[1833], 4 B. & A. 735; Poley on Solicitors, 331.

LORD PRESIDENT—The question raised in this case is a very simple one. The firm of Weir & Wilson, which afterwards became Weir & Wilson, Limited, borrowed money from Samuel Platt, Limited, and in security of this loan they granted a bond and disposition over heritable property belonging to them, which consisted of their works at Hamilton, in favour of Samuel Platt, Limited.

Samuel Platt, Limited, employed an agent, and that agent on their behalf prepared the bond and disposition in security. That bond and disposition in security contained the usual clause of assignation of writs, and also contained a clause, not unusual but not at all necessary in a bond and disposition in security, namely, a clause under which the property writs were expressly delivered to the bondholder. Thereafter the company of Weir & Wilson, Limited, was wound up, the liquidator of the company has effected a sale of the subjects, and wishes to give the titles to the purchaser. That sale, naturally, is under burden of the bond and disposition and security. As it happens, the purchaser is the bondholder, and the bondholder, as bondholder, therefore does not raise any objection to the titles being delivered to him in his capacity as purchaser; but the agent for the bondholder appears and says that he has a lien over the titles in respect of the law agent's lien, and that he proposes to enforce this lien for all business accounts outstanding between him and his clients.

I am of opinion that there is no ground for upholding such a lien. I think the ordinary positions which arise under such transactions are well understood. A person who grants a bond and disposition in security must grant an assignation of writs. The purpose of that assignation is to enable the lender to make good his security, which he may do either by way of diligence or by the more extreme course of enforcing the power of sale contained in the bond. I think that, if nothing else is said, such an assignation is all the borrower is bound to grant. It is not uncommon that the parties stipulate that the titles of the property should also be handed over by the borrower to the lender, the object of that, as is well explained by Mr Menzies, being to avoid the hypothec of the law agent of the proprietor. If such a bargain is made, I have no doubt that the lender is not bound to redeliver these titles to the borrower except upon his debt being paid, and I have no doubt that that right of retention of the titles is good not only against the proprietor but against anyone whose right is derived from that proprietor or borrower. But still the possession of the titles remains exactly as it was, namely, for the purposes of security only. A person having a right for a limited purpose is not entitled to use it for more than that limited purpose. I know of no authority, and I see no principle, on which a securityholder, having got the titles for the purpose of making good his security, should be allowed to give them to his law agents for the purpose of raising up a fund of credit with his own law agents for all accounts between him and them *hinc inde*.

LORD KINNEAR—I am entirely of the same opinion.

LORD SKERRINGTON—I agree with your Lordship.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court found that the respondent had no lien over the titles in question, repelled the answers, and decerned.

Counsel for Petitioner—Lyon Mackenzie—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Respondents — Wilson. Agents—Fraser & Davidson, W.S.

Tuesday, December 6, 1910.

FIRST DIVISION.

[Sheriff Court at Airdrie.

TRAYNOR *v.* ROBERT ADDIE & SONS.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (1) —*"Arising out of and in the Course of the Employment"—Inference from Proved Facts—Disobedience of Order.*

T., a miner, whose duty it was to work at a certain place in a mine, was informed by the fireman that he could work at another place called X till ten o'clock that morning, but that he was not to remain there longer, as after that hour blasting operations would commence from the opposite side, from which a new passage was being opened up. T. worked at X till about ten, when he left and went to his regular working-place, about 65 feet distant, where he remained till eleven, when he was left there working by his mate. About 11·45 a shot was fired opposite X. T. was killed by this shot, and his body was found among the *debris* at X. T. did not require to pass X to get to the pit bottom, and the order to be away from X was in force when the accident occurred. It was not proved what led T. to go to X, but it might have been to fetch a pick which had been left there by his mate. T.'s representatives having claimed compensation, the arbiter assoilzied the defenders, holding that T. had not been injured in the course of his employment.

Held that there was evidence on which the arbiter might reasonably find as he did, that the Court therefore could not interfere with his decision, and appeal *dismissed.*

Mrs Ellen Gallagher or Traynor, widow of Charles Traynor, miner, Coatbridge, for

her own interest and as tutor for her pupil children, and John Traynor, son of the said Charles Traynor, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from Robert Addie & Sons, coalmasters, Rosehall Colliery, Coatbridge, in respect of the death of the said Charles Traynor.

The Sheriff-Substitute (GLEGG) having refused compensation, a Case for appeal was stated.

The *facts* were as follows—"(1) Charles Traynor was a miner in the employment of Robert Addie & Sons, and his average weekly earnings were 27s. a-week. . . . (4) The *locus* of the after-mentioned occurrences was approached from the pit-bottom by a downset road. (5) About 40 feet from the far end of this there issues on the right hand at right angles a branch road about 20 feet in length, and at the end of this was the face at which Traynor's working-place was. (6) From Traynor's working-place the coal or working face ran round to the end of the downset road, forming roughly the other two sides of a square, of which the branch road and the last part of the downset road formed the first two sides. (7) The coal face extended past the end of the downset road and to the left thereof for 15 feet or so. (8) The interior of the above-mentioned square was occupied by building and waste, and there was no way across it. (9) About 10 feet beyond and to the left of the coal face and of the downset road the coal was being mined from the opposite side to open up a new passage, which would enter the downset at a point herein called X. (10) On the morning of 23rd December 1909, about six, Traynor was informed by the fireman that he could work at X till ten o'clock, and take up some loose coal lying there, but that he was not to remain there longer, as after that hour the miners would be blasting coal from the opposite side. (11) Traynor was told by the fireman that his own place was clear, and that he could work there after leaving X. (12) Traynor worked at X till about ten, when he left and went to his working-place mentioned in No. 5, and shortly thereafter he was there warned by another miner, who was attending to the aforesaid blasting, to clear out as they were to begin to fire shots. (13) Traynor then left and went to his own working-place. (14) A shot was fired opposite X about 10·30 which did not clear a way through. (15) Traynor remained at his own working-place till eleven, when he was left working there by his mate. (16) Traynor had intimated to his mate that he was going to knock off after putting up a tree. (17) About 11·45 another shot was fired opposite X, which blew a way through, and Traynor's body was found among the *debris* at X. (18) Traynor was killed by this shot. (19) X is about 65 feet distant from Traynor's working-place, measured along either side of the square. (20) The way from Traynor's working-place to the pit-bottom is in the direction opposite to X, and to get to the pit-bottom Traynor did not need to go nearer X than the junction of the branch and downset roads, which is over 40 feet from X. (21) Traynor would not have been injured by the shot if he had followed this road to the pit-bottom. (22) The route past X did dot lead to any place where Traynor had any interest to be, and about this point before the accident the route was difficult to traverse even by crawling. (23) It is not proved what led Traynor to get to X, but it may have been to fetch a pick which had been left there by his mate. (24) Traynor's order to be away from X was in force when the accident occurred. (25) Traynor had no reason to assume that the shot fired about 10·30 would be the last shot in the aforesaid blasting."

The Sheriff-Substitute further stated—"On these facts I found that, as Traynor met his injury by doing what he was ordered not to do, he was not injured while in the course of his employment. On the assumption that compensation may be found to be payable, I assessed the same at £40, and allocated £15 to Mrs Traynor, £5 to John Traynor, £10 to Mary Traynor, and £10 to Hugh Traynor. I assoilzied the defenders from the conclusions of the action, and found them entitled to expenses."

The *question of law* was—"On the above facts was I entitled to hold that Traynor was not injured while in the course of his employment?"

Argued for appellants—The accident to the deceased arose "out of" and "in the course of" his employment. The arbiter had erred in drawing the inference that the deceased was doing what he had been ordered not to do. The facts did not justify such an inference, for the deceased was found at a place where he was reasonably entitled to be. That being so, the presumption was that the accident had arisen out of and in the course of his employment—*Grant* v. *Glasgow and South-Western Railway Company*, 1908 S.C. 187, 45 S.L.R. 128; *Moore* v. *Manchester Liners, Limited*, [1910] A.C. 498. Further, the natural inference from finding 23 was that the deceased had gone to the place in question in his employers' interests, *e.g.*, to fetch a pick, and that was sufficient to distinguish this case from those of *Marshall* v. *Owners of s.s. Wild Rose*, [1910] A.C. 486, and *O'Brien* v. *Star Line, Limited*, [1908] S.C. 1258, 45 S.L.R., 935 relied on by the respondents. Breach of a rule which merely amounted to negligence did not of itself debar a workman from obtaining compensation—*M'Nicholas* v. *Dawson & Son*, [1899] 1 Q.B. 773; *Whitehead* v. *Reader*, [1901] 2 K.B. 48. That being so, the Court was entitled to review the arbiter's finding—*Sneddon* v. *Greenfield Coal and Brick Company, Limited*, 1910 S.C. 362, 47 S.L.R. 337. To absolve the employers it must be shown (1) that the workman was in a place where he had no business to be, (2) that he was there contrary to an express order, and (3) that he was not there in his employers' interest—*Smith* v. *South Normanton Colliery Company*, [1903] 1 K.B.

204. The *onus* of proving that this was so here lay on the respondents, and they had failed to discharge it.

Argued for respondents — Where, as here, the arbiter might reasonably find as he did, the Court would not interfere with his decision—*Hendry* v. *United Collieries, Limited*, 1910 S.C. 709, 47 S.L.R. 635. It lay on the pursuers to prove that the accident arose "out of" as well as "in the course of" the employment—*Pomfret* v. *Lancashire and Yorkshire Railway*, [1903] 2 K.B. 718; *Mackinnon* v. *Miller*, 1909 S.C. 373, at p. 378, 46 S.L.R. 299; *Marshall* (*cit. sup.*). This *onus* they had failed to discharge, for the deceased was found at a place where he had no right to be, and there was no evidence that he had gone there in his employers' interests. He had been warned not to go there, and in disobeying that order he had exposed himself to unnecessary risk. He was therefore outwith his employment at the time he met with the accident—*Reed* v. *Great Western Railway*, [1909] A.C. 31; *Miller* v. *North British Locomotive Company, Limited*, 1909 S.C. 698, 46 S.L.R. 755.

At advising—

Lord President—This is one of these cases where the question is truly one of fact whether the accident which brought about the deceased man's death arose in the course of and out of his employment. I think it is quite unnecessary to say any more upon the subject, because we quite recently had one of these cases in the course of which reference was made to the most recent judgment of the House of Lords upon the subject, namely, the case of the "*Wild Rose.*"

In this particular case, if I thought that the Sheriff-Substitute's judgment was based upon a universal proposition of law that whenever an injury was suffered by a man who was at the time doing what he had been ordered not to do, then I would have had to have, so to speak, reconsidered the matter, because I do not think that that universal proposition would have been a correct proposition of law. But I am satisfied that to deal in that way with the Sheriff-Substitute's finding would not be fair to the Sheriff-Substitute. I think that when he found that the man was not injured while in the course of his employment, the Sheriff-Substitute was not taking the fact that he was doing what he was ordered not to do as a fact which by itself precluded all further discussion, but was merely taking it as one of the facts from which he drew the inference that when the deceased met with the accident there was nothing to show that he was in the course of his employment, and that the accident arose out of his employment, because, after all, the *onus*, to begin with at any rate, is upon the representative of the workman to show that the accident was met with in the course of his employment and that it arose out of it.

Taking the whole facts together as they are put in the 25 findings which are before us, it seems to me just one of those cases where the Sheriff-Substitute, sitting as arbiter, has to come to a certain result upon inference which he draws from various facts in the case. Absolutely direct proof there could not be in the circumstances. It therefore was a case of drawing inferences, and I cannot say that I think the inferences drawn by the learned Sheriff-Substitute are impossible of being supported.

In those cases of what I may call almost an impression, and certainly where there is a narrow margin between the result on one side and on the other, I think the only safe course for us—admittedly only reviewing upon questions of law—is to leave the judgment of the judge of first instance unless we feel ourselves that that judgment cannot be supported.

Accordingly I am of opinion that we ought to answer the question as put in the affirmative, and to leave the judgment as it stands.

Lord Kinnear—If the whole question which the Sheriff-Substitute is required to decide as arbiter were open for the consideration of this Court, I should probably have thought it a question of difficulty. But then we have no jurisdiction to review the Sheriff-Substitute's decision in fact, and I can see no ground for saying that his decision in fact in this case was not supported by any evidence fit for his consideration, or for saying that he has come to that decision because he was misled by a mistaken view of the law. I think the difficulty that was suggested in the appellant's argument upon this latter point is completely answered by what your Lordship has said, because it was maintained that the way in which the Sheriff-Substitute expresses his ultimate finding suggests that he had proceeded upon an erroneous view of the law. I think that would have been a perfectly sound criticism if we could have taken the words in which he expresses his finding as meaning that he thought there was some rule or presumption of law by which, when a man was found to have been injured while he was doing something which he had been told not to do, he was thereby excluded from the benefit of the Act.

I agree with your Lordship that there is no such general rule of law. But then I agree also that to take this isolated finding apart from all that precedes it in a very detailed statement of the case would be a very wrong way of interpreting the Sheriff-Substitute's decision. I think it appears from the 25 specific articles stating facts that the learned Sheriff-Substitute had taken into consideration all the facts that were proved and had finally come to his conclusion upon the question of fact upon grounds which he was entitled and bound to take into consideration. And I do not think it doubtful that he laid stress upon the one consideration that the man, when the accident happened to him, was at a place he had been ordered, out of regard to his own safety, not to go to. I think that is a perfectly legitimate item of evidence tending in one direction, and I do not

think it is for this Court, which has no power to review the judgment upon the fact, to say that the Sheriff-Substitute has given too much weight to one consideration of fact and too little to another.

The true question, I think, is whether, when this accident happened to him, the man was at a place in the mine where he was reasonably entitled to be, and was engaged in the execution of his duty or was acting in the interest of his employers at that place, or whether, on the other hand, he had gone to a place where he was not entitled to be for some private reason of his own. The Sheriff-Substitute answers the first of these questions in the negative. He says that upon the evidence before him—upon which he was quite entitled to come to that conclusion—that the man was not at a place where he was entitled to be, and was at a place where he had been expressly forbidden to go, and therefore that he had exposed himself to a risk from which, if he had been acting in the ordinary course of his employment and for the interest of his employer, he would have been safeguarded. I cannot say that that judgment is wrong in point of fact, because I cannot form any opinion upon it. If it is right in fact, we cannot say that it is wrong in law.

LORD JOHNSTON—The circumstances are very succinctly and lucidly explained by the learned Sheriff-Substitute, and in the the facts so stated he found, slightly transposing his words, that the deceased did that which he was ordered not to do, that by doing so he received the injury which caused his death, and that accordingly he was not injured while in the course of his employment. I think that the Sheriff-Substitute really meant, and would more correctly have said, was not injured by accident arising out of his employment; and with that correction I should not merely find no ground for disturbing his finding in fact—and I do not think that there is anything but a question of fact in the case—but I may add that I should entirely agree with his verdict.

The case lies between that of *Sneddon* v. *Greenfield Coal and Brick Company*, 1910 S.C. 363—where it was held that the inference from the facts proved was that the deceased in going to his work in the mine had by mistake taken a wrong turning in the dark—and that of *O'Brien* v. *The Star Line Limited*, 1908 S.C. 1258, where the deceased without any call of duty went to a forbidden part of his ship, and to get there by some means opened a locked bulkhead door. Here there was no physical obstruction between the deceased's proper working-place and the forbidden *locus*, but there was the positive order not to approach the point of danger with—though that is not essential—an explanation of the ground of anticipated danger.

I think therefore that the present case falls within the category of *O'Brien's* case and not within that of *Sneddon's*.

There are many other authorities bearing upon this aspect of the question of liability under the Workmen's Compensation Act, but I content myself with referring to *Miller's* case, 1909 S.C. 698, and particularly to the opinion of the late Lord M'Laren.

I agree therefore that the question in the case be answered in the affirmative.

LORD MACKENZIE—The Sheriff-Substitute had here to decide a question of fact, and before coming to a conclusion he had to consider two questions — the first being whether there was disobedience of an order, and then—if he answered that question in the affirmative — to consider whether the effect of that disobedience was to put the workman outside the area of protection which the Legislature has marked out. And I construe the statement by the learned Sheriff-Substitute to the effect that he had considered and decided both questions, although there may be a slight ambiguity in the way in which the point is stated by the Sheriff-Substitute. That being so, the only question is whether there is in the findings a statement of fact from which the Sheriff-Substitute could reasonably draw the inference which he did. If there is evidence which entitled him to draw the inference, then this Court cannot interfere with what the Sheriff-Substitute has done. I accordingly agree with your Lordships.

The Court answered the question of law in the affirmative, and dismissed the appeal.

Counsel for Appellants—Anderson, K.C. —A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—Horne, K.C.—Strain. Agents—W. & J. Burness, W.S.

HIGH COURT OF JUSTICIARY.

Saturday, June 10, 1911.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen.)

CROMWELL *v.* RENTON.

Justiciary Cases — Review — Evidence — Motor Car—Dangerous Driving—Motor Car Passing Tramcar—Motor Car Act 1903 (3 *Edw. VII, cap.* 36), *sec.* 1 (1).

A motor car, driven at a speed of not less than nine miles an hour, passed, on the near side, a tramcar which was at a standstill taking up four passengers. The space between the tramcar and the kerb of the pavement was ten feet. At the moment when the motor car actually passed, three of the passengers had got on to the tramcar, the fourth had to come as near it as possible, his feet being below the footboard, and, even so, his coat was touched by the motor car, though no damage was done. The driver having been convicted of an offence against