

from the parochial board, but argued that the case was ruled by that of *Macdonald v. Simpson*, March 7, 1882, 9 R. 696, which overruled the previous case of *Hunter v. Clark*, July 10, 1874, 1 R. 1154.

There was no appearance for the defender.

At advising—

LORD JUSTICE-CLERK—I think that the case of *Macdonald*, which seems to be the last decided case upon this question, is an authority for this proposition—that it does not follow as a matter of course from a pursuer being in receipt of parochial relief that he is not entitled to sue an action except upon condition of either establishing a *probabilis causa* and then suing *in forma pauperis* or finding caution for expenses. The case of *Hunter v. Clark* does indeed appear to be an authority to the effect that such a pursuer, if he cannot establish a *probabilis causa*, and so get the benefit of the poor's roll, must find caution for expenses, but I see that the Judges who decided *Macdonald v. Simpson* considered that there must have been special circumstances in the case of *Hunter* which led to the Court exercising their discretion in the way they did. There are certain peculiar circumstances in the present case which are not favourable to a judgment ordaining the pursuer to find caution. To begin with, the defender does not choose to appear to defend the judgment she obtained, and to state to us any circumstances justifying it. In these circumstances I think we are entitled to regard the statements of the pursuer as a substantially accurate account of the facts. Now, from these statements it seems that the pursuer had long enjoyed the right to certain heritable subjects. She let them, and she brought an action in the Small Debt Court for the rent. The answer made to her was that she had no title; that someone else had a title. So far, the case does not appear to be that of a woman who has absolutely no estate. The Sheriff sisted the small-debt action (I do not think discreetly) for the purpose of allowing the pursuer to raise an action of declarator of title, and the pursuer brought such an action in order to establish a title which had hitherto not been disputed. The defender maintained in that action that she must find caution because she had obtained parochial relief, and as she failed to do so, the Sheriff assoilzied the defender. I think that judgment was not justifiable in the circumstances. I think that we should follow the case of *Macdonald v. Simpson*, and decide that the pursuer need not find caution as a condition of insisting in the present action.

LORD YOUNG—I agree. I think the case of *Macdonald* rules the present one. It is indistinguishable from it. I need not add more, as I should only repeat my judgment in that case.

LORD RUTHERFURD CLARK—I agree. I have some doubts whether I am correctly

reported in the case of *Macdonald v. Simpson*, because I am made to say that I saw no difference between that case and the case of *Hunter v. Clark*. I think there must be an error in that. In the special circumstances here, however, I think we should not require the pursuer to find caution.

LORD TRAYNER—I agree in the result at which your Lordships have arrived, but upon the ground that there has been no appearance for the defender. I am not prepared to base my judgment upon the grounds upon which your Lordships are proceeding. I think as a general rule that a pauper who does not choose to apply for the benefit of the poor's roll, and to sue *in forma pauperis*, is not entitled to litigate without finding caution. Upon that question as a matter of principle I should adopt the opinion of the Lord President in the case of *Hunter v. Clark*.

The Court sustained the appeal.

Counsel for Pursuer and Appellant—A. S. D. Thomson. Agents—Irvine & Gray, S.S.C.

Tuesday, December 9.

## SECOND DIVISION.

[Lord Trayner, Ordinary.]

### THE MERRYTON COAL COMPANY v. ANDERSON.

*Coal Mine — Check-Weigher — Interdict — Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 13.*

The miners employed in a coal mine appointed a check-weigher in terms of the Coal Mines Regulation Act 1887. The mine-owners became dissatisfied with the check-weigher, and dismissed their miners who had appointed him, and only re-engaged them on the stipulation that they would not appoint him as check-weigher. The miners on their re-employment did not reappoint him. *Held* that the mine-owners were entitled to interdict against him from entering their colliery premises, as his employment fell when the persons who made it ceased to be employed at the mine.

The Coal Mines Regulation Act 1887, section 13(1), provides—“The persons who are employed in a mine, and are paid according to the weight of the minerals gotten by them, may at their own cost station a person (in this Act referred to as a ‘check-weigher’) at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions, in order that he may, on behalf of the persons by whom he is so stationed, take a correct account of the weight of the mineral or determine correctly the deductions, as the case may be. . . . (4) If the owner, agent, or manager of the mine desires the re-

removal of a check-weigher on the ground that the check-weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or with any of the workmen, or with the management of the mine, . . . he may complain to a court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shows sufficient *prima facie* ground for the removal of the check-weigher, shall call on the check-weigher to show cause against his removal. (5) On the hearing of the case the court shall hear the parties, and if they think that at the hearing sufficient ground is shown by the owner, agent, or manager to justify the removal of the check-weigher, shall make a summary order for his removal, and the check-weigher shall thereupon be removed."

Andrew Douglas Brand and Wallace Thorneycroft, coalmasters, were the sole partners of the Merryton Coal Company, Glasgow, and lessees and occupiers of collieries at Merryton, near Larkhall.

About October 1889 the miners in the employment of the company at their colliery known as No. 1 Merryton Pit, Larkhall, appointed John Anderson as check-weigher for them in terms of the Coal Mines Regulation Act 1887.

The Merryton Company became dissatisfied with Anderson in his capacity of check-weigher, and upon 5th August 1890 they presented an application to the Sheriff at Hamilton, in terms of the Act, to have him removed from his position. The Sheriff declined to remove him on the evidence which had been led.

The miners in this pit were employed subject to immediate termination of the contract of service in the option of either party.

Upon 18th August 1890 the company posted up at the pithead the following notice—"Every collier working here is hereby formally dismissed from our employment. All may consider themselves re-engaged on the conditions that they do not appoint John Anderson as their check-weigher. All other conditions of employment to remain the same. Those men who go down to-morrow, or on any future day, do so on the distinct understanding that they agree to the above conditions of employment. John Anderson will not be allowed on the ground again. The graith of those who decline to work under these conditions will be sent to the surface." A number of the miners resumed work on these conditions, and Anderson was not again re-elected. No check-weigher was elected until 27th October.

Upon 19th August, and again upon 2nd October, Anderson attended at the pithead and endeavoured to act as check-weigher. The company and the individual partners presented a note of suspension and interdict against Anderson, to have him interdicted from entering or trespassing upon any part of the lands and premises occupied by their collieries.

Upon 18th November 1890 the Lord Ordinary (TRAYNER) granted interdict as prayed for, and found the respondent liable in expenses.

"*Opinion.*—The respondent was check-weigher at one of the complainers' pits, and was appointed to that office by the miners there employed under the powers conferred on them by the Coal Mines Regulation Act 1887, section 13.

"The complainers were dissatisfied with the respondent's conduct, and applied to the Sheriff to have him removed, but the Sheriff dismissed their application. The complainers thereafter dismissed their miners who had appointed the respondent, and only re-engaged them on the stipulation that they would not reappoint the respondent as their check-weigher. The miners on their re-employment did not reappoint the respondent, and have (since the present proceedings were instituted) appointed another check-weigher. In these circumstances it is plain enough that the respondent has now no right to enter upon the complainers' premises as check-weigher, and he pretends to no other title authorising his presence there. I have been asked, however, by both parties to decide this case, taking the circumstances as they stood at the date of presenting the note of suspension—that is, disregarding the subsequent appointment of a new check-weigher. Taking the case in that view, I am of opinion that the complainers are entitled to the interdict which they seek.

"The respondent was appointed by the miners who were at the time employed at the mine; it is only the persons 'who are employed in a mine' who have by statute the power of appointing a check-weigher. It appears to me that such an appointment must fall when the persons who make it cease to be employed at that mine, because (1) if on their ceasing to be employed no other miners are employed in their place, the work at the mine ceases, and there is no need of a check-weigher; and (2) if other miners are engaged in place of those who had ceased to be employed, then they in turn have right to appoint their own check-weigher. The case of *Whitehead*, L.R., 4 Ex. Div. 13, is not distinguishable from the present case, and I concur in the judgment there pronounced. The statute under consideration in that case was not the statute now in force. But so far as regards the present question, the Act of 1887 is only a re-enactment of the provisions of the Act of 1872."

The respondent reclaimed, and argued—The complainers were not entitled to the interdict they asked. The respondent was the check-weigher appointed by the men, and he was entitled to be upon the ground. If the men were only formally dismissed by the placard put up at the pithead, there was no substantial dismissal, and therefore the respondent continued as their check-weigher until the men appointed another. The complainers had failed in their attempt to remove the respondent in the manner prescribed by statute, and the method employed was illegal. To permit such a course would enable any coalmaster to defeat the Act, and remove a check-weigher who was obnoxious to him for looking after the interests of the miners. The case of *White-*

head did not apply, because under the Coal Mines Regulation Act 1872 the check-weigher must be "one of the persons employed in the mine." There was no such necessity under the Act of 1887, and the check-weigher here was not dismissed by the notice—*Whitehead v. Holdsworth and Another*, November 8, 1878, L.R., 4 Ex. Div. 13.

Counsel for the complainers was not called on.

The Court adhered.

Counsel for the Appellant—Rhind—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for the Respondents—C. S. Dickson. Agents—W. & J. Burness, W.S.

Tuesday, December 9.

## SECOND DIVISION.

[Sheriff of Fife and Kinross.

M'GILL AND OTHERS v. BOWMAN & COMPANY.

*Reparation—Master and Servant—Liability of Coalmaster for Injury to Contractor's Servant—Efficient System of Working—Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58).*

The Coal Mines Regulation Act 1887, sec. 49, General Rules, Rule 19, provides—"The top . . . of every working . . . shaft shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purpose of repairs or other operations if proper precautions are used."

In a contract for sinking a shaft a coalmaster agreed to furnish, and the pit-sinker agreed to satisfy himself of the condition and strength of, all the necessary materials and tackling, it being understood that the contractor might stop work until the necessary alterations or repairs were made. The materials were provided, and accepted in terms of the contract. These consisted of a bogie which ran upon rails to the mouth of the shaft, and carried a "kettle," which, by means of a block and tackle, hoisted the excavated earth to the surface; a table to cover the mouth of the shaft upon which the bogie had to be run before the "kettle" could be placed in a position to be lowered, and a block of wood upon the rails, about a yard and a-half from the shaft's mouth, which, when in position, prevented the bogie's progress towards the shaft. During the operations the fence was removed from the pit-mouth. By a mistake of the pitheadman, a servant of the contractor, the block was removed while the shaft was uncovered, and the bogie and "kettle" fell down the shaft, and killed one of the contractor's servants.

In an action by his representatives against the coalmaster—held that as the system supplied was proved to be reasonably safe, and was accepted by the contractor, there was no breach of contract on the part of the defenders; that the defenders had not violated the provisions of the Coal Mines Regulation Act 1887; and that the accident was due to the fault of the pitheadman.

In consequence of the death of the late Joseph M'Gill, miner, his widow and children sued Bowman & Company, mine-owners, for damages. The defenders contracted with James Swan, contractor, to sink their mine to the parrot seam. The conditions provided, *inter alia*—"Men.—The contractor to pay his own pitheadmen, and take upon himself the responsibility of their conduct when at work, and any accident that may befall them in the execution of his orders. He must therefore satisfy himself as to the condition and strength of all materials and tackling provided for him, it being understood that he may stop work till the necessary alterations or repairs are made. *Materials.*—The proprietors will furnish all timber, nails, and other necessary materials, but the contractor will provide his own powder, fuze, oil, back skins, hats, and shovels, all tools furnished by the proprietors to be returned at end of contract or to be charged for same."

The deceased was a servant of the contractor, and while working in the mine he was killed by the fall of a bogie down the shaft.

The pursuers averred—"The accident happened through the said pithead appliances being insufficient. They were of primitive construction, and had they been such as are in ordinary use the accident could not have happened. The fatal injuries sustained by the said Joseph M'Gill senior were caused by the fault and negligence of the defenders, or those for whom they are responsible, in providing insufficient appliances in connection with the sinking of said shaft. The defenders failed to provide the fencing at the top of said shaft provided for in rule 19 of the general rules contained in the Coal Mines Regulation Act 1887. Had the shaft been fenced no accident of the nature founded on could have taken place."

The pursuers pleaded—" (1) The death of the said Joseph M'Gill senior having been caused through the insufficient appliances provided by the defenders while he was employed at their pit, the pursuers are entitled to decree. (2) The death of the said Joseph M'Gill senior having happened through the failure of the defenders to fence the shaft referred to as required by rule 19 of the general rules contained in the Coal Mines Regulation Act 1887, decree ought to be pronounced as craved."

The defenders pleaded—" (2) The said Joseph M'Gill senior not having been in the employment of the defenders at the time of the accident, the defenders ought to be assolizied. (3) The said accident not having been caused through the fault of the