Wednesday, June 27.

FIRST DIVISION.

[Sheriff Court at Lanark.

ARDEN COAL COMPANY, LIMITED *v.* M'INTOSH.

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 Non-Statutory Prohibition Imposed by Employers.*

A miner who was working where shots were being fired, but who was not himself firing shots, retired to a place of safety with the shot-firers after two fuses had been lit. One of the shots missed fire, and the miner, in contravention of a notice issued not on statutory authority but by the employers themselves—which the miner had read and which provided that if a shot missed fire no person should approach the shot-hole until a specified interval had elapsed—returned to the shot-hole immediately after the other shot had exploded and was seriously and permanently injured by the explosion. *Held* that the non-statutory notice validly limited the sphere of the miner's employment and that the accident did not arise out of and in the course of his employment.

The Arden Coal Company, Limited, Lanarkshire, *appellants*, being dissatisfied with an award of the Sheriff-Substitute at Lanark (HARVEY) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between them and Thomas M'Intosh, miner, Lesmahagow, *respondent*, appealed by Stated Case.

The Case stated—"The following *facts* were established, viz.—1. On 17th March 1922 the respondent was in the employment of the appellants as a miner. 2. On said date, in the course of said employment, the respondent was along with two fellow workmen, John Gilmour and Alexander Gray, driving a stone mine in order to get at the coal seam in the appellants' Hagshaw mine, Douglas. 3. In the course of this work, in the afternoon shift beginning at 3 p.m., two shot-holes were bored, the one by Gray and the other by Gilmour, and charged by them with explosives, a detonator and fuse, in the usual manner adopted in mines, whereas in said Hagshaw mine the use of naked lights is permitted. 4. About 5 p.m. the fuse of the shot prepared by Gray was lighted by him by applying the flame of his lamp thereto. At the same time Gilmour attempted to light the fuse of his shot by the same method, and Gray also applied the flame of his lamp to Gilmour's shot. 5. The three men, believing that Gray's fuse had been successfully lighted and that Gilmour's had not, left the face and retired to a man-hole 30 or 40 fathoms from the face and the shot-holes—which it took them about three minutes to reach—in order to allow the shot fired by Gray to explode. 6. After the men had sought safety in the said man-hole, the shot fired by Gray exploded, and immediately after hearing the report of this explosion the respondent and Gilmour returned to the face in order to make a second attempt to fire Gilmour's shot—the respondent going with Gilmour in case Gilmour's light should be extinguished in applying it to the fuse. 7. On arriving at the face—not more than 15 minutes after Gilmour had made his attempt to light his fuse—and when Gilmour was about to apply his naked light to the fuse, the shot exploded in the faces of the respondent and Gilmour, inflicting serious injuries on Gilmour and serious and permanent injuries on the respondent, involving the loss of his left eye and damage to the sight of his right. 8. The respondent was not the firer of the shot in question, but he was present when Gilmour and Gray attempted to light Gilmour's fuse and was aware that the attempts had been made. 9. It was not proved that the respondent as well as Gilmour and Gray applied the light of his lamp to the fuse when the first attempt was made to light it. 10. The said Hagshaw mine is one to which the Coal Mines Act 1911 applies, as also the Regulation 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913, by which it is provided as follows:—'If a shot misses fire, the person firing the shot shall not approach, or allow anyone to approach, the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means,' the latter being the alternative applicable to the said Hagshaw mine. 11. Along with a copy of said regulation there was posted up in said mine at its entrance and in the engine-room the following 'Warning in case of a miss-fire shot,' namely—'The attention of all workers in this colliery is called to section 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913 made by the Home Secretary, which provides that if a shot misses fire no person shall approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means; and it is hereby directed that the above-mentioned provisions shall apply to all cases where an attempt has been made to light a shot and the men have retired, and no person shall in such circumstances, on any pretext, return to the place before the expiry of the above-mentioned periods respectively from the attempt to light the shot. The management will, where allowable, found on any breach of the provisions of the section above quoted, and of this notice, as "serious and wilful misconduct" on the part of the workman, or as being outwith his employment, in the event of an accident resulting therefrom.' The respondent had read both notices, but his special attention was not called to either. 12. Said 'warning' or notice was issued at their own hand by the management and had no statutory authority."

The Case further stated—"At the hearing before me the respondent's agent objected

to the absence in the appellants' answers of any plea founded on the special notice or warning therein referred to. I indicated that I would allow such amendment and appoint a subsequent diet of proof in regard to it if moved to do so. The respondent's agent thereupon withdrew his objection and consented to the case being dealt with on the evidence already led and on the footing that the amendment of the pleadings had been made. A copy of the special notice was to be lodged in process together with any further citation of authorities which either party desired to submit to the Court. From these facts I found in law that the said 'warning' was not valid as a limitation of the respondent's employment, and that in returning to the shot-hole within the interval of an hour, the respondent not being the firer of the shot did not commit a breach of said Regulation 3 (*a*), and that the said accident arose out of, as well as in the course of, his employment with the appellants. I found further in fact that prior to said accident the average weekly wage earned by the respondent was £2, 14s., that as the result of said accident he was totally incapacitated for work from said 17th March 1922 till 19th January 1923, and that since said 19th January 1923 he has been, and that he still is, partially incapacitated for work, being fit only for work on the surface as a labourer in safe places, and where he will not come in contact with moving vehicles or machinery in motion, and that at such work he could earn an average weekly wage of £1, 12s. 6d. I therefore awarded the respondent compensation as for total incapacity at the rate of £1 weekly (with war additions) from 17th March 1922 till 19th January 1923, and thereafter, until further order, awarded him compensation as for partial incapacity at the rate of £1 weekly, and found him entitled to expenses."

The *questions of law* were — "1. Was I right in holding that said warning or notice was not valid as a limitation of the respondent's employment with the appellants on the ground that it had no statutory authority? 2. On the foregoing facts was I entitled to find that the accident to the respondent arose out of and in the course of his employment with the appellants?"

In a *note* to his award the arbitrator stated—"In the view I take of this case it seems unnecessary to involve the parties in the expenses of a further hearing or of an amendment of the defenders' pleadings. An amendment specifically founding their defence on the 'warning' posted at the mine along with the statutory regulation, of which it bears to be exegetical, would as matter of course be allowed, and I am dealing with the case on the footing that such an amendment has been made. In fact I understand that the case was left with me on that footing at the close of the hearing, subject to a note of authorities being submitted to me by the agents for the parties along with a copy of the exact terms of the 'warning.'

"Where a mine is worked under statutory rules or rules having the force of statute, it has been laid down that these rules cannot be abrogated, waived, or informally modified by the employer—*Colville* v. *Fife Coal Company*, 1921 S.C. (H.L.) 41, at pp. 44, 46, 50, and 52. In *Colville's* case there was a 'notice' in the same terms as the 'warning' in this case, but in the view of the Lord President (Clyde) the judgment in *Colville's* case did not turn on this notice, which in the Lord President's opinion was (as regards the question raised in *Colville's* case) exegetical merely of the statutory prohibition and added nothing to it—*Smith* v. *Archibald Russell, Limited*, 1921 S.C. 335, at pp. 338, 339. Having regard to the decision in the case of *Baillie* v. *Coltness Iron Company* (1922 S.C. (H.L.) 76, 79) it cannot be said that the 'warning' founded on by the defenders is with reference to the question raised in this case merely exegetical of the statutory rule, for if it were binding on the pursuer as a limitation of his employment it would conclude the case against him. In *Baillie's* case Lord Dunedin says of the statutory rule—'Prohibition is laid on one man only, namely, the shot-firer'; and he adds—'It would be easy to frame the order in such terms as "No one shall approach," &c. It is not so framed, and until it is so I do not think we can find a universal prohibition.' It seems to follow that the construction of the rule rejected in *Baillie's* case cannot be enforced against a workman by such a notice as was posted up in this case, and that the meaning which the defenders desire to attach to the statutory rule can only be given to it by a modification of its terms having statutory authority. If it were open to the employer to enforce against the workman the employer's construction of a statutory rule, it ought to be equally open to the workman to insist that he shall be bound only by his (the workman's) construction of it. Both are equally bound by the construction put upon it by the Court.

"I accordingly find, following the case of *Baillie*, that the pursuer not being the firer of the shot committed no breach of the statutory rule, and that he was bound by no other. It was not argued before me that apart from any express prohibition he added a risk by what he did to the risks properly incidental to his employment."

Argued for the appellants—The respondent when injured was acting in breach of a prohibition which the appellants had validly imposed, without statutory authority, so as to limit the sphere of his employment. The accident therefore did not arise out of and in the course of the respondent's employment. Accordingly he was not entitled to compensation — *Donelly* v. *Moore & Company*; *Colville* v. *Fife Coal Company*; *Gordon* v. *Fife Coal Company*, 1921 S.C. (H.L.) 41, *per* Lord Chancellor at p. 46, Viscount Finlay at p. 48, Lord Dunedin at p. 49, and Lord Shaw at pp. 51 and 52, 57 S.L.R. 380. No statutory procedure was required for such a notice unless it was intended to impose penalties. All that was required was that the attention of the workman should have been drawn to the notice, and this was not always necessary—*Wardle* v. *Enthoven & Sons, Limited*, 1916, 10

B.W.C.C. 79, *per* Cozens-Hardy, M.R., at p. 84. The notice was quite unambiguous, and clearly applied to all persons and not merely to shot-firers, and "attempt" to light was equivalent to lighted—*Smith* v. *Archibald Russell, Limited*, 1921 S.C. 335, 58 S.L.R. 284. In *Estler Bros.* v. *Phillips*, 1922, 15 B.W.C.C. 291, where the prohibition related to the conduct of the work only, there was no departure from the principle of *Donelly* v. *Moore & Company, &c.* (*cit.*), *per* Lord Buckmaster at p. 294. The case of *Herbert* v. *Samuel Fox & Company, Limited*, [1916] 1 A.C. 405, *per* Lord Shaw at p. 416, was also referred to.

Argued for the respondent—The notice was merely exegetical of the statutory regulation along with which it was posted and added nothing to the regulation. It therefore only applied to shot-firers—*Baillie* v. *Coltness Iron Company, Limited*, 1922 S.C. (H.L.) 76, 59 S.L.R. 118; *Costello* v. *Addie & Sons' Collieries*, 1922 S.C. (H.L.) 72, *per* Lord Dunedin at p. 75, 59 S.L.R. 116—and could not limit the employment of the respondent. In *Colville* v. *Fife Coal Company* (*cit.*), where there was a notice in similar terms, it was not thought that the notice added to the statutory regulation, and the same view was taken in *Smith* v. *Archibald Russell, Limited* (*cit.*). If, however, it was intended to do so, the requisite statutory procedure had not been followed and the notice was of no effect—Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), secs. 86 to 89; *Waddell* v. *Coltness Iron Company*, 1912, 50 S.L.R. 29. In any event the notice was too vague in its terms to limit the sphere of the respondent's employment.

LORD PRESIDENT—The question in this case is concerned with the effect of a notice to the appellants' workman which was posted up at the entrance of the appellants' mine and in the engine room along with (but separately from) the usual statutory regulations. The notice in question expressly and, as I read it, quite explicitly prohibited any workman whomsoever from approaching the *locus* of a shot which had missed fire until the lapse of a specified period of time. As the Coal Mines Order of 1st September 1913, section 3 (*a*), stood at the date of the accident to the respondent—we were told it has since been amended—the statutory prohibition against approaching the *locus* of a shot which had missed fire was specially directed to the person firing the shot. The notice in question—issued on the authority of the appellants themselves—directed a similar prohibition to all workmen in the mine.

It is found in the case that the workman had seen and read this notice. The regulation it set forth, not being a statutory regulation, depended for its effect on the contractual relation between the appellants and the respondents; there is nothing in the case to suggest that the workman had not accepted it as applying to his employment.

It was quite properly pointed out that the initial words of the notice are framed in such a way as might suggest that the prohibition, albeit directed not against the shot-firer only but against all persons whomsoever, was one which found its warrant in the Coal Mines Order of 1913. So, indeed, in one sense it did, because while the shot-firer alone was expressly prohibited by that Order from approaching the *locus* of the shot until the lapse of the specified time, he was also required to prevent any other person from approaching it. Again, the express extension of the prohibition to cases in which the shot was not "fired" but only "attempted to be fired" added nothing to the statutory prohibition. This was decided in reference to a similar notice in *Smith* v. *Archibald Russell, Limited*, 1921 S.C. 335. The respondent argued that the notice was ambiguous in respect that it might be regarded as being merely exegetical of and as adding nothing to the Coal Mines Order of 1913. Nevertheless the prohibition against *all persons in the mine* from approaching the *locus* of a miss-fire was new so far as the Coal Mines Order of 1913 or any other statutory authority was concerned. I do not think it can be said that this new prohibition as set forth in the notice was attended with any ambiguity whatever. It prohibits, in words which are too clear to admit of mistake or misunderstanding, all persons whomsoever from approaching the shot-hole until after the proper interval. It applies "to all cases where an attempt has been made to light a shot and the men have retired, and no person shall in such circumstances on any pretext return to the place before the expiry of the above-mentioned periods respectively from the attempt to light the shot."

Now the respondent undoubtedly contravened that prohibition. He was not himself one of the shot-firers, but he was engaged in driving a stone mine along with them. Having retired with them after the lighting of the fuses, he accompanied one of them back to the *locus* of the shot which had missed fire within the prohibited time. The shot exploded and injured him at close quarters. The question is, whether being in breach of the prohibition he must be held to have been acting outside the scope of his employment at the time when the accident happened.

The distinction between prohibitions which limit the scope of a workman's employment and prohibitions which merely regulate the mode in which the workman is to execute his duties was brought into great prominence in the case of *Plumb* v. *Cobden Flour Mills*, [1914] A.C. 62. Breach of a prohibition of the latter kind, it was laid down, does not prevent the workman from recovering compensation; breach of a prohibition of the former class does, because it is held to carry with it the result that the workman has gone outside the sphere of his employment. The difficulty is to determine to which of these categories a particular prohibition belongs. In *Bourton* v. *Beauchamp* ([1920] A.C. 1001) a statutory prohibition against removing the stemming from a charged shot-hole or placing a second charge in a hole where a

miss-fire had occurred was held to belong to the former class. Emphasis was laid on the fact that the prohibition removed the workman's act from the category of risks which his employment required him to run, and on the importance attaching to prohibitions directed to ensuring the safety of workmen. In the group of cases reported under the name of *Donnelly* v. *Moore & Company* (1921 S.C. (H.L.) 41, [1921] 1 A.C. 329) it was decided (1) that section 3 (*a*) of the Coal Mines Order of 1st September 1913 was a prohibition of the former class, (2) that the general regulation prohibiting miners to pass a barrier was a prohibition of the same kind, and (3) that the effect of these prohibitions in putting a workman who breached them outwith the sphere of his employment was not attributable to their statutory quality or to the circumstance that breach of them entailed liability to prosecution and penalty, but that the same effect would follow from similar non-statutory prohibitions made on the authority of an employer. It was pointed out that a statutory prohibition is one which everybody is bound to know, whereas a prohibition for which the employer is responsible is one which must be brought in some sufficient way to the notice of the employees; and further that a prohibition of the former class, just because it is statutory, cannot be waived or modified, whereas a prohibition of the latter class can be changed or waived. The Lord Chancellor at the close of his judgment says (1921 S.C. (H.L.) at p. 46, [1921] 1 A.C., at p. 339)—"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 outside the sphere of his employment." The matters under discussion were breaches of (1) the Coal Mines Order of 1st September 1913, and (2) the General Coal Mines Regulation prohibiting miners from passing a barrier. In the still more recent case of *Estler Brothers* v. *Phillips* ((1922) 91 L.J. (K.B.) 470, 127 L.T. 73, 15 B.W.C.C. 291) the House of Lords considered the effect of a non-statutory prohibition against oiling machinery in motion. It might be thought that this prohibition removed the act of the workman who breached it from the category of risks which his employment required him to run—as in *Bourton* v. *Beauchamp* and in the group of cases reported under the name of *Donnelly* v. *Moore*. But it was held that the prohibition was one which merely regulated the mode of the performance of the workman's duties, and that breach of it did not take him outside the scope of his employment.

It might be no easy task to deduce from these decisions any general criterion for making the distinction between prohibitions which limit the sphere of employment and prohibitions which regulate the performance of the duties of employment. But I think the present case can be decided consistently with the authorities which are binding on us on the following grounds:—(1) That a prohibition against the approach of any workman to the *locus* of a miss-fire is at least comparable in importance to the statutory prohibition against a similar approach on the part of a shot-firer, and (2) that provided an employer's prohibition relative to such a matter is brought to the knowledge of his workman—as the prohibition in the present case was—the distinction between a statutory and a private prohibition is of no account.

The Sheriff has taken the view that the notice was not valid. The reason he gives for that is that it is not statutory. But that is not a reason which in view of the decisions we can sustain. It was suggested by the respondent that so wide and comprehensive are the powers of the Secretary of State, and of the inspector, owner, and workmen under sections 61 and 87 of the Coal Mines Act of 1911 in the matter of regulations for the use of explosives and the conduct of the mine, that private regulations dealing with those matters are impliedly forbidden and therefore *ultra vires*. I understand the proposition that no regulation made on the authority of an employer can have the penal consequences which follow from a breach of a statutory regulation. But I cannot imagine that there is any implied restraint upon the owner of a mine in making regulations for the conduct of work in it which neither abrogate nor interfere with the statutory regulations. There is nothing in the notice in the present case which is either inconsistent with or detracts from anything in the statutory regulations or prohibitions.

In these circumstances it seems to me that we have no alternative but to hold that the respondent was not acting within the sphere of his employment at the time of the accident, and I am therefore for answering both questions put to us in the negative.

LORD SKERRINGTON—According to my reading of the Stated Case the sole ground upon which the arbitrator held that the warning or notice was not valid as a limitation of the respondent's employment was the fact that it had no statutory authority. That reason by itself seems to me to be insufficient. If I understand the authorities aright it has been laid down that there is no essential difference, so far as the present controversy is concerned, between a prohibition contained in a statutory regulation and a prohibition contained in a regulation depending purely upon contract. One must consider the nature and object as well as the terms of the prohibition in order to determine whether it was intended to limit the sphere of the employment. I cannot accept the view that the notice was merely exegetical of the statutory regulation to which it referred. I think that the notice contained a further and additional prohibition which derived its validity from the contractual relation between the mine-owners and their employees, and which was primarily intended to secure the safety of all persons present in the mine. It has been decided that the statutory regulation in question limits the scope of the employment of the persons to whom it refers; and

no satisfactory reason was stated why we should deny effect to the manifest intention of the mine-owners that their additional notice should receive the same construction. I agree that both the questions of law should be answered in the negative.

LORD CULLEN—I concur in thinking that the notice in question cannot be read as merely an exegesis of section 3 (*a*) of the Coal Mines Order of 1913. It seems clear from the second part of it, which begins thus—"It is hereby directed . . ." that the employers are purporting to lay down on their own authority a rule of their own for their mine. As to the meaning of that rule it appears to me that its terms were clear in conveying to the mind of a reader that where an attempt was made to fire a shot in the mine none of the men who retired should return within a certain period. In the next place I think it clear that the rule which the employers themselves thus laid down is not of the nature of an interference with or alteration or modification of the statutory rule of section 3 (*a*), but that it represents a conventional rule which they were entitled to issue if they saw fit for obedience by their employees. If that is so, it is not, as I understand, disputed that such a notice, having been duly posted up and having been read by the employee, bound him as part of his contract; and the only remaining question is whether the prohibition contained in the rule was one limitative of the employment or one which only went to the quality of conduct within the sphere of the employment. On that question it appears to me that we have a clear guide, because it has been decided that a similar prohibition addressed to a shot-firer and contained in a statutory regulation is limitative of the employment. The analogy is complete, and it follows that we must here hold that the prohibition was limitative of the respondent's employment.

LORD SANDS—Any difficulty in this case arises not from any uncertainty in regard to the facts, which are clear and simple, but from uncertainty and hesitation, if I may use the expression, in the expositions of the law on this subject. The rules that have been established are, no doubt, to a certain extent artificial and they appear to be somewhat arbitrary, but I think the result at which your Lordship has arrived is in harmony with the latest developments, and accordingly I concur in the judgment proposed.

The Court answered both the questions of law in the negative.

Counsel for Appellants—Robertson, K.C. —Russell. Agents—W. & J. Burness, W.S.

Counsel for Respondent—Fenton, K.C.—Keith. Agents—Simpson & Marwick, W.S.

Thursday, June 28.

FIRST DIVISION.

[Lord Constable, Ordinary.

ROBINSON *v.* WILLIAM HAMILTON (MOTORS), LIMITED.

Process—Jury Trial—Verdict—Contributory Negligence—Verdict of Contributory Negligence on the Part of Both Parties.

Process—Jury Trial—Bill of Exceptions—Ambiguous Verdict—Duty of Party Excepting to Ask for Further Directions if he Thought some Misunderstanding as to the Law Involved Underlay the Jury's Finding.

Reparation — Negligence — Contributory Negligence.

In a trial by jury of an action of damages at the instance of a pursuer who had been run down by a motor car the jury returned a verdict in the following terms — "The jury unanimously agree that there was contributory negligence on the part of both parties in not keeping a proper look-out." The Judge directed the jury to return a verdict for the defenders. In a bill of exceptions for the pursuer, *held* that as the case was not one in which the jury had to select from a series of sucesssive acts of negligence committed by the parties respectively the true cause of the accident, the verdict meant that both parties were to blame, and bill *refused.*

Opinion (*per* Lord Skerrington) that where exception is taken and counsel thinks that some misunderstanding as to the law underlies the jury's finding he ought to raise the question at the time and ask the Judge to give further directions to the jury in regard to the law applicable to the case.

This was a bill of exceptions for John Robinson, Glasgow, *pursuer*, in an action at his instance against William Hamilton (Motors), Limited, *defenders*, in which he claimed £500 damages for personal injuries sustained by him through being run down by a motor car belonging to the defenders.

The action was founded on alleged neglect of a motor driver in the service of the defenders to keep a good look-out or give proper warning of his approach. The defenders denied the existence of any negligence on their part and maintained that the accident was due to the fault of the pursuer in respect that he stepped off the pavement without looking to see if any vehicle was approaching, with the result that he sustained the injuries of which he complained.

The case was tried on 15th and 16th March 1923 before Lord Constable and a jury.

The Bill stated, *inter alia*—"After the evidence for both parties had been closed, and after their respective counsel had addressed the jury, the presiding Judge charged the jury, who thereafter retired to consider their verdict. On their return to the Court the Clerk of Court asked the jury