efficient condition a graving dock which in their opinion it is expedient for them to discontinue; or (*b*) so as impliedly to deprive them of any right which they would otherwise have possessed to sever such a graving dock from the harbour undertaking and to alienate it either temporarily or permanently. Section 111 (2) of the Act of 1913 confers upon the Trustees express powers of alienation either temporary or permanent with respect to "lands for the time being vested in them." By section 3 of the Harbours Clauses Act of 1847 (incorporated by section 6 of the 1913 Act), "unless there be something in the subject or context repugnant to such construction . . . the word 'lands' shall include messuages, lands, tenements, and hereditaments, or heritages of any tenure." "Lands," as used in section 111 (2) of the 1913 Act might possibly include a graving dock which cannot be maintained in efficient condition except at a cost which the Trustees consider to be more than they can afford to pay, or more than the dock is worth to the harbour. In this view of the matter the question is, whether upon the pleadings alone and without evidence the pursuers have been able to demonstrate beyond all reasonable doubt that the Trustees exceeded their powers when they granted the lease, a copy of which will be found in the print. I think that the pursuers have failed to establish their case. They expressly admitted by their counsel that the Trustees acted throughout in good faith, and they did not move for any inquiry into the facts. Every presumption and inference of fact is therefore in favour of the Trustees. In particular, it must be presumed that before they decided to grant the lease they had come to the conclusion (*a*) that the needs of the smaller vessels are sufficiently provided for by the two smaller graving docks; (*b*) that the Garvel Graving Dock is not available for "modern freight steamers" because of the form of its entrance; and (*c*) that the vessels of the limited class which might have been expected to use this dock are deterred from doing so because the Trustees cannot afford to provide the necessary plant and other facilities. The pursuers did not ask for further specification in regard to this last averment, but a perusal of the lease and of the inventory of plant annexed thereto would probably make its meaning clear to any person with practical knowledge of graving docks. For example, article 11 of the lease suggests that the Garvel dock was not supplied with electricity, and that such an instalation was required. It is of course true that the dock was not in a "derelict" or ruinous condition, but on the contrary is of considerable value to a ship-repairer whose customers are sufficiently numerous to keep it always occupied and who are ready to pay for the accommodation without reference to any statutory schedule. It does not, however, follow that in the hands of the Harbour Trustees this graving dock must necessarily pay its way either directly through the rates which they are authorised to charge for its use or indirectly through the trade which it attracts to the harbour. It is impossible to assume without evidence that the Trustees had not good reasons both for discontinuing the use of the Garvel Dock and also for temporarily severing it from their undertaking and for substituting in its place a substantial annual rent. So far as I am in a position to express an opinion upon a question of mixed law and fact in regard to which I possess nothing more than general and perhaps erroneous information, I think it possible that the lease was authorised by section 111 (2) of the Act.

In the course of their argument the pursuers' counsel suggested that the lease disclosed an illegal delegation on the part of the Harbour Trustees of their right and duty to control the general hydraulic installation of the harbour; but this point was not insisted on, and nothing could have been made of it in the absence of the necessary averments and evidence.

LORD CULLEN concurred in the opinion of Lord Skerrington.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—The Lord Advocate (Clyde, K.C.)—Gentles. Agent—Hugh Patten, W.S.

Counsel for the Defenders (Respondents)—Macmillan, K.C.—A. M. Mackay. Agent—W. B. Rainnie, S.S.C.

Thursday, April 1.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

A. G. MOORE & COMPANY *v.* DONNELLY.

Master and Servant — Workmen's Compensation — "Arising out of and in the Course of"—Breach of a Statutory Rule Fenced by a Penalty — Added Peril — 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* 1*st September* 1913, *S.R. and O.* 1913, *No.* 953, *par.* 3 (*a*).

Two shots close together were laid and lighted in a mine by two miners; one explosion occurred; one of the miners within ten minutes returned to the *locus;* the other shot exploded in his face causing him injuries. In an arbitration to recover compensation the arbitrator held that in returning within the prescribed time the workman was guilty of serious and wilful misconduct, as he had acted in breach of paragraph 3 (a) of the Coal Mines Order of 1st September 1913 (an offence against which Order is a statutory offence under the Act of 1911, sections 86 and 101), but awarded him compensation in respect that his injuries were serious and permanent. *Held* in a stated case, following *Conway* v. *Pumpherston Oil Com-*

pany, Limited, 1911 S.C. 660, 48 S.L.R. 632, that the workman had suffered injury by accident arising out of and in the course of the employment.

Opinion per Lord President (Strathclyde) that *Conway's* case was wrongly decided. *Opinions contra per* Lord Mackenzie, Lord Skerrington, and Lord Cullen.

The Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50) enacts—Section 86—"(1) The Secretary of State may by order make such general regulations for the conduct and guidance of the persons . . . employed in or about mines as may appear best calculated to prevent dangerous accidents, and to provide for the safety, health, convenience, and proper discipline of the persons employed in or about mines. . . . (4) An order made under this section shall be laid as soon as possible before both Houses of Parliament and shall have effect as if enacted in this Act." Section 101—"(4) Where a person is guilty of any offence against this Act which in the opinion of the Court that tries the case is one which was likely to endanger the safety of the persons employed in or about the mine, or to cause serious personal injury to any of such persons, or to cause a dangerous accident, and was committed wilfully by the personal act, personal default, or personal negligence of the person accused, such person shall be liable, if the Court is of opinion that a fine will not meet the circumstances of the case, to imprisonment with or without hard labour for a period not exceeding three months."

The Explosives in Coal Mines Order of 1st September 1913, S.R. and O. 1913, No. 953, is quoted *infra* in the Stated Case.

A. G. Moore & Company, coalmasters, Dalkeith, *appellants*, being dissatisfied with an award of the Sheriff-Substitute at Edinburgh (GUY) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), brought against them by Francis Donnelly, coal miner, Dalkeith, *respondent*, appealed by Stated Case.

The Case stated—"The *facts* admitted or proved are as follows:—(1) That the respondent is a coal miner residing at Miller's Close, High Street, Dalkeith; (2) that the appellants carry on business as coalmasters at Dalkeith Colliery, Dalkeith; (3) that while the respondent was at work as a coal miner in the appellants' employment in said Dalkeith Colliery on 26th March 1919 he suffered personal injury by accident; (4) that said injuries consisted of the loss of his left eye, injury to the sight of his right eye, and injury to his ear, and shock; (5) that said accident arose out of and in the course of the respondent's employment; (6) that the respondent has recovered from the injury to his ear and the shock; (7) that the respondent's power of vision in his remaining eye although still much affected has improved; (8) that said accident happened in the following manner:—Two shots close together were being prepared and fired by means of detonators with fuses attached, one by the respondent and another by his companion Andrew Bell; when the fuses had been lighted the respondent and his companion retired to a place of safety; only one shot went off; the respondent returned within ten minutes to the place of the other shot, when it blew off in his face; (9) that the respondent in so returning to the place of the shot was acting in contravention of paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913, which provides that 'if a shot misses fire, the person firing the shot shall not approach or allow anyone to approach the shothole 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'; (10) that in so returning too soon the respondent was guilty of serious and wilful misconduct; (11) that the injury has resulted in the respondent's serious and permanent disablement; (12) that the average weekly earnings of the respondent prior to the accident were at least £4; (13) that the respondent was totally incapacitated for work as the result of said accident from the date thereof till 19th November 1919; (14) that the respondent has been since 19th November 1919 and he still is, partially incapacitated for work as the result of said accident.

"On 22nd December 1919 I issued my award finding that the appellants were liable to pay compensation to the respondent in respect of said accident and injury. I assessed the compensation at £1 per week for the period from the date of the accident to 19th November 1919, and at the rate of 17s. 6d. per week after 19th November 1919, and I awarded these sums with expenses."

The *question of law* was—"On the foregoing facts was I entitled to find that the accident to the said Francis Donnelly arose out of and in the course of his employment with the appellants?"

The *note* appended to the award was—"The main question in dispute between the parties was whether the pursuer by going back to the unexploded shot in contravention of the regulation referred to put himself outside the Workmen's Compensation Act altogether. I cannot adopt this view. The man although going back too soon was going to do what he was really employed to do and was in course of doing. I have found that by being guilty of this breach of the regulation he was guilty of serious and wilful misconduct, but the result of his injury is that he is seriously and permanently disabled, so that I have reached the result of holding that he is entitled to compensation under the Act. It was admitted that if his case fell within the Act he was entitled during his total incapacity for all work to £1 a-week, and I have awarded him this sum. In consultation with the medical assessor I have awarded 17s. 6d. per week for the period from the date of the proof, which was the date upon which the medical assessor saw and examined the pursuer's eyes, and the date upon which for the first time the defenders raised the question of the pursuer's partial incapacity."

Argued for the appellants—The appellant had broken a statutory rule fenced by a penalty, and that alone was sufficient to

disentitle him to compensation, for an act forbidden by statute and penalised could never be within the scope of the employment — *Bourton* v. *Beauchamp & Beauchamp*, 1919, 12 B.W.C.C. 120; *Matthews* v. *Pomeroy*, 1919, 12 B.W.C.C. 136. Statutory rules were different from other rules and were of special sanctity—*Maydew* v. *Chatterley-Whitfield Collieries, Limited*, [1917] 2 K.B. 742, *per* Bankes, L.J., at p. 751. In any event the rule in question limited the scope of the employment—*Herbert* v. *Fox & Company*, [1916] 1 A.C. 405, *per* Lord Atkinson at pp. 412 and 413, and Lord Shaw at p. 416; *Lancashire and Yorkshire Railway Company* v. *Highley*, [1917] A.C. 352. An act which was a penal offence could never be reasonably incidental to the employment—*Kemp* v. *Lewis*, [1914] 3 K.B. 543; *Poulteney* v. *Turton*, 1917, 34 T.L.R. 103. *Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632, and *Harding* v. *Brynddhu Colliery Company, Limited*, [1911] 2 K.B. 747, were no longer good law, since the development of the doctrine of added peril in *Barnes* v. *Nunnery Colliery Company*, [1912] A.C. 44. Further, in *Harding's* case, Buckley, L.J., had dissented on the ground now maintained by the appellants, and in *Watkin* v. *Guest, Keen, & Nettlefolds, Limited*, (1912) 5 B.W.C.C. 307, he had again dissented on the same ground. That last dissent had been approved by Lord Dunedin in *Plumb* v. *Cobden Flour Mills Company, Limited*, [1914] A.C. 62, at p. 70. That approval implied that Lord Dunedin, who was delivering the opinion of the House of Lords (*Highley's* case (*cit.*) at pp. 364-365), disapproved of the decision in *Harding's* case, and necessarily also of the decision in *Conway's* case. The present case was ruled by *M'Diarmid* v. *Ogilvy Brothers*, 1913 S.C. 1103, 50 S.L.R. 883, and *Powell* v. *Brynddhu Colliery Company*, [1911] 5 B.W.C.C. 124. Section 101 of the Coal Mines Regulation Act 1911 (1 and 2 Geo. V, cap. 50) was referred to.

Counsel for the respondent was not called on.

At advising—

LORD PRESIDENT—The workman in this case was permanently disabled in consequence of injuries received in an accident brought about by his serious and wilful misconduct. The question for decision is whether that misconduct was within or outside the sphere of his employment. 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 in 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 arbitrator held that the accident arose out of the man's employment. On the authority of the case of *Conway* v. *Pumpherston Oil Company* (1911 S.C. 660, 48 S.L.R. 632) I consider we must affirm his decision. I am unable to discover any material distinction between the two cases. It is said that *Conway* is inconsistent with two recent decisions in the Court of Appeal, and with the recent trend of judicial opinion. That may be so, but it has not been overruled, though often cited, and it is binding on us. I am prepared to follow it in the present case although I am free to confess that had the question been open I should, for my own part, have held that the respondent here was not acting within the sphere of his employment when the accident befell him. Briefly put, my difficulty is this, that I am unable 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. Can an accident so caused be said to arise out of his employment? Is he, when he suffers, running a risk incidental to his employment? Or is he not rather incurring what has been called an "added peril"? When he received his injuries was not this workman doing something which he was neither engaged to do nor entitled to do? Was his act not an act outside the scope of his employment? I must acknowledge that I find it extremely difficult to answer these questions otherwise than in a sense adverse to the workman's claim. The respondent went to the place where he was injured at a time when he was forbidden by statutory enactment to be there. In going to that place at that time he was acting deliberately in contravention of paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913. He incurred a penalty by so doing. He was certainly not employed to go to that place at that time. To go there then was no part of his duty. It was — and the respondent knew it — outside the sphere of his duty. I cannot think that in going to that place at that time the workman was guilty of serious and wilful misconduct in the performance of his duty. To my thinking he was not performing his duty at all. On the contrary, he was doing what was no part of his duty. He was not employed to go to that place at that time. Indeed it was one of the express conditions of his employment that he should not. I, of course, accept Lord Dunedin's classification of prohibitions — all prohibitions, statutory or otherwise, as given in the case of *Plumb*, [1914] A.C. 62, at p. 67. There are two classes — First, there are prohibitions which limit the sphere of employment. Second, there are prohibitions which only deal with conduct within the sphere of employment. The statutory enactment violated in the case before us appears to me to belong to the former class. To be in the place where the respondent received his injury at the time when he received it, was, I think, clearly outside the sphere of his employment. A workman may well be outside the sphere of his employment when he is in a right place at a wrong time. It is indeed at that time a wrong place to be in. If so, he cannot recover under the Act, for he is not within the sphere of his employment. Of the Scottish decisions the one

which seems to me to be most clearly in point is *M'Diarmid* v. *Ogilvy Brothers*, 1913 S.C. 1103, 50 S.L.R. 383. I take the account of it from my brother Lord Mackenzie's opinion in *M'William's* case, 1914 S.C. 453, 51 S.L.R. 414. "In the case of *M'Diarmid* the man was told not to clean a machine except upon certain stated days. He did clean it on a different day, and it was held that what he did was not within the sphere of his employment. He was not employed to do what he did when he met with the accident." I am unable to reconcile this case with that of *Conway*. In the latter the injured workman broke a rule which had statutory force prohibiting him from proceeding through any fence or passing any notice erected to indicate that danger existed. In my opinion when the workman passed the fence and entered the upset he was outwith the sphere of his employment and the arbitrator was right in refusing compensation. In the case before us the workman was forbidden to go to a particular place at a certain time. He did go at the forbidden time. He was therefore doing what he was not employed to do. It may be said that this is a distinction between the present case and that of *Conway* in respect that the miner here had no occasion to return to the place where he was injured at the time he did, whereas in *Conway* the miner was in immediate need of his pick which was lying in the upset, access to which was forbidden. This distinction is not material. For in both cases a prohibition having statutory force placed the spot where the accident occurred outside the sphere of the miner's employment. In the course of his employment he had no business to be there at all. When I turn to the English cases cited I am in the same difficulty. I cannot pretend to be able to reconcile them. But it is certain that the judgments of the Court of Appeal in *Bourton* v. *Beauchamp* (1919, 12 B.W.C.C. 120) and *Matthews* v. *Pomeroy* (1919, 12 B.W.C.C. 136) are directly in point and are hostile to the respondent here. Those cases are not, of course, binding on us. But I consider them to be sound law and I would have followed them if I had felt myself free to do so. During a very recent case in the House of Lords — *Woodilee Coal Company* v. *Robertson*, 57 S.L.R. 343—Lord Atkinson is reported to have said—"If a man does that which is prohibited by statute, can it possibly be said that he is within the scope of his employment when he has actually committed a crime?" It was argued for the appellants in the present case that Lord Atkinson's question ought to be answered in the negative, and that it was enough to defeat the claim to compensation that the respondent was injured when committing a punishable statutory offence. It may be so; but that has not yet been so decided, and I offer no opinion on the question. As at present advised I am inclined to hold that Lord Dunedin's classification of prohibitions applies to all prohibitions, including statutory prohitions with the sanction of a penalty, and that we must always inquire — did the particular prohibition, whether statutory or not, limit the sphere of the employment? Solely, therefore, on the ground that the case before us is, as I think, covered by authority which is binding on us, I move that we answer the question put to us in the affirmative.

LORD MACKENZIE—The Sheriff-Substitute states in his note that the workman in this case when he met with the accident "was going to do what he was really employed to do and was in course of doing." This in my opinion is sufficient to justify the conclusion that the accident arose out of and in the course of the employment.

The Sheriff-Substitute also states that the workman went back to the place of the shot too soon, but has refused, in my opinion rightly, to hold that by going back too soon he put himself altogether outside the Workmen's Compensation Act. The argument for the employers was based on the finding that the workman in so returning was acting in contravention of paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913. This, it is found, was serious and wilful misconduct. The injury from the accident has resulted in the workman's serious and permanent disablement. The case therefore falls within section 1 (2) (*c*) of the Act, and compensation is not disallowed because the injury was attributable to serious and wilful misconduct.

The workman is not by the express terms of the statute to be deprived of his compensation where his injury and misconduct are as we have here. The employers' counsel made use of an argument which he said is finding favour in more recent cases and contended that by going back too soon the workman had put himself outside the sphere of his employment. This was said to be the result of a breach of a colliery regulation—much more in the present case when there had been breach of a statutory prohibition inferring a penalty. To my mind it is in each case necessary to have regard to what it is that is prohibited. Whether the prohibition be contained in a statute or colliery regulation; whether the misconduct consists in a breach of contract or a transgression against the common law, the question does not end when serious and wilful misconduct is established. The reason is that throughout the train of cases it has been recognised that there are prohibitions which limit this sphere of employment and prohibitions which only deal with conduct within the sphere of employment. The difficulty is to assign each case to its proper category. I take as an illustration two cases. In one a man is told not to clean a machine except upon certain stated days. He cleans the machine on a different day and meets with an accident. He gets no compensation because he was not employed to do what he did when he met with the accident. In the other case a man is told not to oil a certain machine when it is in motion. He oils it when it is in motion and is injured. He gets compensation. He was doing what he was employed to do although he was doing it in a wrong way. The cases in which a work-

man has been held disentitled from getting compensation because he disobeyed a prohibition are cases in which the workman was doing something different from what he had been employed to do. I take as an illustration the case of the railway shunter injured by falling from the buffer of a railway waggon upon which he was riding although prohibited from doing so. He gets no compensation because it was no part of his work to get on to the waggon. In such a case the prohibition has the function of fixing the limits of the workman's sphere of employment. The workman when he mounted the buffer went into a territory with which he had nothing to do.

Can it be said in the present case that the workman went into a territory with which he had nothing to do? So far as this Division of the Court is concerned the answer to that question is to be found in the case of *Conway*, 1911 S.C. 690, 48 S.L.R. 632. There were in that case all the elements that are present here, including the point that there was a breach of a statutory rule. It was held that the accident arose out of and in the course of the employment.

I am unable to take the view that a workman necessarily puts himself outside the sphere of his employment because he commits an offence for which he may be prosecuted. If that were the law then the representatives of a chauffeur who was killed while exceeding the speed limit, contrary to his employer's orders and in breach of the statutory regulations, would not be entitled to recover compensation because the chauffeur ceased to be in the employment when the car was running over twenty miles an hour.

I agree that the question here should be answered in the affirmative.

LORD SKERRINGTON—I agree with Lord Mackenzie, and I think that *Conway's* case (1911 S.C. 660, 48 S.L.R. 632) was well decided. I do not propose to add anything on the merits, but as the case may go further I think it right to refer to the fact that although it appears from the arbitrator's note that he was of opinion that this man went back to the place of danger not to serve some private purpose but in order to do the work which he was employed to perform, there is no express finding to that effect in the Stated Case. There is, however, a finding—the fifth finding in fact—to which the attention of the appellants' counsel was called at the very outset of his speech, and the argument proceeded for two days upon the assumption that the true interpretation of that finding was exactly what I have stated. If it had not been so, it would have been necessary to remit the case to the arbitrator in order that he might explain what he meant by his fifth finding, and in order that he might, if he thought fit, import into the body of the case the opinion which is to be found in the note.

The procedure has been slovenly, but there can be no doubt that justice requires that this case should be disposed of upon the basis that this man received his injuries while doing the work which he was employed to do, and not while endeavouring to carry out some private purpose of his own.

LORD CULLEN—I agree in thinking that this case is ruled by the decision of this Court in the case of *Conway* v. *Pumpherston Oil Company*, 1911 S.C. 660, 48 S.L.R. 630. I see no good reason for doubting the soundness of that decision. I accept the distinction stated by Lord Dunedin in *Plumb* v. *Cobden Flour Mills Company* ([1914] A.C. 62, at p. 67) between "prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment." The recognition of that distinction is consistent with section 1 (2) (*c*) of the Workmen's Compensation Act 1906, which within limits provides compensation although the workman is in breach of his contract of employment through serious and wilful misconduct on his part. As the question is always one as to what is within an employment I am unable to see why, if the said distinction holds good regarding voluntary terms and conditions of a contract of employment undertaken by the workman, it should not also hold good regarding conditions imposed on the contract of employment by a statute which does not in any way limit the provisions of the Act of 1906.

On an application of the said distinction to the facts before us I think that the present case is one where there was a violation of a prohibition dealing with conduct within the sphere of employment. The workman was actively prosecuting a piece of work which he was employed to perform. He had not deserted it for any ends of his own, nor had he engaged in any other work. He did not, however, conduct himself aright in the way he went about his said piece of work. He was disobedient to the regulation in not waiting longer in his place of shelter before going back to resume activities at the shot-hole. I think the regulation falls to be described as one intended to regulate the conduct of the workman while doing his employment work; and the proper characterisation, in terms of the Act of 1906, of his action in so going back prematurely appears to me to be that he thereby was guilty of serious and wilful misconduct within the course of his employment, as the arbitrator has held.

The Court answered the question in the affirmative.

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

Counsel for the Respondent—Brown, K.C. —W. H. Stevenson. Agent—T. J. Connolly.