had been lit, to a place of safety. One of the shots missed fire, and the miner, in breach of a notice issued by the employers which he had read, and which, after referring to the Explosives in Coal Mines Order of 1st September 1913, provided that if a shot missed fire no person should on any pretext approach the shot-hole before the expiry of the period mentioned in the Order, returned to the shot-hole within the prohibited time and was injured by an explosion.

Held (*aff.* the judgment of the First Division) that the miner was not acting within the sphere of his employment at the time of the accident, and appeal *dismissed.*

The case is reported *ante ut supra.*

The claimant appealed to the House of Lords.

At delivering judgment—

VISCOUNT CAVE—It is impossible not to feel sympathy with the appellant in this case who has been seriously injured, but I am afraid that the facts and the law are too strong for him.

This case arose before the making of the amending Order of August 1922, and of course before the passing of the Workmen's Compensation Act 1923, and therefore it has to be decided on the law as it stood before those enactments were passed.

The notice, which is the essential thing in this case, after referring to the Explosives in Coal Mines Order of the 1st September 1913, added these words—"And no person shall in such circumstances"—that is when an attempt has been made to fire a shot—"on any pretext return to the place before the expiry of the above-mentioned periods respectively from the attempt to light the shot." Those words clearly added a new and substantial prohibition to the provisions of the statutory regulation. That prohibition was binding upon all the workmen at the mine, including the appellant. The appellant read it, and in breach of it, and in spite of it, he went to the place where the attempt had been made to fire a shot and was seriously injured.

On the authorities, which are really quite clear, in so doing he was going outside the scope of his employment, and therefore he did not become entitled to compensation under the Acts.

I will only mention one other point. It was suggested that the employer could not add to the statutory regulations in this way. Of course, he could not add to them in this way so as to make the addition statutory and enforceable by penalty, but clearly there was nothing to prevent him from making an additional regulation of his own, even although it dealt with the same subject-matter as that which was dealt with by the statutory regulations, and the regulations which he made were binding upon the workmen who knew of them. I see no option but to hold that the Court of Session was right and that this appeal ought to be dismissed.

VISCOUNT FINLAY—I agree.

LORD DUNEDIN—I concur. I think the notice was sufficiently clear.

LORD SHAW—I agree.

LORD SUMNER—I agree.

Their Lordships ordered that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

Counsel for the Appellant—The Solicitor-General (Fenton, K.C.)—Keith. Agents—Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

Counsel for the Respondents — Graham Robertson, K.C.—Russell. Agents—W. & J. Burness, W.S., Edinburgh—Beveridge & Company, Westminster.

Friday, April 4.

(Before Viscount Cave, Viscount Finlay, Lord Dunedin, Lord Shaw, and Lord Sumner).

MURRAY *v.* FIFE COAL COMPANY, LIMITED.

(In the Court of Session, December 7, 1923, 1924 S.C. 134, 61 S.L.R. 178.)

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*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 instead of from the Side.*

A miner whose duty it was to take hutches, when they were full, down an incline attempted to do so by placing himself in front of them in violation of an express verbal prohibition by his employers from guiding hutches downwards otherwise than from the side, with the result that he was fatally injured.

Held (*rev.* the judgment of the First Division, Viscount Finlay *diss.*) that the miner was not acting within the sphere of his employment at the time of the accident, and appeal *allowed.*

The case is reported *ante ut supra.*

The Fife Coal Company, Limited, appealed to the House of Lords.

At delivering judgment—

VISCOUNT CAVE—This case is of a class with which your Lordships are only too familiar, for the succession of cases in which men have suffered by committing a breach of regulations which were made for their safety appears to be unending.

In this case the deceased was a young man who was employed at a colliery as what is called a "hanger-on"—that is to say, he was employed to conduct hutches or tubs when they were empty up an incline, and when they were full down an incline. He was told very definitely that he was to conduct them from the side, and that he was not to get in front of a descending hutch. The reason for that direction was very plain, as, if he got in front of a descending hutch,

the result might be that he might be caught and crushed between the descending hutch and one which was below it. It is found that he was told this more than once, and it was a regulation imposed upon him and which he was bound to obey. Most unfortunately he disobeyed it, with the result, which might have been expected, that he was caught between the descending hutch and another and was so crushed that the injury resulted in death; and these proceedings are taken to obtain compensation for his family.

The Sheriff-Substitute who had first to deal with the matter found that what the deceased was doing when the accident occurred was outside the scope of his employment, but he stated a Case for the opinion of the Court, in which he put the following question of law—"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?" Thereupon the question went to the Court of Session, which reversed the decision of the Sheriff-Substitute and pronounced an interlocutor finding that there was no evidence on which the Sheriff-Substitute could have come to his conclusion.

I am bound to say that the judgments in the Court of Session, and especially the judgment of the learned Lord President, lose for me a great part of their value, because they appear to me to be arrived at upon the basis that there was some conflict between the decisions of this House which culminated in the well-known case of *Moore* v. *Donnelly* (1921 S.C. (H.L.) 41, [1921] A.C. 329), and that other line of decisions which culminated in this House in the case of *Estler Brothers* v. *Phillips* (1922, 15 B.W.C.C. 291), and that it was the duty of the Court to select between those decisions and (if I do not misunderstand the judgment of the learned Lord President) to decide the case according to the latest of them. In my view that was misconception. The two lines of decision run parallel to one another, and are entirely consistent one with the other. The point for the Court of Session and the point for this House is upon which side of the well-known line this particular case falls. The distinction was taken in a case which my noble and learned friend Lord Dunedin must be tired of hearing quoted, the case of *Plumb* v. *The Cobden Flour Mills Company, Limited* ([1914] A.C. 62), and I cite only three sentences from that judgment—sentences which have often been quoted before—"There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere" of his employment. Now the cases which led up to *Moore* v. *Donnelly* were cases of what is called there "the former class," and the cases which led up to *Estler's* case are cases within "the latter" of those classes; and, although the line is often very fine, yet there is a clear distinction in principle between the two classes of cases. The question, therefore, in this case is on which side of that line this case falls.

The question has been admirably argued on both sides, but after listening to all that has been said I have come to the conclusion that in this case what this lad was doing when he suffered his accident was outside the scope of his employment, and, accordingly, that the accident did not arise, according to the words of the statute, "out of and in the course of his employment." To begin with, the Sheriff-Substitute so found as a fact, and although that finding is not conclusive in these cases, yet it has its weight. But apart from that it appears to me that the case may be put in this way. At the time when the accident happened this man was doing something which he was not employed to do, and at a place where he was not commissioned to go, and, indeed, was expressly forbidden to go. He was employed not to push back the descending trucks but to guide them, and if need be to brake them, from the side. To employ anyone to push back descending trucks in conditions such as these would be to put the man in a position of obvious danger, and I doubt whether any employer would be justified under those conditions in putting such a duty upon anyone. These employers did not put upon this man such a duty; they employed and paid him as a "hanger-on," and not to hold the trucks back by the weight of his own body or by his own muscles. They employed him to perform a duty at the side of the trucks and not in front of the descending hutches. Therefore, what he was doing at the moment was something in a place which was not the place of his employment, and of a nature which did not fall within the scope of his employment.

I should like to adopt, not for the first time, a phrase which was used by Lord Sumner in the well-known case of *Lancashire and Yorkshire Railway Company* v. *Highley* ([1917] A.C. 352), and to say it was "not part of the injured man's employment to hazard, to suffer, or to do that which caused his injury," and I would also cite a passage from Lord Atkinson's speech in the case, which has been so often (and quite properly) referred to in the argument in this case, of *Herbert* v. *Samuel Fox & Company, Limited* ([1916] 1 A.C. 405), where he says of the workman in that case—"He was in a place in which he had been forbidden to be and had no right to be. He was thereby knowingly exposing himself to risks not reasonably incidental to his employment—risks which neither he nor his employers contemplated that he should run, risks which the employers forbade him to run, new perils added by his own rashness." Both these observations apply to the present case, and in my view the decision of the learned Sheriff-Substitute should be restored and the decision of the Court of Session set aside.

I will only add this to prevent misconception, that this question arose long before the passing of the Workmen's Compensation Act 1923, and therefore the provisions of the statute in no way apply.

For these reasons I am of the opinion that the appeal should be allowed, and that the question put by the learned Sheriff-Substitute should be answered in the affirmative, with the usual consequences as to costs.

VISCOUNT FINLAY—The question in this case depends upon the application of the principles which were laid down in *Plumb's* case, and I desire just to refer to that case and to quote two sentences from it for the purpose of ascertaining exactly what the principle is. The question is whether what the servant did was a disobedience to orders as to the way in which he should carry out his employment, or whether he had gone outside the sphere of his employment. At the beginning of the judgment of my noble and learned friend Lord Dunedin in *Plumb's* case, at p. 66 in the report in 1914 Appeal Cases, he says this—"The first and most useful" (test) "is contained in the expression 'scope' or 'sphere of employment.' The expression was used in an early case—the case of *Whitehead* v. *Reader* ([1901] 2 K.B. 48)—by Lord Justice Collins, who pointed out that the question of whether a servant had violated an order was not conclusive of whether an accident so caused did or did not arise out of the employment, and put as the test, Did the order which was disobeyed limit the sphere of the employment, or was it merely a direction not to do certain things, or to do them in a certain way within the sphere of the employment?" Then he (Lord Dunedin) goes on to refer to the case of *Conway* v. *Pumpherston Oil Company* (1911 S.C. 660), where it was stated that there were two sorts of ways in which a workman might go outside the sphere of his employment—"The first when he did work which he was not engaged to perform, and the second when he went into a territory with which he had nothing to do." I accept that principle. The question is as to its application.

Now in the present case the form of the question which has been put has been referred to. It is at the end of the statement in the appellants' Case. After referring to the facts, to which I shall recur presently, the learned Sheriff-Substitute says this—"The question of law for the opinion of the Court is—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?"

Now of course if it were a question of whether there was no evidence to go to a jury on a question of fact it would be another matter, but where the facts are stated, where the Sheriff-Substitute was sitting as arbitrator and all the relevant facts are brought before us and the appeal is on a question of law, I do not think it can be treated as if the question were merely whether there was any evidence which was proper to have been put to a jury. The facts are stated in order that the court for whose opinion the facts are so stated may decide what the effect of the facts as a whole is. There might be evidence which could have been left to a jury on a question of fact, but if the evidence of the whole facts taken together in point of law is such as to enable the court to which the case is stated to arrive at a proper conclusion, then I take it it must answer the question accordingly and give judgment accordingly.

Now that is the way in which I approach the case, and it appears to me that the question we have to answer must be answered with reference to the very concise statement of the facts which is contained in the appellants' Case—"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." That is a plain statement that what he was employed to do was to assist in taking the full hutches down and to assist in pushing the empty hutches up. He was instructed not to go in front of the hutches when he was guiding them down but to go on one side or behind—that is to say, we know exactly what he had to do, and we know that he was told that he was to do that work in a particular way. He violated his duty by not doing it according to the instructions, but I am bound to say that I agree with the conclusions arrived at in the Court of Session. I do not agree with all the reasons that they gave for their opinion, but I think that the result at which they arrived was right, and for this reason—It appears to me that there could hardly be a clearer case of doing the work, which was guiding the hutches, in a wrong way. He had been told—"You are not to go in front; you are to go at one side or the other or behind. That is the way in which you are to do the work." He was engaged in the very thing he was employed to do, but he chose to do it in a way which was wrong and contrary to his instructions, and the result was an unfortunate accident which has led to this litigation.

I think the case of *Revie* v. *Cumming* (1911 S.C. 1032), which was referred to, I think, in the course of the argument by Lord Dunedin, is a very good illustration of the differentiation between this case and other cases which have been referred to. In *Revie's* case a man who was employed to attend to the brakes at the rear of a lorry, instead of stopping behind to attend to the brakes, had gone to sit on the front to have a chat with the driver, intending, of course, to get down whenever his duties called him back to the rear of the lorry, and when he got down (that occasion having arisen) he unfortunately sustained an accident in jumping down to get to the rear of the lorry. It

was held (which was obviously the case) that he had gone for his own purposes to amuse himself talking to the driver to a place where he had no business to be. He was certainly outside the sphere of his employment. So in the case of *M'Diarmid* v. *Ogilvy Brothers* (1913 S.C. 1103) the workman had gone beyond the sphere of his employment altogether in the matter of time. The man there was employed to clean the machinery on Tuesdays and Fridays, the days on which the machinery was at rest. He chose to go on another day on which he was not employed to go and when the machinery was in motion, and the result was an accident. There again he was clearly acting beyond the sphere of his employment altogether. And the same observation applies to that case as to the case of which we have heard a good deal—*Herbert* v. *Samuel Fox & Company, Limited* (1916, 1 A.C. 405)—where the man was riding upon the buffer of the waggon. But in the present case I think this man was doing the very work he was employed to do, but he was doing it contrary to his instructions.

Under these circumstances in my opinion the case ought to stand as regards the conclusion as it stood when it was sent up from the Court of Session to us—that is to say, I think their conclusion (though not the reasons given) was perfectly right.

LORD DUNEDIN—There is no doubt that these cases must run very fine. We have been told that there is a statute which has been passed quite recently which will put an end to all these nice distinctions, and that the chapter of these cases will be closed.

I have had occasion to speak so often and to say so much upon these matters, and part of what I have said has received so much approval, that I think I should naturally not wish to say anything at the very concluding end of the chapter in case what I said should spoil what I said before. I do not feel it necessary to say more on this occasion, because I entirely agree with all that has fallen from my noble and learned friend on the Woolsack, which represents exactly my own opinion in this case.

LORD SHAW—This is one of the narrowest questions I have ever had to decide, and I am not, after full consideration, prepared to dissent from the motion that your Lordship on the Woolsack proposes.

LORD SUMNER—For the reasons given by my noble and learned friend on the Woolsack I concur in the motion he is about to propose.

Their Lordships ordered that the interlocutor appealed against be recalled, that the question of law put by the Sheriff-Substitute be answered in the affirmative, and that the respondent do pay to the appellants their costs in the Court of Session and in this House.

Counsel for the Appellants — Graham Robertson, K.C. — J. Wallace. Agents — Wallace, Begg, & Company, W.S., Edinburgh — Beveridge & Company, Westminster.

Counsel for the Respondents—Wark, K.C. —Carmont. Agents—Alex. Macbeth & Company, S.S.C., Edinburgh—Kenneth Brown, Baker, Baker, & Company, London.

Thursday, April 10.

(Before Viscount Cave, Viscount Finlay, Lord Dunedin, Lord Shaw, and Lord Sumner.)

INLAND REVENUE *v.* MACALISTER.

(In the Court of Session, February 22, 1923 S.C. 495, 60 S.L.R. 344.)

Revenue — Succession Duty — Succession Arising under a Disposition — "First Succession" — Finance (1909-10) *Act* 1910 (10 *Edw. VII, cap.* 8), *sec.* 58 (1) *and* (4).

The Finance (1909-10) Act 1910, section 58, enacts—"(1) Any legacy or succession duty which under the... Succession Duty Act 1853 or any other Act... is payable at the rate of 5 per cent. or 6 per cent. shall be payable at the rate of 10 per cent. on the amount or value of the legacy or succession. . . . (4) This section shall take effect in the case of legacy duty only where the testator by whose will the legacy is given... dies on or after the 30th day of April 1909... and, in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date."

A testator who was beneficially entitled to certain heritable property in fee, subject to the liferent interest of his mother, died in 1900, leaving a testamentary disposition by which he disponed his estate to his mother in liferent and to a cousin in fee. The liferentrix died in 1910, and thereupon the cousin became entitled to the property, and succession duty became payable upon it.

Held (*aff.* the judgment of the First Division) that for the purposes of section 58 (4) of the Act of 1910 the succession to the property arose on the testator's death in 1900, and that accordingly the rate of succession duty payable by his cousin was only 5 per cent.

The case is reported *ante ut supra.*

The Lord Advocate (on behalf of the Commissioners of Inland Revenue) appealed to the House of Lords.

At delivering judgment—

VISCOUNT CAVE — This appeal raises a question as to the rate at which succession duty was payable on the succession of the respondent Captain Norman Godfrey Macalister, under the will of the late Major Claude Wallnutt, to property consisting of a half-share of certain freehold lands in the county of Ayr.

The succession arose in this way. Major Wallnutt (whom I will call the testator) was beneficially entitled under the marriage contract of his parents to the property in question in fee subject to the liferent