas Canavan driving a road through sandstone in this pit. They were directed to bore two shot-holes in the sandstone face of their working-place and to charge and fire the shots. Each of the two men then took the ordinary steps to fire his shot. Canavan saw that his strum had caught fire and said to Colville that it was lit. Colville said that he had failed to light his strum. To avoid the explosion of Canavan's shot the two men left their working-place. Before they had gone 30 yards Canavan's shot went off. They waited ten minutes and then returned. While they were looking for Colville's strum his shot exploded and he was killed.

Operations at the pit in question are governed by the Coal Mines Act 1911. A copy of the material sections of this Act and of the Explosives in Coal Mines Order of the 1st September 1913 were posted at the pithead. Section 3 (*a*) of that Order is 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 10 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."

The following notice was also conspicuously posted at the pithead:—"Workmen's Compensation Act 1906. Notice. The attention of all workers in this colliery is called to section 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913, made by the Home Secretary, which provides that if a shot misses fire no person shall approach the shot-hole until an interval has elapsed of not less than 10 minutes in the case of shots fired by electricity, and not less than an hour in the case of shots fired by other means; and it is hereby directed that the above-mentioned provisions shall apply to all cases where an attempt has been made to light a shot and the men have retired, and no person shall in such circumstances on any pretext return to the place before the expiry of the above-mentioned periods respectively from the attempt to light the shot. The management will, where allowable, found on any breach of the provisions of the section above quoted and of this notice as 'serious and wilful misconduct' on the part of the workman, or as being outwith his employment, in the event of an accident resulting therefrom."

The arbitrator found that the respondents, the present appellants, were liable to pay compensation to the dependants of Colville, and proposed for the opinion of the Court the following question—"Was there evidence on which I was entitled to find that the death of John Colville resulted from personal injury by accident arising out of and in the course of his employment with the respondents, the Fife Coal Company, Limited"?

The First Division found themselves in agreement with the arbitrator. The Lord President, however, reached this conclusion reluctantly, holding the case indistinguishable from *Bourton's* case, but yielded to the authority, binding upon him, of *Conway's* case.

Since the hearing in the First Division *Bourton's* case has been before your Lordships, and the question which requires an answer in the present appeal is whether the facts are distinguishable from those in *Bourton*? I have reached the clear conclusion that they are not. In *Bourton's* case the miner was employed to get coal by pick or shot firing. When he arrived at the coal face he saw a hole already drilled and stopped with stemming, and also the charred remains of a fuse. Intending to lay a fresh shot in the same hole, he proceeded to remove the stemming. An explosion resulted, causing his death. It was made plain in the course of the hearing that the hole had been charged two days before, but that the shot had missed fire. The use of explosives at the mine was regulated by statutory regulations made under the Coal Mines Act 1911, which provided that when a hole had been charged no part of the stemming should be removed, and that if a shot misfired a second charge should not be placed in the same hole. Your Lordships were of opinion that the deceased in disobeying the statutory regulations was acting outside the sphere of his employment, and that consequently his death was not caused by accident arising out of and in the course of his employment.

In the course of his opinion Viscount Cave quoted a passage from the judgment of Lord Sumner in *Highley's* case which contained an admirable summary of the law. Inasmuch as the passage referred to completely represents my own view, it may be repeated here—"I doubt if any universal test can be

found. Analogies, not always so close as they seem to be at first sight, are often resorted to, but in the last analysis each case is decided on its own facts. There is, however, in my opinion one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this—Was it part of the injured person's employment to hazard, to suffer, or to do, that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury."

The attempts made by counsel in the course of the debate to distinguish *Bourton's* case from the present though ingenious, were unsubstantial and far fetched. It was no part of Colville's employment to hazard, to suffer, or to do, that whic hcaused his injury. The cause of his accident was not within the sphere of his employment; it was not one of its ordinary risks, nor was it reasonably incidental thereto. The deceased was not, in the language of Viscount Cave, "doing a permitted act carelessly; he was doing an act which he was prohibited from doing by statutory provisions which attach to his employment, and which by those provisions was expressly excluded from his employment."

The conclusion which I have reached makes it proper for me to point out that the decision in *Conway's* case can no longer be accepted. My noble friend Lord Dunedin, in the course of his judgment in that case, made a permanent contribution to the accepted legal doctrines upon this subject. I should feel more difficulty in overruling this judgment if it did not appear to be plain that he himself had in *Plumb's* case reached a similar conclusion.

I have purposely abstained from laying particular stress upon the circumstance that the rule violated by the deceased workman in the present case was of statutory origin, because on principle no distinction can logically be drawn between a prohibition founded upon statute and one imposed by the employer to regulate the employment. It is no doubt true that a statutory prohibition will usually be more notorious and more authoritative. Nor can it be made the subject of waiver or of informal modification. But where a prohibition, for which the employer is responsible, in matters comparable to those under discussion, is brought clearly to the notice of the workman, his breach of it takes him outside the sphere of his employment, so that the risk in which he involves himself has ceased to be reasonably incidental to that employment.

For these reasons I am of opinion that the interlocutor must be recalled, and I move your Lordships accordingly.

(3) *Fife Coal Company, Limited* v. *Gordon and Another.*

I have formed the same opinion with regard to the third appeal. The facts, which are different in some respects, but so far as the rule of law applicable, are undistinguishable from those in the other cases, were as follows—The respondents are the dependants of one Alexander Gordon, who on 28th August 1919 was in the employment of the appellants in No. 2 pit at Valleyfield Colliery. He was working with another miner named Joseph Gordon in a heading off a level called in the case Gordon's Level. A short distance away two other miners—Lessels and Munro—were working in a level called Lessels' Level. Both levels were driven off No. 5 heading of the East Five-feet Jig Brae section. Lessels' Level was immediately above Gordon's Level, both levels being on the side of No. 5 heading, on which was the intake of the air-course. The gradient was about 1 in 3 or 1 in 4. There was a double line of rails in this heading, and brattice cloth was fixed between the two lines, so as to direct the ventilation up one line and down the other. Brattice-cloth was also led from the centre of the heading along both levels in order to divert the air-current on the intake side of the heading into these levels. Above Lessels' Level the whole of No. 5 heading was fenced off, and had been so fenced off for some weeks, when work there had been stopped.

About 10.30 a.m. on the day in question, Joseph Gordon required some brattice-nails for his work, and told the deceased, who was acting as his drawer, to get some. The deceased met Lessels just outside Gordon's Level, and was told by him that there were some brattice-nails in the manhole below Lessels' Level. Deceased then went into Lessels' Level, where he saw Munro, who was at work. Munro told him that he had no such nails. Deceased then went out of Lessels' Level into the heading by the way he had come, that is, on the intake side, and got through a flap in the brattice cloth on to the return air-course side. About a quarter of an hour after deceased had started on his errand Joseph Gordon went to look for him, and found him in an unconscious condition in No. 5 heading on the intake side about 30 yards above Lessels' Level, and some 7 or 8 yards from the top of the heading. Some distance below, the brattice cloth was found to be torn at the bottom. The deceased died shortly afterwards from gas poisoning. There had been on that morning an outburst of gas on the intake side of the heading above the fencing which cut off the top of the heading at Lessels' Level, and the spot where deceased was found was 30 feet inside the gas.

Brattice-nails were kept in a box at the head of Jig Brae. The deceased knew this, and had previously taken nails from this

box. He also knew that such nails could be obtained from a roadsman or a fireman, as they always carried nails, and the deceased had obtained nails from a roadsman. The way to the top of the Jig Brae along which deceased was entitled to pass on his way to the box was a level road, and drawers were constantly going out and in on this road, and as it was one of the duties of these drawers to bring in nails to men working in this section of the mine if asked to do so, he could have asked any of them to bring the nails to him. The place where he was found was not a part of the mine in which he was working, nor was it the proper road by which he travelled to or from his work.

The General Regulations, dated 10th July 1913, made under section 86 of the Coal Mines Act 1911, apply to No. 2 pit of Valleyfield Colliery, and were duly posted at the pit-head. The relevant regulations are as follows—"(4) Subject to any directions that may be given by any official of the mine, no workman shall, except so far as may be necessary for the purpose of getting to or from his work, or in case of emergency or other justifiable cause necessarily connected with his employment, go into any part of the mine other than that part in which he works, or travel to or from his work by any road other than the proper travelling road. . . . (9) No person shall without authority pass beyond any fence or danger signal or open any locked door."

Whatever may have been the reason which led the workman to go beyond Lessels' Level up the heading, it is clear that there was no reason or need why he should have done so for any purpose connected with his work or the errand upon upon which he was engaged, and in so doing he committed a breach of the two regulations which I have read. It was not the place to which he should have gone to look for nails, and he was not entitled to go there. It cannot be said therefore that the poisoning which caused his death arose either out of or in the course of his employment. Here again the matter is concluded by the decisions in *Bourton's* case and *Colville's*, case.

VISCOUNT FINLAY—The material facts in this case (*A. G. Moore & Company* v. *Donnelly*) were, as stated by the Lord President at the commencement of his judgment—"The respondent was a coal miner. His duty was to fire a shot. He lit the fuse and retired to a place of safety. The shot missed fire. In direct contravention of paragraph 3 (*a*) of the Explosives and Coal Mines Order of 1st September 1913, the respondent returned to the place of the shot in question in less than one hour, when the shot blew off in his face and permanently disabled him."

The question is whether the workman at the time of the accident was acting within or outside the sphere of his employment. The arbiter held that he was acting within the sphere of his employment. In the Court of Session he was affirmed on the authority of *Conway's* case (1911, S.C. 660), but the Lord President gave at some length his reasons for thinking that apart from the authority of that case the decision should have been the other way.

This decision was given on the 1st April 1920. Next month, on the 17th May, the case of *Bourton* v. *Beauchamp* (1920, A.C. 1001) was heard in your Lordships' House. The facts of the present case are undistinguishable from those of *Bourton* v. *Beauchamp*. It was there held that the workman was acting outside the sphere of his employment, and consequently his death was not caused by accident arising out of and in the course of his employment. That decision governs the present case.

I desire only to add that the decision that the workman was acting without the sphere of his employment does not depend upon the fact that the regulation which he was infringing was statutory. The same result would follow if the terms of his employment were to the same effect as the statutory regulation. The question is simply whether what the man was doing fell within the sphere of his employment, and is the same whether that sphere be defined by statute or by the contract of employment.

In the *Fife Coal Company's* case v. *Colville*, and in the *Fife Coal Company's* case v. *Gordon*, I am of opinion that the same principle governs these two cases, and I agree with the conclusion arrived at in them by the Lord Chancellor.

LORD DUNEDIN—I concur in the judgment of the Lord Chancellor. I should not have added anything were it not for the fact that a good many judgments in which I took part have been quoted along with a certain number of dicta of my own.

On the general question I have nothing really to add to what I said in *Plumb's* case with the approval of the noble and learned Lords who sat along with me.

I think the statement of the classes of prohibition as explained in that case is an exhaustive statement. I think that the question of deciding within which class any prohibition falls is not determined by the mere fact that the prohibition is statutory. In other words, the difference between a statutory and a non-statutory prohibition does not consist in that in the former case there is only one class while in the latter there are two. The difference lies in two points—the first that from the evidential point of view a man cannot be heard to say he does not know what a statute enjoins, and the second that while a statutory prohibition cannot, a non-statutory prohibition may be waived. The remarks of Lords Atkinson and Shaw in *Fox's* case, to which I asserted my adhesion in *Bourton's* case, do not really affect the ground of the argument, but are merely a very cogent reason why there should be no judgment-made relaxation of the rules which exist.

The sole question therefore comes to be—Within which class does this prohibition fall? It clearly falls within the first, *i.e.*, of prohibitions limiting the sphere, unless this case can be distinguished on the facts from *Bourton's* case. Now the only distinction

which Mr Moncrieff in his admirable argument could make was that in *Bourton's* case the rule or regulation consisted of two parts—first, a prohibition in the negative form, "Thou shalt not," and secondly, an instruction in positive form, "Thou shalt"—whereas in the present case the rule was only in the negative form. From that he argued that in *Bourton's* case the real want of authority for the man to do what he did came not from his contemning the negative prohibition—a contempt which in itself was only disobedience—but in the absence of any positive authority to do what he did, his only positive authority being to do something which he did not do. In the present case he says the man had a general positive authority to deal as a shot-firer with the portion of the face to be exploded. This is very ingenious, but it is in my judgment quite fallacious. In both cases there is a prohibition to do certain things within a certain time from a certain occurrence. Whether, when that time has elapsed, what he may do depends upon special or upon general and implied instructions matters not. In each case if he acts within the prohibited time he is going out of the sphere of his employment, for he is doing what he was not employed to do.

I must only add that after renewed consideration of the case of *Conway* I am satisfied that the decision to which we came was wrong, and that Lord Wrenbury's criticism delivered in *Harding's* case on my judgment was well founded. Nor will I attempt to shield myself under the plea that the point that the prohibition was a statutory one seems from the report both of the argument and the judgment not to have been before the Court. What I have just said prevents that fact being any excuse. I can only say that armed with a greater authority than I had in *Conway's* case I came to deliver judgment in your Lordships' House in *Plumb*, adopting, no doubt, the general principle laid down in *Conway*, but logically, I think, overruling the results arrived at on the facts. That was followed in *Bourton's* case, and between that case and this there is no relevant distinction.

LORD ATKINSON—I concur with the judgment of the Lord Chancellor. The facts have been already fully stated.

I think the case of *Moore* v. *Donnelly* is completely covered by the decision of this House in *Bourton* v. *Beauchamp*, (1920) A.C. 1001. In neither case was the workman merely prohibited from doing carelessly or recklessly an act he was employed and entitled to do. The statutory prohibition in each case, which because it was statutory the workman must be taken to have known, and which the employer could not waive, extended beyond that. It forbade the doing in any manner whatever of certain things, namely, the being in a certain place within a certain time after the occurrence of a certain event. An act may, of course, in the case of a workman be as effectually prohibited by his contract of service as by a statute, and in neither case is it necessary to couch the prohibition in any particular form of words. All that is, in my view, necessary is that the workman should be clearly informed that he is not to do the particular act as distinct from the manner of doing it. If he be in effect so informed, then it has always appeared to me that it is impossible to hold that the prohibited act is within the scope of the workman's employment. To do so would amount to deciding that a workman might be employed to do, and at the same time to abstain from doing, a particular thing. The appeal should therefore in my opinion be allowed, with costs here and below.

The same authority rules, I think, the other two cases mentioned. I have already pointed out in *Bourton* v. *Beauchamp* that the provisions as to serious and wilful misconduct only apply to a case where the workman is doing an act within the scope of his employ. He may then, if he does not lose his life, be by reason of that misconduct deprived of the compensation he might otherwise have been entitled to..

LORD SHAW—In the first of these cases, that of *Moore*, the workman, a miner, sustained very serious injuries by an accident occurring on the 26th March 1909, in one of his employers' pits.

By paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913, it is provided that—"If a shot miss 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."

The mode of firing was neither in the present instance by electricity, nor by a squib, and therefore when a shot failed to explode the workman was plainly prohibited from returning to the place of the shot within one hour.

He, however, returned within less than ten minutes, when, the shot exploding, he was injured.

It is plain that in so returning he was thereby contravening the statutory Order, and by section 101, sub-section 3, of the Coal Mines Act of 1911, he was thus guilty of offence for which he was liable to be fined, or, in circumstances of danger to others than himself, was liable to be imprisoned for three months.

The sole question in the case is whether when the workman met with his accident he was within the scope of his employment. Once it is settled that he was not, then any question as to whether his conduct amounted to serious and wilful misconduct is not in place. That latter question does not arise until the former question has been settled in the affirmative.

In the present case I am of opinion that it was outside the scope of the workman's employment to be at the time of the accident at the place where he was. It was his duty not to be in that place but to be elsewhere. This being so, then, so far as the law is concerned, your Lordships in this House, as it humbly appears to me, are

clearly bound by the decision in the case of *Bourton*. A further citation of authority is substantially unnecessary, because the decision in *Conway's* case in the Court of Session cannot be reconciled with *Bourton* in this House. In reference to *Conway's* case I desire, however, to say that apart from the application to the particular facts of that case, which must now be held to have been erroneous, I know no more satisfactory statement of the general law as to the ambit of employment than what was there laid down by my noble and learned friend Lord Dunedin. With those passages, and with his judgment in the case of *Plumb*, the guiding authority is provided in this branch of the law.

At the time of the decision in this case your Lordships had not decided that of *Bourton*, and the learned Judges of the Court of Session stood bound by *Conway's* decision. The Lord President in these circumstances puts the difficulty thus—"I am unable," he says, "to see how a workman who has brought a disaster upon himself by wilfully disobeying a statutory prohibition limiting, as I think, the sphere of his employment, can be said to be acting within the scope of his employment." I fully agree with the learned Lord President, and in *Bourton's* case that was the view of this House. The difficulty is removed.

I only desire to add one word lest any misapprehnsion should arise to the effect that the principle of *Bourton* is necessarily confined to the case of statutory employment. Upon the question of prohibition specially made by Act of Parliament for the protection of those engaged in dangerous employment, I have nothing to add to what I said in *Herbert* v. *Fox*. In the case of what may be called statutory employment the Act and the rules thereunder make clear beyond all question what are the definite lines of the employment. When these lines are transgressed, with the natural consequences of danger to all concerned—danger to life and limb, and property, and with the possible criminal consequence to the chief actor—then there can be no question arising as to the act being beyond the scope of the employment. Whereas in the case of private employment there may be difficulties of establishing the ambit of particular rules, their application to specific circumstances, the possible point whether they were waived at a particular time or in the case of a particular man, and the further possible point as to whether this waiver was express, or was to be implied through conduct and slackness of management.

In the case of statutory rules these questions do not arise. It is not possible to abrogate them except by a statutory repeal or an administrative regulation which has statutory force, and all parties, whether employer or workman, who were art and part in such a contravention, stand liable to the penal consequences prescribed. It is in this way that the breach of the statutory regulation, so far as the law is concerned, has made clear and vivid the limits and scope of the employment. The statute stands *probatio probata* upon that topic. In a case of ordinary employment, once the limits of the range of employment are made clear, then, of course, similar consequences—that is to say, the application of a similar principle—would follow.

I agree to the course proposed from the Woolsack.

In *Colville's* case the result and reasoning leading to the decision come to in *Moore* have expressly negatived the right to recovery of compensation. The facts are unfortunately much the same. The imperative prohibition of the statute was again disobeyed.

In *Gordon's* case I think the same principle holds. By a general regulation, dated 10th July 1913, issued by the Secretary of State under section 86 of the Coal Mines Act 1911, it was provided that—"(4) Subject to any direction that may be given by any official of the mine, no workman shall, except so far as may be necessary for the purpose of getting to and from his work, or in case of emergency or other justifiable cause necessarily connected with his employment, go into any part of the mine other than that part in which he works, or travel to or from his work by any road other than the proper travelling road. (9) No person shall without authority pass beyond any fence or danger signal, or open any locked door."

Alexander Gordon, a miner in the pit, left the place of his work in search for brattice nails, which were kept in a box at the head of a part of the pit known as the Jig Brae. Most unfortunately however, instead of going there for the nails or asking a drawer to bring the nails to him, he entered another and fenced-off part of the pit, and there he met his death by gas poisoning. There is no question in the case as to the fencing-off with the notice "No Road," and no question as to the application of the rule to the circumstances.

The learned Sheriff-Substitute, who had a clear apprehension, as is shown by his careful note, of the case law upon this topic, says that "the workman went to a place where he was not employed to work. He went there contrary to expressed orders and contrary to regulations which have the force of statute. His action in going there was a criminal offence, for which he was liable to penalty. His breach of the regulations resulted in his death." And he closed his review by saying—"It is sufficient to say that in going into the fenced-off portion of No. 5 head he went out of the course of his employment, and that any personal injury or accident which he sustained in that place did not arise out of the employment."

I concur with this clear statement. It is a lamentable case, but apparently those most salutary lessons of discipline read by the Legislature on this subject are still unhappily and not infrequently disregarded. All that we can do is to uphold the law applicable to such a situation.

I agree.

Their Lordships ordered in *A. G. Moore & Company* v. *Donnelly*, and in *Fife Coal Company, Limited* v. *Colville and Others*,

that the interlocutor appealed from be reversed; that the cause be remitted back to the Court of Session with a direction to answer the question of law in the negative; and that the respondents do pay to the appellants their costs here and below.

In *Fife Coal Company, Limited* v. *Gordon and Another* it was ordered that the interlocutor appealed from be reversed; that the cause be remitted back to the Court of Session with a direction to answer the question of law in the affirmative, and to restore the determination of the Sheriff-Substitute and remit to him to proceed as accords; and that the respondents do pay to the appellants their costs here and below.

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COURT OF SESSION.

Tuesday, November 16.

FIRST DIVISION.

POLE AND SCANLON, PETITIONERS.

Election Law—Corrupt and Illegal Practices—Authorised Excuse—Inadvertence or Reasonable Cause of a Like Nature—Failure to Transmit Return and Declaration Timeously — Corrupt and Illegal Practices Prevention Act 1883 (46 *and* 47 *Vict. cap.* 51), *sec.* 33.

A practising solicitor who was candidate at a bye-election employed as his election agent a person who had acted as agent in a recent election, and had been selected as agent for the bye-election by a former prospective candidate. He had no professional qualifications. After the contest the candidate went on holiday, trusting to the agent to attend to the statutory declarations and return of election expenses. The return and the agent's declaration were ready within the time fixed by statute for transmission to the returning officer. The candidate's declaration was not then ready. The agent did not realise that he could transmit the return and his own declaration without at the same time transmitting the candidate's declaration, and accordingly failed to transmit them within the statutory time.

In a petition for an order allowing an authorised excuse for the failure of the petitioners to comply with the statutory requirements, the Court excused the candidate's failure, but *quoad ultra* refused the prayer.

Observations (*per* the Lord President) as to the employment of unskilled persons as election agents.

The Corrupt and Illegal Practices Prevention Act 1883 (46 and 47 Vict. cap. 51) enacts, section 33—"(1) Within thirty-five days after the day on which the candidates returned at an election are declared elected the election agent of every candidate at that election shall transmit to the returning officer a true return (in this Act referred to as a return respecting election expenses) in the form set forth in the Second Schedule to this Act or to the like effect. . . . (2) The return so transmitted to the returning officer shall be accompanied by a declaration made by the election agent before a justice of the peace in the form in the Second Schedule to this Act (which declaration is in this Act referred to as a declaration respecting election expenses). . . . (4) At the same time that the agent transmits the said return, or within seven days afterwards, the candidate shall transmit or cause to be transmitted to the returning officer a declaration made by him before a justice of the peace in the form in the first part of the Second Schedule to this Act (which declaration is in this Act referred to as a declaration respecting election expenses). . . . (6) If, without such authorised excuse as in this Act mentioned, a candidate or an election agent fails to comply with the requirements of this section, he shall be guilty of an illegal practice."

Section 34—"(1) Where the return and declarations respecting the election expenses of a candidate at an election for a county or borough have not been transmitted as required by this Act, or being transmitted contain some error or false statement, then (*a*) If the candidate applies to the High Court or an election court and shows that the failure to transmit such return and declarations, . . . has arisen by reason of . . . inadvertence or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant; or (*b*) if the election agent of the caudidate applies to the High Court or an election court and shows that the failure to transmit the return and declarations which he was required to transmit . . . arose by reason of . . . inadvertence or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant, the Court may, after such notice of the application in the said county or borough, and on production of such evidence of the grounds stated in the application, and of the good faith of the application and otherwise, as to the Court seems fit, make such order for allowing an authorised excuse for