

intelligible detail of facts, which will enable the Court to judge of it in another year. In regard to what we have here, I entirely agree with Lord Trayner and Lord Moncreiff that there is no case upon which we can with safety sustain the conclusions at which the Commissioners have arrived.

LORD JUSTICE-CLERK—I also concur.

The Court reversed the determination of the Commissioners, and found the appellants entitled to costs.

Counsel for the Appellants—D. F. Asher, Q. C.—Salvesen. Agent—J. Smith Clark, S. S. C.

Counsel for the Crown—Sol. Gen. Dickson, Q. C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Wednesday, March 3.

SECOND DIVISION.

[Sheriff-Substitute at Dunfermline.]

FERRIS v. COWDENBEATH COAL COMPANY, LIMITED.

Reparation—Master and Servant—Defect in Ways—Manholes in Coal Mine—Employers Liability Act 1880 (43 and 44 Vict. cap. 42), sec. 1, sub-sec. 1, and sec. 2, sub-sec. 1—Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 49, General Rules 14 and 16.

The manholes constructed in a coal mine in terms of the Coal Mines Regulation Act 1887 are part of the ways of the mine.

In a coal mine some rubbish had been placed in one of the manholes at the side of the wheel-brae by orders of the person whose duty it was to see that the ways were in a proper condition. After the rubbish had been there some days a labourer at work in the mine, hearing the hutches approaching him, sought refuge in the manhole, but finding it blocked was prevented from getting in, and was knocked down and injured by a hutch.

Held that there was a defect in the condition of the ways in terms of section 1, sub-section 1, of the Employers Liability Act 1880, and that the employer was liable in damages.

By section 1 of the Employers Liability Act 1880 (43 and 44 Victoria chapter 42) it is enacted—"Where after the commencement of this Act personal injury is caused to a workman (1) by means of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer . . . the workman, or in case the injury results in death the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation

and remedies against the employer, as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

By section 2 of the said Act it is enacted—"A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say, (1) under sub-section 1 of section 1, unless the defects therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition."

By section 49 of the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58) general rule 14, it is enacted—"Every underground plane on which persons travel which is self-acting or worked by an engine, windlass, or gin, shall be provided (if exceeding 30 yards in length) with some proper means of communicating distinct and definite signals between the stopping-places and the ends of the plane, and shall be provided in every case with sufficient manholes for places of refuge, at intervals of not more than 20 yards, or if there is not room for a person to stand between the side of a tub and the side of the plane, then (unless the tubs are moved by an endless chain or rope) at intervals of not more than 10 yards." And by general rule 16 it is enacted—"Every manhole and every place of refuge shall be constantly kept clear, and no person shall place anything in any such manhole or place of refuge."

John Ferris, labourer, Cowdenbeath, raised in the Sheriff Court at Dunfermline, against the Cowdenbeath Coal Company, Limited, an action of damages for £250 at common law, or otherwise for £150 under the Employers Liability Act.

The Sheriff-Substitute (GILLESPIE) dismissed the action as irrelevant *quoad* the first conclusion, and *quoad ultra* allowed a proof.

The pursuer appealed for jury trial. An issue was adjusted in common form and on 18th December 1896 the case was tried before the Lord Justice-Clerk and a jury.

The evidence brought out the following facts:—On 11th July 1896 the pursuer was in the employment of the defenders as an oncost-man in No. 1 pit Lumphinnans. He was ordered by John Laird, whose duty it was to see that the ways in the pit were in a proper condition, to clean a wheel-brae in the pit on an incline on which hutches are worked by means of an endless chain, the full hutches in running down the brae pulling the empty ones up. This wheel-brae was over 200 yards in length, and at the side of the incline there were manholes for places of refuge at intervals of not more than 10 yards, as provided by the Coal Mines Regulation Act 1887, for the use of those employed in the mine to take shelter in when the rakes of hutches were running on the incline. The men got notice of the approach of the hutches by the movement of the chain on which they

ran. The pursuer while cleaning the wheel-brae by the light of his lamp saw the chain begin to move and sought refuge in the nearest manhole to escape the approaching hutch. He found it blocked with rubbish, and being thus prevented from getting in he was knocked down by a hutch and received serious injury. There was some divergence of opinion among the witnesses as to the amount of rubbish in the manhole at the time of the accident, the pursuer and another workmen saying one and a-half hutches, a third workman a hutch, and a fourth half a hutch. The rubbish had been put in the manhole by Laird's orders, and had lain there for some days.

The jury found unanimously for the pursuer, and assessed the damages at £50.

The defenders moved for a rule to show cause why a trial should not be granted on the ground that the verdict was contrary to law, and argued—The blocking up of the manhole with rubbish did not constitute a defect in the construction of the ways in terms of section 1, sub-section 1, of the Employers Liability Act. An obstruction of a temporary nature was not a defect of the ways. A perfect way which was temporarily rendered defective by rubbish being placed in it was not a defective way. Anything of a permanent or quasi-permanent nature might constitute a defective way, but a mere obstruction would not—*M'Quade v. William Dixon, Limited*, July 19, 1887, 14 R. 1039; *M'Giffen v. Palmer's Shipbuilding and Iron Company, Limited*, 1882, L.R., 10 Q.B.D. 5; *Willetts v. Watt & Company*, 1892, 2 Q.B. 92. The expression "defect in the condition of the ways" referred to something inherent in the subject-matter, and did not include anything not connected in any manner with the way, but merely placed in or added to it. The negligent act of a servant could not be construed as a defect in the condition of the way—*Pegram v. Dixon*, 1886, 55 L.J., Q.B. 447. A new trial should be allowed.

Counsel for pursuer were not called on.

At advising—

LORD JUSTICE-CLERK—The pursuer's case before the jury was, that having been instructed to clear a wheel-brae, he, on the approach of a train of trucks or hutches, did what it was his duty to do in ordinary circumstances, viz., to make for the nearest manhole, being a hole put at the side of the road in order that any person might be in a place of safety when a train was passing. It was said that he did not know the exact position he was in upon the brae, and that he was clearing up with a lamp on his head which did not give a very strong light, and he just made for the nearest manhole. The nearest manhole that he came upon was one obstructed by stuff which had been placed on the bottom of it, so that he had to adopt some other course. Whether there was enough of stuff in the manhole to prevent him getting in or not, is not, I think, of very much consequence, because in the dim light if he found the manhole obstructed it was quite natural for him to

think it was not safe for him to make the attempt, and to consider some other expedient. Therefore I do not think any blame attaches to him in what he did in that state of matters. The owners of the pit had constructed a good road and made manholes, and there is therefore no objection to the way in which the thing was constructed—the condition of the roadway when it was constructed was satisfactory, the owners having done all that was necessary to be done. The question comes to be, whether a certain interference with that roadway took place in such a way, or whether the roadway was allowed to remain in such a condition, that the jury were justified in finding that the pursuer was entitled to a verdict. Now, there is a great deal of conflicting evidence upon that subject—conflicting evidence as to the quantity of stuff that had been thrown into this manhole; and I think it is quite plain, and the impression I formed at the time was, that there was a good deal of exaggeration on the part of several of the witnesses in regard to that matter, but this is quite certain, that a certain time, whenever it was, before this accident happened, a quantity of stuff had been put on the bottom of one of the manholes. Unless it was done by some person in a position of authority, however, the mere fact would not make the master responsible, because it was not an interference with the condition of any of the ways established by the master, and if done by some person for whom he was not responsible at the time at which it was done, there could not be any blame attached to the master. But then it is quite plain that if such a state of matters was allowed to continue in the knowledge of the master or was allowed to continue by some one for whom the master was responsible under the Act of Parliament, then it might become a defective condition of the way, because if the rubbish was left there it practically resulted in this, that instead of providing a manhole of sufficient height with the floor level with the rails, the manhole was not level with the rails and was not of sufficient height.

Now, whatever impression I might form myself upon the evidence upon that matter, having seen the witnesses, the real question is, whether the jury, upon the evidence which they had before them, rightly came to the conclusion that this state of matters was allowed to continue by the person who was responsible to see that the ways and plant and all these matters connected with the pit were in proper order—that it was allowed to remain by him so as to constitute a condition of the ways for which the master would be responsible. Now, having considered the notes of evidence, I have come to the conclusion that we have no grounds for holding that the jury were not justified, if they considered that to be the sound view of the evidence, in coming to that conclusion. There are one or two points in the evidence which are pretty strong in that direction. One is that the manager of the pit himself admits that such a state of things was wrong. He cannot account for

the work of clearing it out afterwards taking the time it did if it was only transferring the quantity of stuff that was upon the floor of that manhole, and therefore there presumably was a considerable quantity of stuff, and if there was a considerable quantity of stuff, then it must have been or ought to have been seen by the roadsman, who was the person responsible by Act of Parliament for seeing that the ways were kept in proper order.

Therefore, as I think there was material evidence here upon which the jury might return the verdict complained of, I have come to the conclusion that a new trial ought not to be granted.

LORD TRAYNER—The case presented to us as the ground on which a new trial ought to be granted is, as I understand, rather a question of law than a question of fact. I understood Mr Salvesen to argue to us that there could be no liability here, because in the proper legal sense there was no defect in the ways in this pit in respect of which the master should be made liable to the pursuer in the damages claimed. Now, the pursuer's right is based on the Employers Liability Act, which provides that a master shall be liable for damage done to his servant from any defect in the condition of the ways. But then it qualifies that by saying that the master shall not be liable unless the defect thereof mentioned arose or had not been discovered or remedied owing to the negligence of the master or some person in his employment to whom he had entrusted the duty of seeing that the ways were in proper condition. It was said that in this case the way—the underground plane—by which the workmen travelled was in itself complete; that there was no defect; and I do not think that that could be disputed. There could not therefore be any liability for damages on that account under the section of the Act to which I have just referred. But the Mines Regulation Act prescribes that not only shall there be a free unencumbered way along which the men may travel, but that in all these ways there shall be what are called manholes into which persons travelling along can find a safe resort in the event of hitches passing along the way by which they are travelling. These manholes are as essentially part of the way as the plane on which the traveller walks. Therefore if there was any defect in the manholes, there was a defect in the way which the employer is required to keep clear and in good condition. The evidence shows that the manhole to which the pursuer resorted when he was in danger was filled with rubbish—I do not mean absolutely full, but to some extent filled with rubbish which certainly should not have been there, because the statutory requirement is, that these manholes or places of refuge shall always be kept clear. There is a positive enactment to the effect that "Every manhole and every place of refuge shall be constantly kept clear, and no person shall place anything in any such manhole or place of refuge." Now, that statutory obligation on

the part of the masters was disregarded, and they will be responsible for that under section 1 of the Employers Liability Act, unless it can be shown that they fall within the exception of sub-section 1 of section 2, which I have referred to. It appears from the proof upon this matter that the duty of keeping the ways clear was entrusted to a man named Laird, and I think there is evidence to show that Laird neglected his duty, and that it was in consequence of that neglect on his part to keep clear these manholes that the accident occurred. That being so, I have no difficulty in arriving at the conclusion that there was, both in law and in fact, good ground here for the verdict, and therefore, like your Lordship, I am not disposed to grant a new trial.

LORD YOUNG—I entirely concur in what Lord Trayner has said as to the law of the matter. I assent generally to the opinion which has been delivered by the Lord Justice-Clerk, but I agree also upon the point of law that the ways here were in a defective state in a manner for which in law the master was responsible.

LORD MONCREIFF—I am of the same opinion as the rest of your Lordships. I think the manhole was part of the ways, and that it was so obstructed as not to be able to be used, and that that was a defect in the ways. I think there was evidence to justify the jury in coming to the conclusion that this manhole was obstructed, not in a casual or temporary manner, but in such a manner as to prevent the pursuer, the man who was injured, from taking refuge in it, and that that was due to the fault of the person Laird who was entrusted with seeing that the ways were in a proper condition. In these circumstances I think the verdict should be sustained.

The Court refused the motion, discharged the rule, and of consent applied the verdict.

Counsel for the Pursuer—Comrie Thomson—M'Clure. Agent—Frank M. H. Young, S.S.C.

Counsel for the Defender—Salvesen—Orr Deas. Agent—W. G. L. Winchester, W.S.