

pursuer has eventually obtained decree if we except an award of interest thereon at 5 per cent. from the date of citation. It is therefore apparent that the proof from the pursuer's point of view was entirely unsuccessful and unnecessary, and it seems to me to be only just that he should bear the expenses of it. It is true that the defender omitted to tender interest on record. In certain circumstances such a failure might have been of serious importance, because the Court has as a rule been accustomed to treat tenders strictly. But in the present case the omission does not appear to me to affect the question or to alter the fact that the responsibility for the proof rests wholly with the pursuer. Had the attention of the Sheriff or even of the defender been drawn to the fact of the omission of interest it cannot be doubted that the omission would at once have been rectified and interest included in the decree as has been done by the Sheriff.

I am accordingly of opinion that the pursuer should be found entitled to expenses down to 22nd October 1909, the date of the interlocutor ordering the proof, and that the defender should be found entitled to expenses from that date onwards both in the Sheriff Court and the Court of Session.

LORD SALVESEN—I quite agree with the opinions that have been expressed in other cases that this Court will not readily entertain appeals from the Sheriff Court where the only question is of expenses. At the same time it is not suggested that such appeals are incompetent, and in certain cases it appears to me that the Court ought to entertain them as readily as appeals on the merits—*e.g.*, where the amount of the expenses is largely in excess of the sum in controversy between the parties, or a plain error has been made. A wrong decision on the question of expenses in such circumstances might amount to serious injustice, which the Court should never hesitate to remedy. In the present case I think the decisions in the Court below on the question of expenses are not merely plainly wrong, but that they probably involve a sum in excess of the actual merits of the litigation. The action concludes for payment of £150, with interest at 5 per cent. per annum from the date of citation. Of that sum £75 represents what I may describe as principal, and £75 represents what may be described as bonus in lieu of interest. In his defences the defender admitted his liability for and tendered £75 (the principal sum), with expenses to the date of tender. He omitted, however, to tender interest on that sum from the date of citation, a very trifling sum, but it would have been quite open to the pursuer to get decree for the interest along with the principal if he had been willing to restrict his claim. Instead of doing so, the pursuer embarked upon an expensive proof, in which he was entirely unsuccessful, in the hope of establishing his right to the bonus of £75. In these circumstances the Sheriffs have awarded him the whole expenses of the proof. I think that constitutes a clear and substan-

tial injustice to the defender, who, I think, while liable in expenses up to the date of the interlocutor allowing proof, should have been found entitled to his expenses in the Sheriff Court from that date onwards. As the defender has been entirely successful in his appeal to this Court he will of course be entitled to expenses here.

LORD SKERRINGTON concurred.

The LORD JUSTICE-CLERK and LORD DUNDAS were absent.

The Court pronounced this interlocutor—

“Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against, with the exception of the finding for expenses, which is hereby recalled: *Quoad ultra* affirm the said interlocutor, and of new grant decree against the defender for payment to the pursuer of the three sums of £30, £30, and £15, with interest thereon at 5 per centum per annum from the date of citation until paid, and decern: Find the pursuer entitled to expenses up to and including 22nd October 1909, and find the defender entitled to expenses in this and in the Inferior Court (including fees to counsel) since said 22nd October 1909,” &c.

Counsel for the Pursuer (Respondent)—
Wark. Agents—Winchester & Nicolson,
S.S.C.

Counsel for the Defender (Appellant)—
Morison, K.C.—Ingram. Agent—J. Munro
Glass, Solicitor.

Wednesday, February 1.

FIRST DIVISION.

[Sheriff Court at Banff.]

M'LAUHLAN v. ANDERSON.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—“Arising out of and in the Course of the Employment.”

A workman was employed as labourer in connection with loading and unloading waggons, and accompanying them while being hauled by a traction engine from one quarry to another. While sitting on a waggon which was being so hauled, he dropped his pipe, and in attempting to get down to recover it he lost his balance and fell in front of the wheels of the waggon, which went over his left leg, seriously injuring him.

Held that the accident “arose out of and in the course of the employment,” within the meaning of section 1 (1) of the Workmen's Compensation Act 1906.

Mrs Jane Wilson or M'Lauchlan, widow of Peter M'Lauchlan, traction engine assistant, for her own interest and also

as tutor for her three pupil children, claimed compensation under the Workmen's Compensation Act 1906 from George Anderson, traction engine owner, Fordyce, Banffshire, and being dissatisfied with the determination of the Sheriff-Substitute (LAING), acting as arbitrator under the Act, appealed by way of stated case.

The Case set forth, *inter alia*—"This is an arbitration in which I found the following facts established, viz.—(1) that the deceased Peter M'Lauchlan, who resided at 87 Moss Street, Keith, Banffshire, was employed by the respondent as a traction engine assistant from October 1909 to 25th April 1910 inclusive; (2) that the deceased's duties consisted of assisting his fellow workmen, Alexander Reid, traction engine driver, and Alexander Crighton, traction engine assistant, both of Fordyce, Banffshire, to load at various quarries the waggons attached to a traction engine for conveyance to Portsoy; to accompany said waggons to their destination and there to assist in unloading; (3) that on said 25th April, between the hours of 3.30 and 5.30 p.m., the deceased Peter M'Lauchlan was engaged at the Ord Quarries, Banffshire, assisting the said Alexander Reid and the said Alexander Crighton to load the waggons; . . . ; (5) that after the waggons were loaded, the said Alexander Reid, the said Alexander Crighton, and the said Peter M'Lauchlan, about 5.30 p.m. proceeded with the traction engine and waggons from the said Ord Quarries along the public road to Portsoy, where they were to assist in unloading the waggons; (6) that at that time the said Alexander Reid and the said Alexander Crighton were on the traction engine, and the deceased Peter M'Lauchlan was sitting at the right-hand corner of the front waggon next the engine with his legs dangling over the front; (7) that about 6.30 p.m., at a point on the road to Portsoy, the said Peter M'Lauchlan was in the act of lighting his pipe when it dropped from his grasp on to the road; (8) that while he was attempting to get down from the corner of the front waggon for the purpose of recovering his pipe, he lost his balance and fell in front of the waggon, with the result that the wheels thereof went over his left leg, seriously injuring him; (9) that the said Peter M'Lauchlan was removed as soon as possible to the Chalmers Hospital, Banff, where, in spite of medical treatment, he succumbed to his injuries on 26th April 1910; (10) that the deceased Peter M'Lauchlan attempted to get down from the waggon, not for any object connected with his employment with the respondent, but for his own purpose; . . . ; (12) that the appellant and her said children were wholly dependent upon the weekly earnings of the said Peter M'Lauchlan. On these facts I found in law that the appellant was not entitled to compensation in respect that the accident, from the effects of which the said Peter M'Lauchlan died, was not the result of an accident arising out of his employment with the respondent in the sense of section 1, sub-section 1, of the Workmen's Compen-

sation Act 1906. I therefore assolized the respondent from the conclusions of the initial writ. . . ."

The question of law for the opinion of the Court was—"Whether the death of the said Peter M'Lauchlan was the result of an accident arising out of and in the course of his employment with the respondent, within the meaning of section 1, sub-section 1, of the Workmen's Compensation Act 1906."

Argued for the appellant—The accident arose out of and in the course of the employment. They referred to *Moore v. Manchester Liners*, [1910] A.C. 498, *per* Lord Chancellor Loreburn at p. 500; *Keenan v. Flemington Coal Company, Limited*, December 2, 1902, 5 F. 164, 40 S.L.R. 144; *Harrison v. Whitaker Brothers, Limited*, 1899, 16 T.L.R. 108; and by way of contrast to *Reed v. Great Western Railway Company*, [1909] A.C. 31, 46 S.L.R. 700.

Argued for the respondent—The Sheriff was right in holding that the accident did not arise out of the employment. The picking up of the pipe was for the workman's own purpose. Nor did it arise in the course of the employment, for he had for the time abandoned his master's work in order to serve his own private ends. Reference was made to *Reed (cit. sup.)*, opinion of Lord Macnaghten; *Smith v. Lancashire and Yorkshire Railway*, [1899] 1 Q.B. 141; *Morrison v. Clyde Navigation Trustees*, 1909 S.C. 59, 46 S.L.R. 40. In any case the Sheriff's finding that the accident did not arise out of the employment was a finding in fact which there was evidence to support.

LORD PRESIDENT—The facts in this case are as follows:—The deceased was engaged as a labourer in connection with loading at various quarries waggons which were afterwards hauled by a traction engine over the roads of Banffshire to Portsoy. The deceased's main duties were to help at the loading and unloading and to accompany the waggons on their journeys. On the occasion of his death he was sitting on one of the waggons which was being hauled by the engine in the prosecution of one of the intermediate journeys from one quarry to another. While sitting on the waggon he dropped his pipe and got down to recover it; in so doing he stumbled and fell, and was run over by the waggon. The arbitrator has found in fact that "the deceased Peter M'Lauchlan attempted to get down from the waggon, not for any object connected with his employment with the respondent, but for his own purpose," and proceeding upon that has found in law that the appellant is not entitled to compensation in respect that the accident was not an accident arising out of his employment in the sense of section 1 (1) of the Workmen's Compensation Act 1906.

The question before your Lordships is whether that finding in law can be supported in view of the various facts the arbitrator found to be proved, which I have detailed. I am of opinion that the finding cannot be supported. I think the

fallacy that has led the learned arbitrator astray is connected with the true meaning of the words "his own purpose." In one sense anything a man does in connection with his own body is done for his own purpose—eating and drinking are illustrations, but these are none the less things a workman is perfectly entitled to do in the course of his employment. The Lord Chancellor (Lord Loreburn) in the course of his opinion in the case of *Moore v. Manchester Liners, Limited*, [1910] A.C. 498, at p. 500, said this—"I think an accident befalls a man 'in the course of' his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing." Now this man's operation of getting down from the waggon to recover his pipe seems to me to satisfy all those conditions. Taking them in their inverse order, he had a right to be at the place, riding on or walking beside the waggons; he was within the time during which he was employed, because the accident happened during the actual period of transit; and he was doing a thing which a man while working may reasonably do—a workman of his sort may reasonably smoke, he may reasonably drop his pipe, and he may reasonably pick it up again.

I think this case is in thorough contrast to the cases which were cited to your Lordships of the engine-driver and the ticket-collector. Each of those men was doing something which was not incidental to his ordinary work, but took him away from his work for a purpose purely his own—the engine-driver went to fetch a book, and the ticket-collector to talk to a lady passenger.

A good deal has been said about the difference between an accident arising "out of" and one arising "in the course of" the employment. No doubt in the earlier cases under the Act there was a certain amount of difficulty in the distinction, but my view on the matter is quite determined. I think it is impossible to have an accident arising out of, which is not also in the course of, the employment, but the converse of this is quite possible, as, for instance, if a workman were shot by a lunatic, or struck by lightning, while at the moment engaged in his work. In a great many cases, however, the two phrases do not admit of separate consideration, and the present is one of those cases. If this accident took place in the course of the workman's employment, it also indubitably arose out of that employment; if not, not. On the whole matter I propose that we should recal the finding of the arbitrator and find the widow entitled to compensation.

LORD KINNEAR—I am of the same opinion. Mr Brown has very properly called our attention to a very material finding of the Sheriff, that this injury was not the result of an accident arising out of the workman's employment in the sense of the first section of the Act. He said that this

was a finding of fact which we could not disturb if there was evidence before the Sheriff on which it could reasonably be supported. I agree that we must be very careful to keep in view this limitation of our jurisdiction, and that we are not entitled to review findings of pure fact. But this is not a finding of pure fact, but a mixed finding of fact and of law, because to arrive at that finding it was necessary not only to draw an inference of fact but also to construe the Act of Parliament in a particular way, and the Sheriff has enabled us to disentangle the question of law from the question of fact by the series of specific findings in fact which he sets out as leading up to his conclusion. So separating these two questions I am clearly of opinion that the Sheriff has gone wrong in applying the statute to the facts which have been proved in this case.

I do not think that it is necessary to distinguish very exactly between the two requirements that this accident must satisfy in order to fall within the scope of the section, namely, those arising out of and in the course of the employment respectively, because I think it is quite clear here that both conditions are satisfied. The injury arose from a risk to which the workman was exposed by the nature of his work. He was in charge of a traction engine and was run over by it. That this was an accident arising out of his employment I see no reason to doubt. It is proved that the man was in the course of his employment when the accident occurred. The only ground suggested for a different view is that the accident happened when the man had got off the waggon on to the road to pick up something which he had dropped. It is conceded that it was not part of his duty to sit on the waggon all the time. He was entitled to walk, and therefore to be on the road. This is exactly the situation which was considered by the Lord Chancellor in the case of *Moore*, and I think his reasoning conclusive. The present case is quite indistinguishable from that of *Keenan*, where it was held that a man was still in his employment though he had moved a few steps from the place of his work in order to get a drink of water. There is no such distinction between the purpose of drinking and that of picking up an article that has fallen as to justify a finding that the one man was still in employment whilst the other was not. The question to be decided here would be exactly the same if this man had got off the waggon to drink from a spring at the roadside. I therefore entirely agree with the Lord President that the Sheriff has decided upon a wrong view of the statute and that his decision cannot be supported.

LORD MACKENZIE—I am entirely of the same opinion. I think that when the facts of the case are considered along with the opinion of the Lord Chancellor in *Moore v. Manchester Liners, Limited*, [1910] A.C. 498, to which your Lordships have referred, there is no evidence to justify the result at which the Sheriff-Substitute as arbi-

trator has arrived. The workman was at his work, and his attempt to get down to pick up his pipe was merely an incident in the day's work.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

“Answer the question of law in the affirmative: Recal the determination of the Sheriff-Substitute as arbitrator: Remit the cause to him to proceed as accords,” &c.

Counsel for the Appellant—Dykes. Agent—J. P. Ross, W.S.

Counsel for the Respondent—A. R. Brown. Agents—Macpherson & Mackay, W.S.

VALUATION APPEAL COURT.

Thursday, February 2.

(Before Lord Johnston, Lord Salvesen, and Lord Cullen.)

BAILIE AND OTHERS (MILLER'S TRUSTEES) v. BERWICKSHIRE ASSESSOR.

Valuation Cases—“*Yearly Rent or Value*”—*Agricultural Lease*—*Deduction from Rent Specified in Lease*—*Obligation on Landlord to Supply Lime*.

Where a landlord, in implement of an obligation undertaken by him under an agricultural lease, repaid to his tenant half the cost of lime put upon the land in a certain year, held, that in entering the farm in the valuation roll for the succeeding year the Assessor was bound to allow as a deduction from the rent specified in the lease the sum so repaid to the tenant in respect of lime.

At a meeting of the Valuation Committee of the County Council of Berwickshire held at Duns on Thursday, the 15th day of September 1910, General Thomas Maubourg Bailie, Caldecott House, Abingdon, Berkshire, and others, trustees acting under the trust-disposition and settlement of the late Sir James Miller of Manderston, in the county of Berwick, Baronet, appealed against the following entry in the valuation roll of the county for the year ending Whitsunday 1911, viz. :—

Description and Situation of Subject.	Proprietor.	Tenant.	Occupier.	Rent or Yearly Value.
Farm and House, late Sir James Edrom Miller of Manderston, Newton.	Trustees of the late Sir James Edrom Miller of Manderston, Bart.	John Webster.	Same.	£447 18 6

The appellants craved that the subject should be entered in the roll at £417, 2s. 6d. The Committee sustained the Assessor's valuation, but gave effect to a modification agreed to by the Assessor, which reduced the valuation to £446, 7s. 6d. *Quoad*

ultra they dismissed the appeal, and on the appellants expressing their dissatisfaction therewith, stated a case.

The Case stated—“This sum (£447, 18s. 6d.) is the amount of the rent specified in the lease entered into between the said trustees and John Webster, farmer, Edrom Newton, of the said farm of Edrom Newton, dated 14th, 21st, 23rd, and 24th November 1908; said lease is for nineteen years, and crops from and after the term of Martinmas 1908.

“The appellants in their annual return for 1910-11 entered the farm at the sum of £417, 2s. 6d. The Assessor in place of this figure entered the farm as above at £447, 18s. 6d., and the appellants claimed to have this valuation reduced to the said sum of £417, 2s. 6d., made up as follows:—

“Rent per lease	£447 18 6
One-half of insurance premium over buildings repayable by tenant	2 13 6
	£450 12 0
Less—One-half of fencing outlay	4 4 6
	£446 7 6
One-half of cost of lime applied to lands (season 1909)	29 5 0
	£417 2 6

“Prior to the meeting of the Valuation Committee the Assessor agreed to the above sum of £446, 7s. 6d. as the maximum sum to be entered, so that the only question for the Valuation Committee to decide was whether one-half of the amount expended on lime fell to be deducted.

“It is stipulated in the said lease as follows:—‘Further, it is hereby agreed with regard to any land requiring to be limed during the currency of this lease, that the necessary lime shall be supplied at the mutual expense of the proprietors and tenant, the latter being bound to perform the cartages and apply the lime free of charge.’

“It is further stipulated in the lease that the fences on the farm shall, during the whole currency of the lease, ‘be kept up and renewed when necessary at the mutual expense of the proprietors and tenant,’ and that the proprietor shall insure the farm buildings against loss by fire and pay the premiums, the tenant being bound to repay one-half thereof.

“The total cost of the lime applied during season 1909 amounted to £58, 10s., and the proprietors (the appellants) have repaid to the tenant one-half of the same, viz., £29, 5s.

“The fire insurance premiums amount to £5, 7s., and the fencing outlay to £8, 9s., the tenant paying one-half of said sums and the proprietors the other.

“These facts were admitted by the Assessor, and no evidence was led nor productions put in.”

The Committee “decided that the deduction from the rental, £29, 5s., being half the cost of supplying lime to the farm, was not of such a character as to constitute a deduction from the rateable value, and on this point dismissed the appeal.”