the Second Division in March 1921. In that petition the trustees of a mechanics' institute asked for authority to transfer the funds of the institute to a branch of the Young Men's Christian Association and for discharge. The reporter in the case, after calling the attention of the Court to the cases of *Dundas* (7 Macph. 670) and *Rosebery* (1892, 29 S.L.R. 865), advised that the exoneration should be refused on the grounds that the granting of exoneration and discharge on an *ex parte* application might embarrass the Court in the event of any item of expenditure being subsequently challenged. The Court, however, remitted the petitioners' accounts to the Accountant of Court, and thereafter on his report granted discharge. In the present case the accounts of the petitioners have not been audited, but it humbly appears to the reporter that it would in the circumstances be a reasonable and convenient course for the Court to follow the procedure adopted in *Petition, Mitchell*, and that there could be no practical objection to the granting of a discharge after an official audit."

At the hearing in the summar roll counsel for the petitioners argued—The petitioners were entitled to the decree prayed for—*Petition, Mitchell* (*unreported, cit. per Reporter*). The case of *Dundas and Others, Petitioners*, (1869) 7 Macph. 670, was distinguishable. In the case of *The Earl of Rosebery and Others, Petitioners*, (1892) 29 S.L.R. 865, the Court granted decree of exoneration and discharge (see *ibid.* at p. 867).

LORD JUSTICE-CLERK (ALNESS)—This is a petition at the instance of the trustees of the Rosyth Royal Naval Depot Canadian Fund and of the Admiralty. The petitioners in the first place seek authority to transfer certain funds which they hold to the Royal Naval Benevolent Trust, and in the second place they ask for discharge of their intromissions as trustees.

As regards the proposed transfer, it is clear upon the report by the reporter to whom we remitted the petition that, owing to the change of circumstances which he narrates, the fund in question has become quite unworkable for lack of effective machinery, and that there is no prospect of cobbling up the machinery to make it workable. It is therefore desirable to transfer the money to somebody who can more effectively deal with it. The Royal Naval Benevolent Trust is a suitable body for that purpose, its operations would seem to be in accord with the intentions of the providers of this fund, and we have been informed that the Trust is both able and willing to undertake the task which it is proposed to lay upon it. In these circumstances I suggest to your Lordships that, as recommended by the reporter, the first part of the prayer of the petition should be granted.

As regards the crave for discharge which is also included in the prayer, it is obviously a delicate and a difficult matter to grant forthwith, upon an *ex parte* application, the discharge which the petitioners seek. The reporter has properly drawn our attention to an unreported case where, under similar circumstances, a remit was made by this Division to the Accountant of Court to report upon the accounts of the petitioners, and on his report a discharge was granted. I see no reason why we should not follow that precedent, and why, so far as the second part of the prayer is concerned, we should not now remit the accounts of the petitioners to the Accountant of Court for report. I suggest to your Lordships that we should do this. Should this report be favourable then we shall grant the second part of the prayer as well as the first. In the meantime the petition must remain in Court.

LORD HUNTER and LORD ANDERSON concurred.

LORD ORMIDALE was absent.

The Court pronounced this interlocutor—

"Approve of the report: Authorise and empower the petitioners, as surviving trustees acting in the trust constituted by the declaration of trust mentioned in the petition, to transfer the trust estate in their hands (under deduction of the expenses found chargeable by this interlocutor) to the Royal Naval Benevolent Trust (Grand Fleet and Kindred Funds): And with reference to the application by the petitioners for discharge, remit their accounts and vouchers to the Accountant of Court to examine and audit the same and to report to this Court," &c.

Counsel for the Petitioners—Crawford. Agent—Norman M. Macpherson, Solicitor in Scotland to the Admiralty.

Friday, December 7.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

MURRAY v. FIFE COAL COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Arising out of and in the Course of the Employment—Breach of Verbal Prohibition Imposed by Employers—Guiding Descending Hutches by Getting in Front of them Contrary to Orders.*

A miner whose duty it was to take hutches down an incline in a mine attempted to do so by placing himself in front of them, in violation of an express verbal prohibition by his employers from guiding the hutches downwards otherwise than from the side, with the result that he was fatally injured. *Held* that the accident arose out of and in the course of his employment.

Mrs Jane M'Lean Braid or Laurence or Wilson or Murray, mother of the late William Laurence, miner, Windygates, and Marion Wallace Laurence, the minor child of the said Mrs Murray, *appellants*, being dissatisfied with an award of the Sheriff-Substitute at Kirkcaldy (DUDLEY STUART)

in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between them and the Fife Coal Company, Limited, *respondents*, appealed by Stated Case.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, under which the claimants craved an award against the respondents for payment into Court in terms of Schedule I (5) of the statute for the benefit of the claimants in respect of the death of William Laurence on 1st December 1922. The claimants averred that the said deceased William Laurence when in the course of his employment with the respondents in Wellsgreen Colliery, Wellsgreen, was accidentally crushed between two hutches and seriously injured, that the said accident arose out of and in the course of his employment, and that he died as a result thereof on 1st December 1922. The respondents denied that the said accident arose out of and in the course of the deceased's employment with them. They averred that prior to the accident orders had been given to the deceased by William Cowan, under manager, Frank Dickson, oversman, and Patrick Burns, fireman, all officials of the respondents' company, not to go in front of tubs descending the incline in the Sandwell Coal Section from the foot of No. 8 heading and forming the siding in the main pony haulage roadway; that such orders were directions with respect to working given to the deceased with a view to safety; that notwithstanding said orders the deceased went in front of a rake of hutches descending said incline in the Sandwell Coal Section, and was as a result thereof crushed between said descending rake of hutches and another rake of hutches which had already descended and was standing against the block in said siding; and that in so doing deceased (1) was in breach of said orders, and (2) contravened section 74 of the Coal Mines Act 1911, which provides—'Every person shall observe such directions with respect to working as may be given to him with a view to comply with this part of this Act or the regulations of the mine or with a view to safety." The respondents also denied that the claimant Mrs Jane M'Lean Braid or Laurence or Wilson or Murray was wholly dependent, and that the claimant Marion Wallace Laurence was partially dependent, on the deceased William Laurence at the date of his death.

"Proof was led before me on 30th March 1923 and the following *facts* were admitted or proved:—1. That the deceased William Laurence was on 29th November 1922 in the employment of the respondents as a hanger-on at the Wellsgreen Colliery belonging to them. 2. That both claimants were partly dependent upon the deceased at the time of his death. 3. That deceased's duties were to assist another lad with the pushing of empty hutches up an incline about 54 feet long to the foot of a heading, and with the taking of full hutches from the foot of said heading down said incline, the gradient being about 1 in 26 in favour of the loaded hutch. 4. That the deceased was instructed in taking the full hutches down said incline to guide them from the side or the back, and in particular had been forbidden by the officials above mentioned to do so by going in front of them between the rails. 5. That on said 29th November 1922 the deceased was proceeding to let down a rake of three full hutches, and he did so by walking in front of the rake of hutches and backwards between the rails. 6. That the said hutches which deceased was guiding collided with a stationary rake of hutches which had been previously brought down and the deceased was crushed between them, sustaining injuries from which he died. 7. That on the morning of the accident and prior to the happening thereof the deceased was found by the said Frank Dickson, oversman, guiding hutches by walking between the rails, and was severely reprimanded by Dickson for breach of said orders. 8. That the deceased stated to his companion, who came to his assistance, that he thought the hutches he was guiding were the first three that had come down.

"On 14th April 1923 I found that the said accident did not arise out of and in the course of deceased's said employment, and that the respondents were not liable in compensation to the claimants therefor. If I had found the respondents liable in compensation I should have awarded compensation to both claimants on the footing of partial dependency."

The *question of law* was—"Was there evidence on which I was entitled to find that the death of William Laurence did not result from personal injury by accident arising out of and in the course of his employment?"

In a *note* to his award the arbitrator stated—"The facts in this case are not, I think, in dispute. The deceased lad met his death as the direct consequence of his disobedience to the instructions and warnings which he had received. These instructions were explicit and peremptory, and were to the effect that he must not go in front of the hutches when taking them down the incline; and he had been sharply rebuked on the very morning before the accident by the oversman Dickson, who found him disobeying the rule. The question whether a workman who has been injured by accident has been injured while doing what he was employed to do, although doing it in a dangerous and even forbidden way, or while doing something that was outwith the scope of his employment, is a question seldom easy of solution. The line separating the one class of case from the other seems to be in spite of much exposition and illustration somewhat elusive. But I venture to think that in the more recent decisions of authority the tendency of judicial opinion has been towards a strict view of explicit orders or prohibitions in relation to the question under discussion. I take the following passage from the judgment of the Lord Chancellor (Birkenhead) in *Donnelly* v. *Moore* (1921 S.C. (H.L.) 46)—'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 out of the sphere of his employment, so that the risk in which he involves himself has ceased to be reasonably incidental to that employment.' This dictum was quoted and applied by Lord Sterndale, M.R., in a case which in the facts proved bears a close resemblance to the present. In *Cook* v. *L. and S.-W. Railway Company* (1921, 14 Butterworth 100) a railway shunter was injured while in the act of coupling up two corridor carriages. His duty was to couple the carriages, and to do so he was obliged to stand between the lines on which they were. But he was expressly prohibited from going between the lines until the carriages were at rest. He disobeyed this order by going within the lines while the one carriage was being shunted against the other, and in consequence was fatally injured. It was held that the accident did not arise out of his employment, and that the company was not liable. The circumstances in the present case are even less favourable to the claim, for the deceased had no duty to perform within the hutch rails. He was prohibited from going within the rails for any purpose whatever. If the case of *Cook* was rightly decided—and the judgment was unanimous—it appears to support the respondents' contention that the accident by which the deceased lost his life did not arise out of his employment. I propose to follow it and to dismiss the claim. I should add with regard to the question of dependency which may arise if it should be held that my judgment is wrong, that I should have awarded compensation to both claimants on the footing of partial dependency."

Argued for the appellants—The arbitrator had come to a wrong decision. The prohibition which the workman had disobeyed merely referred to the way in which his work was to be done. The infringement therefore did not put him outwith the sphere of his employment—*Plumb* v. *Cobden Flour Mills Company*, 1914 A.C. 62, *per* Lord Dunedin at p. 65; *Mawdsley* v. *West Leigh Colliery Company, Limited*, (1911) 5 B.W.C.C. 80; *Blair & Company, Limited* v. *Chilton*, (1915) 8 B.W.C.C. 324, 53 S.L.R. 503; *Herbert* v. *Samuel Fox & Company*, [1916] 1 A.C. 405; *Donnelly* v. *Moore*, 1921 S.C. (H.L.) 41, 58 S.L.R. 85; *Bourton* v. *Beauchamp*, [1920] A.C. 1001, *per* Viscount Cave at p. 1005; *Estler Bros.* v. *Phillips*, (1922) 91 L.J. (K.B.) 470, 127 L.T. 73, 15 B.W.C.C. 291. In the light of these decisions *Cook* v. *London & South-Western Railway Company*, 1921, 14 B.W.C.C. 100, was of no authority. The prohibition was not one which had reference to the *locus* or area within which the workman was to work, and the infringement of which might have put him outwith the sphere of his employment—*Plumb* v. *Cobden Flour Mills Company*; *Donnelly* v. *Moore*. *M'Intosh* v. *Arden Coal Company*, 1923 S.C. 830, 60 S.L.R. 532, was practically the same as *Donnelly* v. *Moore*. *Gaunt* v. *Babcock & Wilcox*, 1918 S.C. 14, 55 S.L.R. 28, was also referred to.

Argued for the respondents—The arbitrator was right. The question whether or not a rule was such that a breach of it put the workman out of the sphere of his employment was one of degree. The only principle established was that of Lord Birkenhead in *Donnelly* v. *Moore* (*cit.*). The decision in *Estler Bros.* v. *Phillips* (*cit.*) stood alone. No reasons were given, and it decided no general principle. Where, as here, there was a rule of an important character for the safety of the workman himself, it fell to be relegated to the category of rules the breach of which put the workman outside the sphere of his employment. This was a prohibition observance of which was statutory—Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), sec. 74, and it fulfilled the requirements of the test propounded by Lord Dunedin in *Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632, and in *Plumb* v. *Cobden Flour Mills Company, Limited* (*cit.*). The cases of *Fairhurst* v. *Hollinwood Screw and Rivet Company*, (1923) 16 B.W.C.C. 168; *Rodger* v. *Fife Coal Company*, 1923 S.C. 280, 50 S.L.R. 187; and *Hawkridge* v. *Howden Clough Collieries Company, Limited*, (1923) 16 B.W.C.C. 55, were also referred to.

LORD PRESIDENT (CLYDE)—At the time of the accident the workman was engaged in taking certain hutches down a sloping road in Wellsgreen Colliery. This was part of his regular duties as a hanger-on. He had been verbally prohibited by his employers from guiding the hutches in their downward course otherwise than from the side. In violation of this express prohibition, of which he had been reminded so recently as the morning of the day of the accident, he attempted to guide a rake of hutches down the slope by getting in front of them. The result was that an accident happened which cost him his life. The question which is raised on the facts of the case as held proved is whether the workman's breach of the prohibition does or does not put him outside the scope of his employment. This is, of course, a question of law. The learned arbitrator has decided it on the principle thought to have been laid down by the Lord Chancellor in the group of cases reported under the name of *Donnelly* v. *Moore* (1921 S.C. (H.L.) 41, [1921] 1 A.C. 329), and in accordance with which the recent case of *M'Intosh* v. *Arden Coal Company* (1923 S.C. 830) was decided in this Court. Putting aside as irrelevant the statutory or non-statutory origin of a prohibition, my own opinion is that a prohibition directed to a hanger-on against placing himself between the rails in front of a moving rake of hutches in order to control them, is in every way comparable—as regards importance, object, and character—with a prohibition directed to a shotfirer against prematurely placing himself in proximity to the site of a miss-fire in order to get on with his work. But in deciding the question of law the decisions of the House of Lords are binding on us, and *Donnelly* v. *Moore* has been succeeded by the later case of *Estler Brothers* v. *Phillips* (91 L.J. (K.B.) 470, 127 L.T. 73, 15 B.W.C.C. 291) decided in 1922. In that

case there was the clearest prohibition directed to the workman against oiling machinery while in motion, and it was proved that the workman was fully aware of it. It is stated in the judgment, and appears from the report, that all the authorities dealing with the legal question we have to determine here were brought to the notice of the House, including of course *Donnelly* v. *Moore*. The House decided that the workman's breach of the prohibition did not put him outwith the scope of his employment. No reasons are given in the judgment as reported, but it is very evident that after a full citation of the authorities the House of Lords took the view that the prohibition did not belong to the class dealt with in *Donnelly* v. *Moore*. Now, I am not able to draw any material distinction between the character of the prohibition in *Estler's* case and the character of the prohibition in the present case. Both of them seem to me to be "prohibitions which deal only with conduct within the sphere of employment"—*Plumb* v. *Cobden Flour Mills*, [1914] A.C. 62, at p. 67. The only thing that raises any doubt in my mind is that if I were at liberty to exercise my own judgment I should think exactly the same of the prohibition against a shotfirer prematurely visiting the *locus* of a miss-fire. But the opinion to that effect which I expressed in the *Donnelly* v. *Moore* group of cases was corrected in the House of Lords. There is indeed one feature in this case which does not find a counterpart in *Estler*, and that is that under section 74 of the Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50) disobedience to any order with regard to the working of the mine may be treated as an offence. But if that specialty attaching to orders in coal mines had possessed any material importance, I have no doubt it would have been dealt with in the House of Lords judgments in the *Donnelly* v. *Moore* group. Since, then, I cannot distinguish the present case from *Estler*, my duty seems to be to follow it as the latest House of Lords decision on the subject. I am therefore for answering the question put to us in the negative.

LORD CULLEN—Apart from decisions I should have come to the conclusion that the act of the workman was misconduct in the course of doing his work rather than one of going beyond the scope of his employment. While the authoritative decisions are varying, I agree with your Lordship that we may be guided by the recent decision in the case of *Estler* (91 L.J. K.B. 470, 15 B.W.C.C. 291) which I am not able to distinguish materially from this one as regards the degree or quality of the rule which was broken. I accordingly think with your Lordship that we should follow that authority and answer the question in the negative.

LORD SANDS—In this case a workman, whose duty it was to bring trucks down an incline, disregarded a prohibition against getting in front of them when engaged in this work. Like Lord Cullen, if I had been left to myself, I should have been of opinion that this man met with an accident in the course of doing in a wrong way, *i.e.*, a prohibited and dangerous way, the work which he was employed to do, and not in the course of some work outwith the sphere of his employment. But after I had read the case of *Donnelly* (1921 S.C. (H.L.) 41, [1921] 1 A.C. 329), and in particular the judgment of the Lord Chancellor therein, I should have been satisfied that my first impression was erroneous, and I should have been of opinion that this man must be held to have met with his accident when engaged in doing something outside the sphere of his employment. But we were referred to a later and the most recent case, viz, *Estler* (91 L.J. (K.B.) 470, 15 B.W.C.C. 291), and I have found it impossible to distinguish that case from the present, for I am unable to distinguish in this regard a prohibition against getting in front of a moving body from a prohibition against touching a body whilst it is still in motion. Accordingly, after studying that case, I am satisfied that my interpretation of the case of *Donnelly* must be erroneous, and that I must revert to my original impression.

LORD SKERRINGTON was absent.

The Court answered the question of law in the negative.

Counsel for Appellants—Wark, K.C.—Normand. Agents—Alex. Macbeth & Company, S.S.C.

Counsel for Respondents—Macmillan, K.C—Wallace. Agents—Wallace, Begg, & Company, W.S.

Saturday, December 15.

FIRST DIVISION.

[Sheriff Court at Glasgow.

YOUNG *v.* CAMPBELL.

Reparation—Negligence—Property—Common Court—Defect in Pavement of Common Court—Injuries to Wife of Tenant—Liability of Owners—Obvious Defect—Averments—Relevancy.

The wife of a tenant met with an accident through a fall consequent on catching her foot in a depression in the pavement of the common court of the tenement in which she resided. In an action of damages against the owners of the tenement she averred that the accident was due to a depression in the pavement of the court, that said depression was "obvious," and had been "dangerous" for "some years." She did not aver, however, either that she was not aware of the defect or that she had complained of it to the defenders. Nor did she state how long she had been a resident in the tenement. *Held* that pursuer's averments were irrelevant to infer liability against the defenders in respect that the averments themselves represented the alleged dangerous con-