it is made to affect lands of which the granter is not proprietor. In most cases where accretion has been held to operate, the grant has been on its face good, but the granter has had either no title or at best an imperfect title to the ground. At this distance of time it is impossible to say what were the intentions of parties with reference to the servient ground, but on the appellants' own admissions the servitude was not made effectual to them over the portion of the area belonging to Walker not acquired by Brough in 1781.

None of the cases relating to negative servitudes to which we were referred appears to have any bearing upon the present question except perhaps the case of *Sivright* (7 S. 210), where it was decided that a negative servitude expressed in a minute of sale but not in the subsequent titles had been impliedly departed from. The question raised was different from that raised in the present case, but in his opinion the Lord President said—"I doubt, however, whether such an obligation by a person who is not infeft be good in a question with a singular successor, more especially in relation to a negative servitude on which there can be no possession. It may be good against heirs, but here I am satisfied that there is no subsisting obligation."

I think that the appeal should be dismissed on the ground that the appellants have not shown that they have a valid right of servitude over any portion of the ground affected by the Dean of Guild's lining.

LORD SALVESEN, who was present at the advising, did not hear the case.

LORD DUNDAS was absent.

The Court allowed the appeal, recalled the judgment appealed against, and remitted the case to the Dean of Guild to proceed.

Counsel for the Petitioner and Respondent—D. P. Fleming, K.C.—Jas. Stevenson. Agents—A. & W. M. Urquhart, S.S.C.

Counsel for the Respondents and Appellants — W. T. Watson, K.C. — Patrick. Agents—M. J. Brown, Son, & Company, S.S.C.

HOUSE OF LORDS.

Friday, January 20, 1922.

(Before Viscount Haldane, Viscount Finlay, Lord Dunedin, Lord Shaw, and Lord Sumner.)

COSTELLO *v.* ROBERT ADDIE & SONS (COLLIERIES), LIMITED.

(In the Court of Session, January 28, 1921, S.C. 356, 58 S.L.R. 286.)

Workmen's Compensation—"Out of and in the Course of the Employment"—Breach of Statutory Rule—Miner Returning to Shot-hole within Prohibited Time—"If a Shot Misses Fire"—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Explosives in Coal Mines Order of* 1*st September* 1913, *sec.* 3 (*a*).

Paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913 provides — "If a shot misses fire the person firing the shot shall not approach, or allow anyone to approach, the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

Two shots were laid close together in a mine by two miners A and B, each of whom applied a light to his respective fuse. Both A and B were of opinion that A's fuse had failed to ignite, but they retired to a place of safety as B's fuse was burning. B's shot went off, and thirty or forty minutes thereafter A returned to the shot-hole for the purpose of lighting the fuse attached to his shot. As he approached his shot it went off and he was seriously injured. The arbitrator found as a fact that A had failed to light the fuse of his shot. *Held* (*aff.* judgment of the Second Division) that A's shot had missed fire within the meaning of the Order, and that as A had contravened the Order in approaching the shot-hole within an hour the accident did not arise out of and in the course of his employment.

The case is reported *ante ut supra.*

The claimant appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—In this case I have had the opportunity of perusing the judgment which has been prepared by my noble and learned friend Lord Dunedin. That judgment entirely expresses my own view and I desire to adopt it.

My noble and learned friend Lord Sumner has requested me to say that he concurs.

VISCOUNT FINLAY—I also concur with the judgment which has been prepared by my noble and learned friend Lord Dunedin, and I have nothing to add to it.

LORD DUNEDIN—In this appeal I take the narrative of the essential facts of the case from the Case which was stated by the arbiter, the Sheriff-Substitute, in a workman's compensation case for the opinion of the Court of Session—"The pursuer (who is now the appellant) and his mate Alexander Fisher had in the course of and as part of their employment to prepare and fire two shots in the pavement of their working-place. The appellant prepared one and his mate the other, each with a detonator and with a fuse attached thereto. The shots were from 2½ to 3 feet apart. The men then proceeded to apply a light to their respective fuses. Fisher was successful in lighting his. Both the appellant and Fisher were of the opinion that the appellant was unsuccessful in lighting his. As, however, Fisher's fuse was burning it was necessary for them to seek a place of safety. This they did accordingly till they heard Fisher's shot go

off, and waited for between thirty and forty minutes to allow the reek to clear, eat their pieces, and have a smoke. Thereafter between thirty and forty minutes after they had left the place where the shots were the appellant returned for the purpose of lighting his own shot. This shot, the fuse of which he believed he did not light, went off as he was in the act of approaching it and injured his left leg and foot."

The Sheriff-Substitute found that the accident arose in the course of and out of his employment and awarded compensation accordingly. The Second Division, on appeal, reversed the judgment of the arbiter and remitted to him to dismiss the claim. They proceeded on the authority of the case of *Smith* v. *Archibald Russell, Limited,* which had been decided by the First Division a week before, and two of the learned Judges confined their remarks to the statement that the case was ruled by that decision. Lord Salvesen said that apart from authority he would have reached the same conclusion.

There is no question but that the appellant was in the course of his employment. The question as to whether the accident arose out of his employment or not depends entirely on whether he did or did not act in contravention of a statutory rule. In the case of *Plumb* ([1914] A.C. 62), in your Lordships' House, it was pointed out that prohibitions were of two classes—those that do and those that do not limit the scope of the employment. The case of *Fife Coal Company* v. *Sharp* ([1921] 1 A.C. 329, reported *sub nom. Fife Coal Company, Limited* v. *Colville and Others,* 58 S.L.R. 85), also in your Lordships' House, settled that a prohibition of the first class was effected by the rule contained in paragraph 3 (*a*), Explosives in Coal Mines Order, 1st September 1913, which applied to the pit in question, and 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 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 argument of the appellant in this case turned entirely on the contention that in order to have a misfire in the sense of the Order you must first have ignition, and that here there was a finding that ignition had not taken place. In the case of *Waddell* (1912, 50 S.L.R. 29), in the Court of Session, under a rule of prohibition phrased "If a shot has been fired and does not explode," I, sitting as Lord President, decided that to light under the rule meant to apply a light with a view to ignition, and did not infer a certioration that ignition had effectively taken place. The case of *Smith* v. *Russell,* (1921) 58 S.L.R. 284, which was followed by the Second Division in this case, was in the First Division. In that case, as here, there were two shots contiguous to each other prepared by the men who simultaneously applied light to the strums or fuses. The finding of the arbiter was—"The appellant applied his naked light to the end of the strum of his shot, but he believed that the strum had not been ignited. As, however, M'Cutcheon (who was the other man) had lit his he told the appellant it was time for them to retire to a place of safety." I summarise what followed. They did retire, but the appellant returned within the forbidden time, his shot went off, and he was injured. The Court held that the accident did not arise out of his employment. The Lord President (Clyde), who delivered the judgment of the Court, after reading paragraph 2 (*e*) of the Order, which provides that "The person firing the shot shall take shelter," and also paragraph 3 (*a*) already cited, says this—"A shot misses fire in the sense of the latter paragraph if it does not explode in the usual time. *Firing the shot* is the equivalent of *igniting the fuse by applying a naked light* in the language of the Order. But what does the latter expression imply? I think it means such application of the naked light to the fuse as in ordinary circumstances will cause the fuse to take light. If this is not its true meaning, the whole of the provisions of the Order on this topic become useless. For the ordinary interval between the ignition of the fuse and the explosion is short, and the Order would fail in its object if it permitted the worker to go on applying the naked light to the fuse until he was satisfied that he had successfully ignited it." And he then proceeds to say that he thinks that is in accordance with what I said in *Waddell's* case.

I agree with the Lord President. I would only submit a remark by way of further observation. No man presumably is anxious to go and get blown up. It is only therefore in cases where he thinks that he has not successfully ignited the fuse that he returns to it at all. It is just to protect him against himself that the regulation says he shall not go back till after such an interval as will reasonably avoid the danger of a deferred explosion. Yet if the opposite argument is right, then this is a class of case to which the regulation cannot apply. This would be my opinion if there was no further authority, but there is further authority, to which I think it a pity that your Lordships' attention was not specially directed at the debate, though probably it is due to the fact that the case to be mentioned is reported embedded between two others. In the case of *Fife Coal Company* v. *Sharp* in your Lordships' House, already cited, the regulation said to be transgressed was the same as in this case. The facts were also the same in respect that two contiguous shots were laid by two different men, that both men attempted to light the fuses, and that on retirement only one shot went off, though on premature return the other shot exploded. I have looked at the appeal Case in that appeal, and I find that one finding of the arbiter was as follows:—"Each of the 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 alight. The other said that he had not

ignited his strum." Your Lordships held that under this circumstance when Colville returned before the allowed time he was guilty of a contravention of the Order and was acting outwith the scope of his employment. It is true that the point was not specially argued, but if the appellant's argument in the present case was right that case would be wrongly decided. I am therefore of opinion that the appeal fails and should be dismissed with costs.

LORD SHAW—I entirely agree.

Their Lordships ordered that the interlocutor of the Court below be affirmed and the appeal dismissed with costs.

Counsel for Appellant—Solicitor-General for Scotland (Murray, K.C.) — Fenton — Brightman. Agents—Hay, Cassels, & Frame, Hamilton—Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

Counsel for Respondents — Sandeman, K.C.—Beveridge. Agents—W. & T. Craig, Glasgow — W. & J. Burness, W.S., Edinburgh — Beveridge & Company, Westminster.

Friday, January 20.

(Before Viscount Haldane, Viscount Finlay, Lord Dunedin, Lord Shaw and Lord Sumner.)

COLTNESS IRON COMPANY, LIMITED *v.* BAILLIE.

(In the Court of Session, March 11, 1921, S.C. 505, 58 S.L.R. 331.)

Workmen's Compensation—"Out of and in the Course of the Employment"—Miner Returning to Shot-hole within Prohibited Time—"Person Firing the Shot"—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Explosives in Coal Mines Order of* 1*st September* 1913, *sec.* 3(*a*).

Paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913 provides:—"If a shot misses fire the person firing the shot shall not approach, or allow anyone to approach, the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

In a mine to which the above regulation applied a shot missed fire, and a miner who was not the person who had actually applied the light to the fuse returned to the working-face within an hour in order to light the fuse, which he believed had not been ignited, and was injured in consequence of the shot then going off. *Held* (*aff.* judgment of the Second Division) that as he was not the person who had applied the light to the fuse, he was not the person firing the shot, and that accordingly he had not acted in breach of the Order in returning to the shot-hole.

The Case is reported *ante ut supra.*

The Company appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—In this case also I have had the opportunity of perusing the judgment which has been prepared by my noble and learned friend Lord Dunedin, and I am entirely satisfied with the conclusions as he has expressed them.

Lord Sumner, my noble and learned friend, desires me to say that he concurs.

VISCOUNT FINLAY—I also concur in the judgment which has been prepared by my noble and learned friend Lord Dunedin.

LORD DUNEDIN—In this case, as in the preceding, two contiguous shots were arranged, though the distance between them was about 20 instead of 3½ feet. The one was arranged by a man called Muncie. The other was arranged by a gang working together composed of the respondent and his two sons William and John Baillie. William bored the shot-hole, the respondent put in the explosives, did the packing, and arranged the fuse. Muncie having indicated that he was ready and proposed to fire, William Baillie applied his naked light to the fuse. He was under the impression that it had failed to light, but as Muncie's fuse was burning the party retired. Muncie's shot exploded, when without waiting for the prescribed period the respondent returned and his own shot exploded and injured him permanently.

The learned Sheriff-Substitute as arbiter found that the shot did not miss fire, and that consequently the rule did not apply. He also expressed the opinion that even if that was not so, yet in accordance with the decision in *Donelly's* case (57 S.L.R. 380, *rev.* 58 S.L.R. 85) in the Court of Session (for this award was issued before *Donelly's* case was reversed in your Lordships' House), the respondent was not disentitled to receive compensation. In the Inner House the point as to missing fire was given up by the respondent's counsel, who admitted that there was a missfire in the sense of the Order. Your Lordships are absolved from the consideration of whether such an admission should hold good because in accordance with the judgment in the preceding case there was a missfire. *Donelly's* case being by this time decided in your Lordships' House, the learned Judges of the Second Division held that though not absolved in respect of that case, the respondent was not disentitled in respect that the rule did not apply to him, he not being the firer of the shot.

The appellants, the employer company, argued that the respondent was the firer of the shot, inasmuch as he was in charge of the gang composed of himself and his two sons, and that a firing by the son was equivalent to a firing by himself. Alternatively they argued that the provisions of the Order as a whole made the neighbourhood of the shot a prohibited territory till after the expiry of the prescribed time, and that consequently the respondent in going into that territory within the prescribed time was acting outwith the scope of his employment.