Milne's case. That has the effect of altering the original will, and the will as altered is the will which regulates the succession to the estate.

The extrinsic evidence upon which I proceed is that the deed was found in a locked repository of the testator where he kept his private papers, and in an envelope which was marked with his own name and with the word "private." The intrinsic evidence is that the parties in whose favour the will had originally been conceived, and whose provisions were affected by the deletions, were, with the exception of George Lidster, all dead, and therefore that seems to me a most excellent reason why the testator should bring his deed up to date by deleting the provisions which he must have known, owing to the predecease of the parties in question, could not receive effect.

It is also not to be left out of account that the testator, whose holograph deed this was, was a man of a comparatively humble position in life, with no great culture, and that the absence of his initials, which one would expect in the case of a person who was acquainted with the forms of law, is therefore not of so much moment as it might have been had the alterations been made by a professional man or by one who was accustomed to legal business.

For the reasons which I have stated I am prepared to follow the case of *Milne's Executors* in the present case, which I regard as quite indistinguishable; but I need scarcely say that it requires to be followed with great caution and not to be extended to a case where there can be any doubt as to the genuineness of the deletions made.

LORD ORMIDALE—Standing the case of *Milne's Executors* I can come to no other conclusion than that in this case the deletions in the testamentary writing of the testator ought to receive effect as cancelling the provisions so deleted. I concur in the opinion of Lord Dundas.

LORD JUSTICE-CLERK (SCOTT DICKSON)—In this case the only question we are disposing of is whether in the circumstances above set forth the deletions in the testamentary writing of the testator ought to receive effect as cancelling the provisions so deleted. We were informed that none of the parties desired to raise the point, and they did not raise the point, of what was the effect of these alterations on the deed as a whole. Accordingly the question of whether the deed should stand or not is not before us and does not enter into our decision.

I agree that the facts in this case suffice to justify us in drawing the inference that the deletions were made by the testator himself; and I think that the facts bring this case within the scope of *Milne's* case, as they are not distinguishable in material respects from the facts in that case. Accordingly I think the very limited question which we have to deal with here should be answered as your Lordships propose.

I desire to say quite distinctly that while we have not had such a full argument as would justify me in saying that I disagree with the judgment in *Milne's* case, yet I am of opinion that if a suitable case arises the decision in that case, and particularly whether it is of universal application, should be reconsidered. I am not prepared to assent to the view that that decision is to be accepted as laying down a rule of law to the effect that you can alter a will by mere deletions, however extensive. If that case is to be held as going that length, I think it requires more consideration than I have been able to give it in this case. But on the whole I do not dissent from the judgment which your Lordships propose.

The Court answered the question in the affirmative.

Counsel for the First and Second Parties —Wark. Agents—Warden, Weir, & Macgregor, S.S.C.

Counsel for the Third and Fourth Parties —Patrick. Agents—Ross & Ross, S.S.C.

Tuesday, July 6.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

GORDON AND ANOTHER *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—"Arising Out of and in the Course of"—Breach of Statutory Rule Fenced by Penalty—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *secs.* 1 (*b*) *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," in breach of Regulation 9 of the General Regulations under the Act of 1911. The nails could have been obtained otherwise. While in the fenced-off area he was overcome by gas fumes, as the result of which he died. His dependants claimed compensation. *Held* that the accident arose out of and in the course of the employment.

Conway v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632; and *Moore & Company* v. *Donnelly*, 1920, 57 S.L.R. 380, *followed*.

Bourton v *Beauchamp & Beauchamp*, 1920, 13 B.W.C.C. 70, *distinguished*.

Moore v. *Donnelly* (*cit.*), *per* Lord President (Strathclyde) at p. 383, *disapproved per* Lord President (Clyde).

The General Regulations under the Coal Mines Act 1911 (1 and 2 Geo. 5, cap. 50), sec. 86, Regulations 4 and 9, provide—"(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 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 and 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."

Mrs Helen Fyfe or Gordon and another, the wife and sister of the deceased Alexander Gordon, *appellants*, being dissatisfied with an award of the Sheriff-Substitute at Dunfermline (UMPHERSTON) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by them against the Fife Coal Company, Limited, *respondents*, appealed by Stated Case.

The Case stated—"The following *facts* were admitted or proved, viz. — 1. The claimants were both partially dependent on Alexander Gordon at the date of his death. 2. On 28th August 1919 Alexander Gordon was in the employment of the respondents in their No. 2 pit, Valleyfield Colliery. 3. On said date, and for two or three months prior thereto, Joseph Gordon and Alexander Gordon were working in a heading off Gordon's level. James Lessels and David Munro were working in Lessels' level. Both these levels were driven off No. 5 heading of the east five-feet Jig Brae section, Lessels' level being immediately above Gordon's level, and both being on the side of No. 5 heading, on which was the intake of the air course. 4. The gradient of No. 5 heading was about 1 in 3 or 1 in 4, rising in the direction from Gordon's level to Lessels' level. There was a double line of rails in No. 5 heading, and brattice cloth was led up the heading between the two lines of rails, in order to direct the ventilation up one side and down the other. Brattice cloth was also led from the centre of No. 5 heading along Gordon's level and along Lessels' level for the purpose of diverting the air current on the intake side of No. 5 heading into these levels in order to ventilate them. 5. Above Lessels' level No. 5 heading was fenced off on both the intake and the return air course sides of the brattice cloth. The heading had been so fenced off for five weeks prior to said date. The fencing was done on each side of the brattice-cloth in the customary manner, viz., by two crossed rails, on which was written 'No road.' 6. Until five or six weeks before said date James Lessels and David Munro had been driving No. 5 heading, and up till that time the top of said heading was Lessels' working place. They came on a fault or hitch in the strata, and work at the top of the heading was thus brought to an end. They then began to drive Lessels' level, and the portion of the heading above that level was fenced off as described, in consequence of it having ceased to be a part of the pit which was being worked; but it required to be ventilated, and therefore remained in the ventilating system of the said Jig Brae section of the pit. 7. At about 10·30 a.m. on said date Joseph Gordon required some brattice-nails for the purposes of his work. Miners are in the habit of using nails of different kinds frequently at their work, but it is only on odd occasions that they require brattice nails. Joseph Gordon told his brother Alexander, who was his drawer, to go and get some. Alexander Gordon went out to the plates in No. 5 heading, opposite the end of Gordon's level, where he met Lessels, who was preparing to run a rake of hutches. Alexander Gordon asked Lessels if he had any brattice-nails, and Lessels replied that there were some in the manhole below his (Lessels') working-place. After Alexander Gordon's death two nails were found in that manhole, wrapped in a piece of brattice cloth. There were manholes on the intake side of No. 5 heading the whole way from the bottom to the top. 8. Alexander Gordon went up No. 5 heading and along Lessels' level on the intake side of the brattice cloth. David Munro was working at the face at the end of that level, and Alexander Gordon asked him if he had any brattice-nails. Munro said he had none. Alexander Gordon then went out from Lessels' level into No. 5 heading by the way he had entered, viz., by the intake air-course. At the plates in No. 5 heading, opposite the end of Lessels' level, there was a moveable flap in the brattice cloth which runs up No. 5 heading. The purpose of this flap was to enable Lessels to get to the line of rails on the return air-course side of the heading. When Alexander Gordon left Lessels' level he went through this flap into the return air-course side of the heading. 9. About ten minutes or a quarter of an hour after Alexander Gordon left his working-place Joseph Gordon, becoming anxious in consequence of his brother's failure to return, went in search of him. Alexander Gordon was ultimately found in an unconscious condition on the intake side of the brattice cloth in No. 5 heading, about 90 feet above Lessel's level and about 7 or 8 yards from the top of No. 5 heading. Some distance below the place where he was found the brattice cloth was torn at the bottom. Alexander Gordon died in the pit, efforts to revive him by means of artificial respiration having been ineffectual. 10. Alexander Gordon's death was due to gas poisoning. On the morning of said date, after the fireman's inspection at 8·30 a.m., there was an outburst of gas in the said fenced-off part of No. 5 heading on the intake side. Alexander Gordon was found about 30 feet inside the gas. 11. Brattice nails for the use of men in this section of the pit were kept in a box at the head of the Jig Brae. This was known to Alexander Gordon and he had previously got nails from this box. They could also be obtained by men in the section from a roadsman or a fireman, who always carried nails with them. Alexander Gordon had previously got nails from a roadsman. From the foot of No. 5 heading there was a level road to the top of the Jig Brae, and drawers were constantly going out and in on this road. There was no mechanical haulage in this level road and Alexander Gordon was entitled to walk by it to the head of the Jig Brae for nails. He could also have asked one of the drawers working on this level road to bring nails to him. It was one of the duties of these drawers to bring

in nails to men working in the section if asked to do so. The distance from Gordon's level to the head of the Jig Brae was about 1350 feet, to the foot of No. 5 heading about 350 feet, and to the top of No. 5 heading about 300 feet. 12. The portion of No. 5 heading above Lessel's level was not a part of the mine in which Alexander Gordon worked, or the proper travelling road by which Alexander Gordon travelled to or from his work. 13. The General Regulations dated 10th July 1913, made by the Secretary of State under section 86 of the Coal Mines Act 1911, apply to No. 2 Pit, Valleyfield Colliery, and were duly posted at the pithead. . . .

"On 10th March 1920 I found in fact that the death of Alexander Gordon did not result from personal injury by accident arising out of and in the course of his employment with the respondents; and therefore found that the respondents were not liable to pay compensation in respect of his death."

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

The Sheriff-Substitute's *note* was—"Joseph and Alexander Gordon worked in a heading off Gordon's level in Valleyfield Pitt. James Lessels and David Munro worked in Lessels' level. Both these levels were driven off No. 5 heading of the east five feet Jig Brae section, Lessels' level being immediately above Gordon's level, and both being on the side of No. 5 heading, on which was the intake of the aircourse. No. 5 heading, above Lessels' level, was fenced off on both the intake and the return side of the brattice cloth, which ran up the middle of the heading between the two lines of hutch rails. It had been fenced off for five weeks before Alexander Gordon met his death. Lessels and Munro had been driving the heading, but they came on a hitch and work there was stopped. They then started to drive Lessels' level, and all No. 5 heading above that level was fenced off.

"On 28th August 1919 Joseph Gordon required some brattice nails. He told his brother Alexander, who was his drawer, to go and get some. Alexander went out to the plates in No. 5 heading, opposite the end of Gordon's level, where he met Lessels, who was preparing to run a rake of hutches. Alexander Gordon asked Lessels if he had any nails, and Lessels replied that there were some in the manhole below his (Lessels') working-place. (After Alexander's death nails were found in that manhole). Alexander Gordon then went to David Munro, who worked along with Lessels in the end of Lessels' level, and asked him if he had any nails. Munro said he had none. Alexander left Lessels' working-place by the way he had entered, viz., by the intake air course; but when he reached the plates, opposite Lessels' level in No. 5 heading, he passed through a flap in the brattice cloth, which had been there to allow Lessels to get to the rails on the return air course side of No. 5 heading. Some time afterwards he was found lying insensible on the the intake side of the brattice cloth in No. 5 heading, some 90 feet above Lessels' level. In spite of heroic attempts at rescue on the part of his brother Joseph, and Munro, and Lessels, Alexander Gordon died, his death being due to gas poisoning.

"So far as one can surmise, the cause of Alexander Gordon's presence at the place where he was overcome by gas was as follows—He had not heard, or had misunderstood, Lessels' reference to the manhole below his working-place. After leaving Munro he passed the fence on the return air course side of No. 5 heading, and ascended it for some distance. He then forced a way through the brattice cloth to the intake side of No. 5 heading, probably because he was sensible of gas and wanted to get into fresher air. He was found about 30 feet inside the gas on the intake side.

"Brattice nails, for the use of men in this section of the pit, were kept in a box at the head of the Jig Brae. This was known to Alexander Gordon, and he had previously got nails from this box. They could also be got from a roadsman or a fireman, who always carried nails with them. Alexander Gordon had previously got nails from a roadsman. The distance from Gordon's level to this box, at the head of the Jig Brae, was much greater than the distance to Lessels' working-place, or even to the top of No. 5 heading. But if Alexander Gordon did not wish to go to the Jig Brae, he could have asked one of the drawers working on the level road, between the foot of No. 5 heading and the Jig Brae, to bring in some nails to him. It was one of the duties of these drawers to bring in nails to the men working in the section if asked to do so.

"The question which I have to determine is whether the death of Alexander Gordon resulted from personal injury by accident arising out of and in the course of his employment with the respondents. At the outset one must notice that Alexander Gordon's death resulted from a breach of regulations 4 and 9 of the general regulations made under section 86 of the Coal Mines Act 1911. These regulations apply to this colliery, and they were duly posted at the pithead. The next observation one is bound to make is that his death occurred owing to him having gone to a place where he had neither a duty nor a right to be.

"In regard to the first of these matters one can only say that the mere transgression of an order does not necessarily take a workman outwith the sphere of his employment. It has been definitely decided by the Courts of Appeal that that is not the necessary effect of doing a forbidden act, even when it is a criminal offence, as it is in the present case.

"The cases are well nigh innumerable in which the ground of decision has been that a workman went to a place where he had no right to be and thus incurred the risk to which the accident was due. I may cite as

typical examples *Brice* v. *Edward Lloyd Limited*, [1909] 2 K.B. 804, and *Revie* v. *Cumming*, 1911 S.C. 1032, 48 S.L.R. 831.

"But there are two cases in which a workman was injured through going to a place to which he was forbidden to go, and the accident was held to have arisen out of and in the course of the employment—*Conway* v. *Pumpherston Oil Company Limited*, 1911 S.C. 660, 48 S.L.R. 632; *Harding* v. *Brynddu Colliery Company, Limited*, [1911] 2 K.B. 747. Both were cases of a miner going to a part of the mine which was fenced off, and in both cases the workman who met his death did so through breaking one of the colliery regulations. In *Harding's* case the workman was boring a hole from a higher passage into the top of a heading underneath in order to release an accumulation of gas there. He had made two vain attempts to do this, and then, contrary to both a verbal order and the colliery regulations, he went into the heading to try and locate the direction of his bore. He was overcome by the gas and killed. In *Conway's* case the workman required a particular kind of pick for the work at which he was engaged. He knew that there was one belonging to his fellow-workman which had been left in the adjoining part of the pit that was fenced off. He went there contrary to the regulation to fetch it, was overcome by gas, and killed.

"It seems to me that these two cases exemplify the limit which can be reached in this matter. In both cases the workman went to a place where he was not employed to work; he went there contrary to express 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 a penalty. His breach of the regulation resulted in his death. And yet it was held that his death resulted from personal injury by accident arising out of and in the course of his employment.

"The present case does not seem to me to be governed by the cases of *Conway* and *Harding*. I assume that Alexander Gordon went into this fenced-off heading to look for brattice nails. If I were to hold that that fact brought the case within the compass of these two decisions, I should equally require so to hold if he had gone past the head of the Jig Brae into another section of the pit or to the store on the surface to look for nails. It was not the mere fact that Conway was looking for a pick that kept him in the course of his employment. He was looking for one particular tool which he knew to be in the place to which he went, and that was the one tool which so far as he knew would serve the purpose for which it was required. Similarly in *Harding's* case there was only one place in the pit where he could locate the direction of his bore, and he went there for the purpose. In the present case, if no roadsman or fireman was at hand (as there was none), there was one place in the section of the pit where Alexander Gordon could obtain the nails he required, and he knew where that place was. I am not disposed to ascribe any motive to him in going to a different place. It is sufficient to say that in going into the fenced-off portion of No. 5 heading he went out of the course of his employment, and that any personal injury by accident which he sustained in that place did not arise out of the employment.

"If it is necessary to place this case in any of the categories of decisions in which this phrase in the statute is being classified I should cite as apposite these three, viz.—*Thomson* v. *Flemington Coal Company, Limited*, 1911 S.C. 823, 48 S.L.R. 740; *Weighill* v. *South Hetton Coal Company, Limited*, [1911] 2 K.B. 757; and *Horner* v. *Wandsworth, Wimbledon, and Epsom Gas Company*, 12 B.W.C.C. 21."

Argued for the appellants—The case contained no finding that the deceased workman was in the place where he was found for the purpose of obtaining the nails required for his own and his brother's work. But there was no suggestion of any other reason why he was there, and the Sheriff-Substitute's note proceeded on the footing that that was his purpose in being at that place. It was not necessary to have an express finding as to that when such a finding was fairly to be inferred from the whole case—*Sneddon* v. *Greenfield Coal and Brick Company, Limited*, 1910 S.C. 362, 47 S.L.R. 337. Accordingly the case must be taken on the footing that the deceased when he was overcome by the gas was searching for nails, *i.e.*, was engaged in his own proper work. That distinguished the case from such cases as *Brice* v. *Edward Lloyd Limited*, [1909] 2 K.B. 804, and *Revie* v. *Cumming*, [1911] S.C. 1032, 48 S.L.R. 831, where purposes of his own took the man to a place where he had no business to be. The present case was ruled by *Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632, and *Harding* v. *Brynddu Colliery Company, Limited*, [1911] 2 K.B. 747. In both those cases the workman for the purposes of his work broke a statutory prohibition. The Sheriff-Substitute's distinction between the present and those cases was too fine and had no substance. Those cases had not been overruled by *Bourton* v. *Beauchamp & Beauchamp*, 1919, 12 B.W.C.C. 118, 1920 (H.L.) 13 B.W.C.C. 70. *Bourton's* case did not decide that the mere breach of any statutory rule necessarily took the employee outwith the scope of his employment. In *George* v. *Glasgow Coal Company, Limited*, 1909 S.C. (H.L.) 1, 46 S.L.R. 28, where breach of a statutory rule was involved, no such suggestion was made. In *Robertson* v. *Woodilee Coal and Coke Company*, 1920, 57 S.L.R. 343, that ground of decision was again open, but the House of Lords proceeded upon added peril. Fairly read, the opinions in *Bourton's* case did not support that proposition. If so, *Bourton's* case left *Conway's* case and *Harding's* case still authoritative. Further, *Bourton's* case was distinguished from the present, for in it the workman (*a*) removed the stemming of a shot (*b*) to place another in the same hole. His act and his object were both prohibited by statute. Here the employee's purpose was legitimate. His action to effect it was forbidden. *Harding's* case had been followed in *Foulkes* v. *Roberts*, 1919,

12 B.W.C.C. 370, *per* Atkin, L.J., at p. 378, and with *Conway's* case had been followed in *Moore & Company* v. *Donnelly*, 1920, 57 S.L.R. 380. *Matthews* v. *Pomeroy*, 1919, 12 B.W.C.C. 134; the Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), section 37 (1); and Elliot on the Workmen's Compensation Act (7th ed.), p. 55, were referred to.

Argued for the respondents—The Sheriff-Substitute was right. He was entitled to withhold the finding that the deceased met his accident when looking for nails, for there was nothing to show that the workman knew there were nails in the place where he was when overcome by the gas. That distinguished the case from *Conway's* case, for in it the workman knew that the tool he required was behind the barrier. There was also the further distinction that the nails could have been obtained elsewhere, where the workman was legitimately entitled to be. But if not, *Conway's* case was overruled by *Bourton's* case, the opinions in which supported the proposition that any breach of a statutory prohibition was fatal to a workman's claim, at least if they did not go that length they certainly did lay down that such was the effect of statutory prohibitions imposed directly on the workman as a person employed in a certain occupation. That type of statutory prohibition was distinguished from (*a*) prohibitions emanating from the master, where there was always room for implied relaxation, and from (*b*) statutory prohibitions reaching the employee only through the master. In those two cases the prohibition might or might not limit the sphere of the employment. The prohibition in *Conway's* case applied directly to the workman, but the Court had wrongly assigned it to the other class of prohibitions. The prohibition in the present case applied directly to the workman. *Herbert* v. *Samuel Fox & Company, Limited*, [1916] 1 A.C. 405, *per* Lord Wrenbury at p. 420, 53 S.L.R. 810; *Plumb* v. *Cobden Flour Mills Company, Limited*, [1914] A.C. 62, *per* Lord Dunedin at p. 67, 51 S.L.R. 861; *Lancashire and Yorkshire Railway Company* v. *Highley*, [1917] A.C. 352, 55 S.L.R. 509; *Weighill* v. *South Hetton Coal Company, Limited*, [1911] 2 K.B. 757, *per* Fletcher Moulton and Buckley, L.JJ., at p. 758; *Whitehead* v. *Reader*, [1901] 2 K.B. 48, *per* Collins, L.J., at p. 51; and the Workmen's Compensation (Illegal Employment) Act 1918 (8 and 9 Geo. V, cap. 8), section 1, were referred to.

At advising—

LORD PRESIDENT (CLYDE)—The learned arbitrator has found that the workman was in breach of both No. 4 and No. 9 of the General Regulations.

I do not think that No. 4 applies to this case. It prohibits—subject to exception in the event of (*a*) official direction, or (*b*) necessity arising out of emergency or out of any other justifiable cause—workmen from going into any part of the mine other than that in which they work, and from deviating from the proper travelling road in going to and from their work. In my opinion this refers to parts of the mine which are open, and not to parts which are fenced off or closed, so as to fall under No. 9. Moreover, in the present case the workman was not outside the part of the mine in which he worked—namely, the east 5 feet Jig Brae section, or, on the narrowest reasonable view, No. 5 heading, and was neither going to nor coming from his work at the time when the accident happened.

No. 9 prohibits workmen from passing beyond any fence or danger signal without authority. The findings clearly establish breach by the deceased of this regulation; and the learned arbitrator holds that this breach takes the accident out of the category of accidents arising out of and in the course of the employment.

In the first place, he seeks to distinguish the present case from those of *Conway*, 1911 S.C. 660, 48 S.L.R. 632, and of *Harding*, (1911) 2 K.B. 747. In both these cases the workman went into a locality which was forbidden by Regulation. In both cases it was found that the workman entered the forbidden locality in the furtherance of the work which he was employed to do. In *Conway* the workman was in search of a sharper pick which was required for his work as a miner. In *Harding* the workman was engaged in locating the direction of a bore which it was his duty to drill. In the present case the learned arbitrator does not expressly find that the workman entered the forbidden locality while still in search of the brattice nails which his brother and he needed for their work. But he assumes that such was the case in his note. In my opinion no other inference from the facts found proven is reasonably open, and the reason given by the learned arbitrator (in the third sentence of the penultimate paragraph of his note) for not expressly drawing that inference appears to me to be fallacious. I think I am entitled to read the findings in the light of the note, and also as containing the only reasonable inference which is open upon their terms, viz., that the workman passed the fence in No. 5 heading in his search for brattice nails. It is proved that he left Gordon's place to get nails from one of the refuge-holes near Lessels' place; that in one of those holes, just below Lessels' place, there were some nails—but only two in number—wrapped up in a piece of cloth; that he inquired for nails at Lessels' place but got none; that he passed the fence just above Lessels' place immediately thereafter. If what I have said above is right, then the distinction between the present case and those of *Conway* and *Harding* disappears. All three cases present illustrations of the workman's transgression into a forbidden locality while he was acting in furtherance of the work which he was employed to do. The fact that brattice nails could be got, according to the arrangements of the pit in the present case, at the head of the Jig Brae—a quarter of a mile away—or from one of the itinerant roadsmen or firemen in the section, does not disturb the analogy of *Conway*, for all the workman wanted in that case was to get a sharper pick, and it was not proved that sharper picks were

unobtainable except by going into the forbidden locality.

This leaves us face to face with the question as to the effect of the workman's breach of the prohibition in Statutory Regulation No. 9.

In *Conway* there was a very similar statutory regulation, and the workman breached not only it but also a verbal prohibition by the foreman directed against passing a particular fence. It was maintained before us that *Conway* stands practically overruled by the recent judgment pronounced in May of this year by the House of Lords in *Bourton* v. *Beauchamp & Beauchamp*, [1920] 13 B.W.C.C. 70. The argument in the present case followed the same lines as in the case of *Moore & Company* v. *Donnelly*, 1920, 57 S.L.R. 380. In *Moore*, *Conway* was followed; but opinions were expressed by the Lord President adverse to the soundness of *Conway*. *Conway* was thought by his Lordship to be inconsistent with the later case of *M'Diarmid* v. *Ogilvie* in this Court (1913 S.C. 1103, 50 S.L.R. 883), and with the case of *Bourton* v. *Beauchamp & Beauchamp*, then decided only in the Court of Appeal in England, 12 B.W.C.C. 120. The Lord President indicated that if he had not felt himself bound by the authority of *Conway* he would have preferred to follow the two last-mentioned decisions.

In *M'Diarmid* the workman was a "beamer" in attendance, along with and under a "headman," at a mechanical mangle. The mangle had rails round it, and the "beamer's" duties in connection with the mangling process were performed only outside these rails. They consisted mainly in bringing forward the cloth to the mangle, in helping (from outside the rails) to put the cloth on the "beamer-roller" (which was moved out from the machine on slides for the purpose of receiving the cloth), and in helping to remove the cloth from the "stripper-roller," on which it was delivered by the machine after the mangling process was completed. The mangling process was put out of operation at stated hours twice a week for cleaning. It was then the duty of the "beamer" to help the "headman" to clean and oil the standing machine, and for this purpose he passed inside the rails. The workman was verbally and by printed notice prohibited from cleaning or oiling any running machinery. The workman did pass inside the rails while the mangling process was in operation in order to clean part of the running machinery; and it was held that an accident which happened in consequence did not arise out of and in the course of his employment. It is a mistake to suppose that the decision hung upon the workman's breach of the prohibition, verbal or printed. It followed from the precision with which the "beamer's" duties were defined and limited in accordance with the nature and conditions of his employment. The case was one of departmentalised, or rather specialised, employment, in its way not unlike *Lowe* v. *Pearson*, [1899] 1 Q.B. 261. The workman put himself outside the sphere of his employment the moment he passed inside the rails while the mangling process was going on. Lord Dunedin expressly pointed out that mere breach of the prohibition against passing inside the rails would not, apart from the defined and limited character of the workman's employment as a "beamer," have had that effect. The prohibition afforded additional proof of, or added sanction to, the limits prescribed, but that was all. In *Conway*, on the other hand, the search for a sharper pick, in course of which the accident happened, was a proceeding clearly within the scope of the workman's general employment as a miner; his error was to carry the search into a forbidden locality. In short, the breach of the prohibition in *Conway* was on all fours with the breach which in *M'Diarmid* Lord Dunedin said would not have been of itself, and apart from the specialised character of the employment, sufficient to put the workman outside its sphere. When examined and compared, therefore, *M'Diarmid* and *Conway* do not seem to present any inconsistency.

Breach by the workman of statutory or other prohibition or direction has played a frequent and a varied part in the cases decided under the Workmen's Compensation Acts.

It has appeared as a piece of evidence relevant, along with other circumstances, to prove the extent of a workman's duties and the limits of his employment. *M'Diarmid* and *Lowe* are illustrations in which such evidence, along with other circumstances, was sufficient to establish a limit in conformity with the prohibition. *Whitehead* v. *Reader* ([1901] 2 K.B. 48) is an instance in which, while the prohibition was distinct in its terms, the other circumstances were regarded as so ambiguous as to deprive the prohibition of limiting effect.

Again when a statutory or other prohibition or direction not merely forbids the workman to do a certain thing, but commits the doing of it—either expressly, or impliedly as the result of departmental arrangements established by the employer—to another employee or class of employees, it has been held to have the effect of putting that particular thing outside the sphere of the workman's employment—*Kerr* v. *Baird & Company*, 1911 S.C. 701, 48 S.L.R. 646; *Burns* v. *Summerlee Iron Company*, 1913 S.C. 227, 50 S.L.R. 164. The reversal of *Smith* v. *Fife Coal Company* (1913 S.C. 662, 50 S.L.R. 455, 1914 S.C. (H.L.) 40, 51 S.L.R. 496) on a different view of the true cause of the accident, does not shake the authority of the decisions just quoted.

Further, breach of a statutory or other prohibition or direction has often formed an important ingredient of decisions on the question whether a particular act, not itself directly part of the workman's duties, should be regarded as "reasonably incidental" to their performance or not. Illustrations of this are presented in *Kane* v. *Merry & Cuninghame*, 1911 S.C. 533, 48 S.L.R. 430; *Barnes* v. *Nunnery Colliery Company*, [1912] A.C. 44; *Herbert* v. *Fox & Company*, [1915] 2 K.B. 81, [1916], A.C. 405, 53 S.L.R. 810; and *Robertson* v. *Woodilee Coal Company*, 1920, 57 S.L.R. 343.

We have been furnished by the parties with full copies of the opinions delivered in the House of Lords in *Bourton*. None of them professes to overrule any of the reported cases or to establish any new principle, and in one of them *Conway* is referred to for a dictum of Lord Dunedin's which is cited as authoritative. There is nothing, in short, in the judgment to suggest that it was intended to be of equal application in all cases of prohibition or direction, or even to all cases of breach of statutory prohibition or direction. A number of the reported cases are concerned with breaches of statutory prohibition, such as general or special regulations made under the Coal Mines Act 1911 which have the sanction of prosecution and penalty attached to them. *Conway* and *Harding* are illustrations of this. I hesitate to adopt the conclusion, pressed on us by counsel for the respondents, that *Bourton* overrules all the cases in which breach of prohibition or direction has been found insufficient to take a workman outside his employment, and in effect wipes out of existence the second of the two categories of prohibition defined by the House of Lords in *Plumb* v. *Cobden Flour Mills Company, Limited*, [1914] A.C. 62, 51 S.L.R. 861. That case is one of those founded on by Lord Cave in his judgment in *Bourton*. I apprehend that the two categories of *Plumb* still stand; and that in this—as in any other case in which breach of prohibition or direction is founded on for the purpose of showing that the workman has gone outside his employment—the question still is—to which of these two categories does the prohibition belong?

The peculiarity and novelty of *Bourton*, as I understand the case from the materials available to me, is that the statutory prohibition in the Explosives in Coal Mines Order of 1st September 1913 which the workman breached is directed against specific acts which but for the prohibition would have formed part of the actual work he was directly employed to perform. The workman was employed as a miner and shot-firer in a mine where mining was carried on by shot-fire. A workman employed simply—that is, without limitation or prohibition—to fire shots in a mine would be doing the very work directly incumbent on a shot-firer, just the same whether the shot went off at the first attempt or only at the second or third. A second or third attempt to fire a shot which missed would be just as much part of the actual work he was directly engaged to perform as the first, and to hazard the second and third attempts would be just as much part of his employment as to hazard the first. But if the duty of making any such second or third attempt is excluded from his work as a shot-firer by prohibition, it is intelligible to hold that the work he was employed to perform is correspondingly restricted. It is not inconsistent with this that there may be prohibitions or directions incumbent on a shot-firer which regulate his conduct as such, and breach of which would not put him outside his employment. In *Moore* the workman was a miner and shot-firer, and breached another of the prohibitions contained in this same Explosives in Coal Mines Order, by approaching a shot which had missed within the prohibited interval of time. The majority of the judges of this Division placed this prohibition in the second of the two categories defined in *Plumb*, and decided the case in conformity with *Conway* and *Harding*. The case of *Moore* appears to me, if I may say so, to be a typical illustration of a prohibition or direction which deals with the conduct of a workman within the sphere of his employment as a shot-firer, and to be in contrast with *Bourton*, an equally typical illustration of a prohibition which limits the sphere of his employment. The considerations which apply to a prohibition dealing with the mode of doing the work which the workman is directly employed to do, or with acts incidental to the performance of that work, are different from those which apply to a prohibition which cuts out what would otherwise have been part of the ordinary and necessary work directly incumbent on him in virtue of his employment.

The prohibition with which the present case is concerned is similar to that in *Conway*, and the circumstances in which the workman breached it are also similar. I see no reason to think either that the principles illustrated by *Conway* are inconsistent with the judgment in *Bourton*, or that they are otherwise than properly applicable to the present case. I therefore think the question should be answered in the negative.

LORD MACKENZIE—The view taken by the Sheriff-Substitute was that the accident did not arise out of the employment. The question for the Court is whether there was evidence upon which he was entitled to come to this conclusion. The difficulty in the case is in making out the ground of judgment. The findings in this case do not make the matter clear, and this seems to me one of those exceptional cases in which the note must be read to explain the findings. I say exceptional, because in my opinion the findings ought to contain all that is necessary for judgment.

In his note the Sheriff-Substitute says he assumes the workman went into the fenced-off heading to look for brattice nails, but that in going into the fenced-off portion of the heading he went out of the course of his employment. Upon the Sheriff-Substitute's assumption, which in my opinion is the fair inference from the facts, his conclusion was not warranted. The workman was engaged in work he was employed to do when he was looking for brattice nails. He was not engaged in a purpose of his own when he passed the fence in search of the nails; he was going about his work, though he went about it in the wrong way. He was not doing anything he was not employed to do. He did not, therefore, by passing the fence put himself out of the sphere of his employment.

The case is, in short, a typical illustration of the principle contained in *Conway's* case (1911 S.C. 660, 48 S.L.R. 632), which we had

occasion recently to apply in the case of *Moore* v. *Donnelly*, 1920, 57 S.L.R. 380. For the reasons explained by your Lordship in the chair, there is nothing in the recent judgment in *Bourton's* case (1920, 13 B.W.C.C. 70) to warrant the argument that the decision in *Conway* cannot be reconciled with it. I am of opinion that the Sheriff-Substitute went wrong, not because he drew a wrong inference in fact, but because, as explained in his note, he refused to apply the principle recognised as law in *Conway's* case.

I think the question should be answered in the negative.

LORD SKERRINGTON—It was suggested in argument by the respondents' counsel that the award might be defended upon the ground that the arbitrator having fully in view the whole facts admitted or proved, refused to draw the inference in fact that Gordon went into the fenced-off heading in order to look for brattice nails. Obviously, if the facts which were admitted or proved had been consistent with the theory that Gordon entered the heading either in search of brattice nails which it was his duty to procure, or alternatively for some different and private purpose of his own, and if the award had left this question undecided, the appellants would have failed to prove a fact which was essential to their success. The Stated Case, however, when read along with the arbitrator's note, makes it clear as I think that the award proceeded upon the "assumption that Alexander Gordon went into the fenced-off heading to look for brattice nails," in other words for a purpose directly connected with his employment. I asked the respondents' counsel whether they could suggest any other purpose for which the deceased man could on any reasonable view of the facts be supposed to have gone into the heading, and the answer was in the negative. Though the Stated Case ought to have contained an express finding to the above effect, I do not feel bound to construe it in a sense which is plainly unreasonable and contrary to what the arbitrator's note explains to have been its meaning.

If I am right so far, I am of opinion that the burden of proof shifted, and that it lay upon the respondents to establish special facts and circumstances from which it might reasonably be inferred, if the arbitrator chose to take that view, that Gordon's conduct in entering the heading in search of nails instead of fetching them from the Jig Brae placed him outside the course of his employment for the time being. To this suggestion the arbitrator himself supplied a sufficient answer when he stated that "so far as one can surmise" Gordon's presence in the heading was due to his having not heard or having misunderstood what a miner called Lessels said to him in answer to his inquiry for brattice nails. There remains, of course, the important fact that in entering a closed heading the deceased man contravened an express statutory prohibition. The case of *Conway* (1911 S.C. 660, 48 S.L.R. 632), however, meets this point by deciding that a statutory prohibition substantially identical with Rule 9 in the present case did not limit the sphere of the employment, but merely regulated the way in which the workman should conduct himself in the course of his employment. The same reasoning applies to the other rule (4) cited in paragraph 13 of the stated case. It was maintained that *Conway's* case was no longer law in respect that it could not be reconciled with later decisions of the House of Lords. In the latest of these, however (*Bourton* v. *Beauchamp*, 1920, 13 B.W.C.C. 70), *Conway's* case was referred to by Lord Cave without any expression of disapproval. It was also expressly approved of in the recent case of *Moore & Company* v. *Donnelly* (57 S.L.R. 380) in this Division.

For these reasons I am of opinion that the question of law should be answered in the negative.

LORD CULLEN—I have had some difficulty in this case arising from the absence of an explicit finding by the arbitrator regarding the object of the deceased workman in entering on the part of the mine in question, but I have, like your Lordships, come to think that it is implicit in the case that he was then pursuing his quest for the brattice nails. Apart, therefore, from the effect of his breach of the regulations in entering the fenced area, he was in the course of his employment, which included the task of procuring the nails.

With regard to the effect of his said breach of the regulations, I am unable to distinguish the present case from the case of *Conway*, 1911 S.C. 660, 48 S.L.R., 632, to which your Lordships have referred. The distinction on which the arbitrator proceeds does not appear to me to be a material one. I am accordingly of opinion that the question submitted in the Stated Case should be answered in the negative.

The Court answered the question of law in the negative.

Counsel for the Appellants—The Dean of Faculty (Constable, K.C.)—Scott. Agents—Alex. Macbeth & Company, S.S.C.

Counsel for the Respondents—The Solicitor-General (Murray, K.C.)—R. M. Mitchell. Agents—Wallace & Begg, W.S.

Tuesday, July 6.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

COLQUHOUN'S *CURATOR BONIS* *v.* GLEN'S TRUSTEE AND ANOTHER.

Superior and Vassal—Property—Building Restriction — Dwelling-house not to be Employed for any Other Use or Purpose than as Self-contained Dwelling-house for the Occupation of One Family only.

A feu-contract provided that the villas erected on the feus should not be employed "for any other use or purpose than as self-contained private