

fact that the shot went off, and from the learned arbitrator's finding that the true cause of delay in the explosion was the damp condition of the fuse. I cannot read the findings as being consistent with any but a serious attempt having been made by the workman to ignite the fuse—such an attempt as would in ordinary circumstances have ignited it. Now it is enacted by paragraph 2 (e) of the Order that “the person firing the shot” shall take shelter, and by paragraph 3 (a)—being the enactment said to have been breached in this case—that “if a shot misses fire, the person firing the shot shall not approach . . . the shot-hole until” at least one hour thereafter, *i.e.*, after firing the shot. A shot “misses fire” in the sense of the latter paragraph if it does not explode in the usual time. *Firing the shot* is the equivalent of *igniting the fuse by applying a naked light*, in the language of the Order. But what does the latter expression imply? I think it means such application of the naked light to the fuse as in ordinary circumstances will cause the fuse to take light. If this is not its true meaning the whole of the provisions of the Order on this topic become useless. For the ordinary interval between the ignition of the fuse and the explosion is short, and the Order would fail of its object if it permitted the workman to go on applying the naked light to the fuse until he was satisfied that he had successfully ignited it. I think what I have said is in accord with the remarks made on this subject in *Waddell v. Coltness Iron Company* (1912, 50 S.L.R. 29), although in that case the workman was not—like the workman in this case—confident that he had not succeeded, but was only doubtful of his success. If the fuse is in perfect condition its behaviour will probably leave him in no doubt as to its ignition, but if it does not show the usual signs described in *Waddell's* case, the workman who has performed those acts which in ordinary circumstances would have ignited it is not entitled to prolong his efforts or his investigations into their success beyond the time reasonably necessary for the performance of the acts referred to, nor to return to the shot-hole before the elapse of the prescribed interval. This is a hard rule, but it is probably not difficult in observance, and, as I have said, the Order would on a more loose construction be rendered unserviceable. Accordingly, notwithstanding the absence of any exegetical notice to the workman, I think the present case is indistinguishable so far as the *species facti* is concerned from that of *Colville*.

The question submitted to us is, however, not the same as that submitted in *Colville*. In the latter the issue raised was the broader and prior one, as to the sphere of the workman's employment. Here it is the narrower issue of serious and wilful misconduct, and that issue, strictly speaking, cannot arise if the workman was not acting within the sphere of his employment. I must conclude that the employer did not raise the broader and prior issue in his defence against the claim. But the only result is to put the case in the same position as that in which *George v. Glasgow Coal Company, Limited*

(1909 S.C. (H.L.) 1, 46 S.L.R. 28) was presented to and decided by the House of Lords, and having regard to the opinions there expressed I feel no doubt, even if the workman be deemed, in consequence of the form of the pleadings, to be acting within the sphere of his employment, it was serious misconduct to violate the statutory prohibition, and that the learned arbitrator was entitled to hold that that misconduct was wilful, because an erroneous interpretation of statutory provisions does not make a breach of their terms other than wilful.

LORD MACKENZIE—I agree with the opinion of your Lordship, which I have had an opportunity of reading.

LORD SKERRINGTON—I also concur.

LORD CULLEN—I also agree.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Sandeman, K.C.—Gillies. Agents—W. & J. Burness, W.S.

Friday, January 28.

SECOND DIVISION.

[Sheriff Court at Airdrie.]

COSTELLO v. ROBERT ADDIE & SONS
(COLLIERIES), LIMITED.

Master and Servant—Workmen's Compensation—“Arising out of and in the Course of the Employment”—Breach of Statutory Rule—“If a Shot Misses Fire”—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), sec. 86—Explosives in Coal Mines Order, dated 1st September 1913, par. 3 (a).

The Explosives in Coal Mines Order of 1st September 1913, par. 3 (a), provides that “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.”

Two shots were laid close together in a mine by two miners, A and B, each of whom applied a light to his respective fuse. Both A and B were of opinion that A's fuse had failed to ignite, but they retired to a place of safety as B's fuse was burning. B's shot went off, and thirty or forty minutes thereafter A returned for the purpose of lighting the fuse attached to his shot. As he approached his shot it went off, and he was seriously and permanently injured. *Held (following Smith v. Archibald Russell, Limited, 1921, 1 S.L.T. 171)* that A's shot had “missed fire” within the

meaning of par. 3 (a) of the Explosives in Coal Mines Order of 1st September 1913, and that, as A had contravened the Order, the accident did not arise out of and in the course of his employment.

Robert Addie & Sons (Collieries) Limited, coalmasters, Rosehall Colliery, Whifflet, Coatbridge, *appellants*, being dissatisfied with a decision of the Sheriff-Substitute at Airdrie (MACDIARMID) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought against them by John Costello, repairer, 66 Mid Row, Rosehall, Whifflet, Coatbridge, *respondent*, appealed by Stated Case.

The facts admitted or proved were as follows:—“1. That the pursuer and respondent, who is a miner, was on 6th December 1917 injured by accident in No. 3 Pit, Rosehall Colliery, Whifflet, belonging to the defenders and appellants, while employed by them there, and that the said accident happened as follows:—The pursuer and respondent and his mate Alexander Fisher had in the course of and as part of their employment to prepare and fire two shots in the pavement. The pursuer and respondent prepared one and his mate the other, each with a detonator and with a fuse attached thereto. The shots were from 2½ to 3 feet apart. The men then proceeded to apply a light to their respective fuses. Fisher was successful in lighting his. Both the pursuer and respondent and Fisher were of opinion that the pursuer and respondent was unsuccessful in lighting his. As, however, Fisher's fuse was burning it was necessary for them to seek a place of safety. This they accordingly did. They heard Fisher's shot go off, and waited for between thirty and forty minutes to allow the 'reek' to clear and to eat their 'pieces' and have a smoke. Thereafter, between thirty and forty minutes after they had left the place where the shots were, the pursuer and respondent returned for the purpose of lighting his own shot. This shot, the fuse of which he believed he had not lit, went off as he was in the act of approaching it and injured his left leg and foot. 2. That paragraph 3 (a) of the Explosives in Coal Mines Order of 1st September 1913 applied to the said pit, and provided that '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,' and that the shot in question was a shot 'fired by other means,' viz., by the application of a naked light to the fuse. 3. That the pursuer and respondent suffered serious and permanent disablement and was still totally incapacitated for work. 4. That parties were agreed that at the date of said accident pursuer's and respondent's average weekly earnings were £3, 14s. 2d.”

The Case further stated—“In these circumstances I found that the said accident arose out of and in the course of the pursuer's and respondent's employment with the defenders and appellants, that the pur-

suer and respondent was in breach of said paragraph of said Order and guilty of serious and wilful misconduct, but that his disablement being serious and permanent he was not barred from recovering compensation from the defenders and appellants.

“I accordingly found the defenders and appellants liable to the pursuer and respondent in compensation in respect of total incapacity at the rate of £1 per week (with war additions) from the date of said accident until further order of Court, and found the former liable to the latter in expenses.”

The *question of law* was—“On the foregoing facts was I entitled to find that the accident to the said John Costello arose out of and in the course of his employment with the appellants?”

In a *note* to his award the arbitrator stated—“The main point in this case is whether or not this accident arose out of and in the course of the employment. The facts are practically identical with those in *Donnelly v. A. G. Moore & Company*, 1920, 57 S.L.R. 380. Since that case was decided in the Court of Session *Bourton's* case has been decided by the House of Lords—*Bourton v. Beauchamp & Beauchamp*, 1920, 13 B.W.C.C. 90—but as I understand the matter *Bourton's* case differed from that of *Donnelly* in that in the former case the workman when he met with his accident was doing an act which he was expressly prohibited from doing, whereas in the latter he was doing a permitted act carelessly or recklessly. In any event it was admitted by the agent for the employers that this case could not be distinguished from *Donnelly's* but that it differed from *Bourton's* and that accordingly an award in this Court could not be resisted.

“As the case will no doubt go further it is right that I should note the argument put forward by the agent for the workman on paragraph 3 (a) of the Order of 1st September 1913 as applied to the facts of this case. It was argued in the first place that it was proved that the fuse was not lit and that therefore the shot could not be said to have missed fire; and secondly, that assuming the fuse was lit the shot could not have missed fire because in point of fact it exploded. It does not appear to me to be of much moment whether or not the fuse was lit but I am unable to find it proved that it was not. It seems to me clearly proved that both the pursuer and his mate thought that the former had failed to light his fuse but I do not think it is possible to go further than that. And while without doubt the shot exploded, I do not think that really helps the pursuer. I would refer to the remarks made by Lord Dunedin when Lord President in the case of *Waddell v. Coltness Iron Company*, 1912, 50 S.L.R. 29. The phraseology of the rule then in force differs slightly from that of the rule now under consideration, but it seems to me that those remarks are directly in point, and if that be so then the pursuer having attempted to fire this shot, was not entitled under the rule to return to the place until an hour had elapsed. He returned in between thirty to forty minutes and was therefore in breach of the rule and

guilty of 'serious and wilful misconduct' in the sense of the Act. I see no reason to doubt the pursuer, who although a man of fifty-two enlisted in the army in August 1914 and had just returned when this accident happened in December 1917, when he says that he had no very clear recollection of the rule but thought that thirty minutes was the time within which he must not return to the place where the shot-hole was."

On 4th January 1921 the Second Division, having considered the Stated Case on appeal and heard counsel for the parties, *hoc statu* remitted to the Sheriff-Substitute as arbitrator to state whether he found it proved as a fact in the case that Costello's fuse was lit by Costello.

On 19th January 1921 the Sheriff-Substitute reported as follows:—"The evidence led in this case was, on behalf of the workman, that of himself and of his mate Alexander Fisher, who were the only persons present when the shots were about to be fired; of the fireman, to whom the accident was reported; and, on behalf of the employers, the manager of the colliery.

"Costello and Fisher both deponed that the former was not successful in his attempt to light the fuse of his shot. The fireman, who came on the scene immediately after the accident, deponed that Costello and Fisher had both said to him then that Costello had not lighted his fuse. I had no difficulty in reaching the conclusion that Costello and Fisher honestly believed what they said, and that Costello returned to the place where his shot was in the belief that he had not been successful in lighting the fuse. The difficulty was on this evidence to account for the explosion of the shot. The shots were placed in the pavement 2½ to 3 feet apart with their strums or fuses inclining towards one another. The suggestion was made by Costello and Fisher that the flame from the explosion of Fisher's shot might have lit the fuse of Costello's, and this suggestion was concurred in by the manager of the colliery, who said that it was possible when shots were so placed for the flame from the explosion of one to ignite the fuse of the other.

"It humbly appeared to me at the time when I issued my award that it was immaterial whether or not Costello was successful in his attempt to light the fuse of his shot, but my view on the evidence of Costello and Fisher, two experienced shot firers, and of the manager of the colliery, who supports the theory that Costello's fuse might have been lit by the explosion of Fisher's shot, is that he was unsuccessful. On reconsideration therefore I find in fact that Costello attempted to light but did not succeed in lighting the fuse attached to his shot."

On 28th January 1921 the case was again heard before the Second Division.

Argued for appellants—The shot had "missed fire" within the meaning of the statutory rule, because it had failed to explode within the normal time, and accordingly the pursuer had contravened the rule by returning to the shot before an interval of an hour had elapsed. The pursuer had

thus placed himself outside the sphere of his employment—*Smith v. Archibald Russell, Limited*, 1921, *supra*, p. 284, *per* Lord President (Clyde) at 286; *Waddell v. Coltness Iron Company, Limited*, 1912, 50 S.L.R. 29. The former of these cases was indistinguishable from the present and should be followed.

Argued for respondent—The pursuer had not succeeded in lighting the fuse of his shot, and the explosion of his shot may have been caused by the fuse having been ignited by the explosion of Fisher's shot. The pursuer's shot could not be said to have "missed fire." Accordingly the pursuer had not contravened the statutory rule. The accident therefore arose out of and in the course of the employment—*Smith v. Archibald Russell, Limited, per* Lord President (Clyde), *cit.*; *A. G. Moore & Company v. Donnelly*, 1920, 58 S.L.R. 85, *per* Viscount Finlay at 90; *Lynch v. Baird & Company, Limited*, 1904, 6 F. 271, 41 S.L.R. 214. *Fife Coal Company, Limited v. Colville and Others*, 1920, 58 S.L.R. 85, was distinguishable. In that case there was no finding in fact that the fuse had not been lit. When there was any doubt as to the meaning of a rule the rule ought to be construed favourably to the workman.

LORD JUSTICE-CLERK—In this case I really cannot say that I have arrived at an independent opinion upon my own grounds as to how the case should be decided, but I cannot see how, after the cases of *Waddell* (1912, 50 S.L.R. 29) and *Smith* in the other Division of the Court, we can follow any other course than recal the judgment of the arbitrator and answer the question in the negative. I proceed entirely upon the authority of these two cases because as I have said I have not arrived at any independent judgment of my own.

LORD DUNDAS—We have now the report of the learned arbitrator which we asked him to make. And I confess that I might have been left in a state of some doubt and difficulty as to what course I should pursue if it had not been for the recent decision of *Smith v. Archibald Russell* in the First Division. The case is not yet reported, but prints of the Stated Case and typed copies of the Judges' opinions were handed up to us.

We have to decide whether the facts as now ascertained bring the case within the operation of the rule, which is substantially quoted in paragraph 2 of the case, providing that several things are to happen if a shot misses fire. We know in the first place that the pursuer and another man proceeded to apply the light to their respective fuses. We also know now from the learned arbitrator that in fact Costello attempted to light, but did not succeed in lighting, the fuse attached to his shot. He was seriously injured when he went back to the place shortly after by his shot going off.

The question therefore seems to me to be—Did the shot miss fire? It does seem at first a strange and hard saying that a shot "missed fire" which exploded and injured a man. I think therefore one must conclude

that the phrase "miss fire" is not used in the regulation in exactly the same sense as in ordinary language. I should have found it puzzling to know exactly what it did mean, but I find my answer in the recent case of *Smith*, which appears to me to be binding upon us. I find this in the Lord President's opinion; he says—"I cannot read the findings as being consistent with any but a serious attempt having been made by the workman to ignite the fuse—such an attempt as would in ordinary circumstances have ignited it." Well I think we have a parallel case here. The man did attempt to ignite his fuse by applying a light to it. The Lord President then goes on to quote the part of the Order we are dealing with, and says this—"A shot 'misses fire,' in the sense of the latter paragraph, if it does not explode in the usual time. Firing the shot is the equivalent of igniting the fuse by applying a naked light, in the language of the Order. But what does the latter expression imply? I think it means such application of the naked light to the fuse as in ordinary circumstances will cause the fuse to take light. If this is not its true meaning the whole of the provisions of the Order on this topic become useless." Now that is a complete code of the meaning of "miss fire." Like your Lordship I prefer to proceed upon authority, because I am not certain—and I do not find it necessary to be certain at this moment—whether or not I should have been able to arrive independently at that result. But the case of *Smith* is not only authoritative but very recent, and I consider it to be binding upon us, and I think it solves the question which we have here to decide. I think we must take it that there was here a miss fire, that the facts bring the case within the operation of the rule, that the man was in breach of the rule, and, accordingly, that the accident did not arise out of and in the course of the employment, and that we must answer the arbitrator's question in the negative.

LORD SALVESEN—I come to the same result, and I should have done so whether the case that was recently decided in the First Division had been before us or not. I think it clearly followed from the judgment in the House of Lords that this man's action came within the statutory prohibition.

In the original case we had a statement of fact to the effect that each of the two men here, mates in this working-place, proceeded to apply a light to their respective fuses. Then it was further said that they thereupon retired to a place of safety. They heard the one shot go off and waited for between thirty and forty minutes "to allow the 'reek' to clear and to eat their 'pieces' and have a smoke." Thereafter they returned, and the shot to which the pursuer had applied his light then went off and injured him. These were the main facts found in the Stated Case as we had it originally before us, and I should have thought that on these facts the application of the rule was perfectly clear. I cannot say that I am impressed by the lawyer's subtleties that have been applied to the construction

of this rule, which I am quite sure is understood by everyone in practice.

I agree with the Lord President when he says that a shot misses fire when, after the usual means have been taken to ignite the fuse, it does not explode within the usual time. This particular shot undoubtedly missed fire within that definition, because it did not explode until thirty or forty minutes after the one to which the other light was applied, and which, I think it may be assumed without having an express finding to that effect, went off in ordinary course. It therefore missed fire, but if it missed fire then it is perfectly plain that the man who had applied the light to it was guilty of a contravention of the statutory rule in returning within the hour. After the hour he could have returned, and although the shot had then exploded he would not have been contravening his duty. But he was prohibited from going back to the place where he had left a fuse in the position that he had applied a light to it and nothing had followed the application of that light in the nature of exploding the shot.

But then it is said by the respondent that more light has been thrown upon the matter by the report which we got from the arbitrator later. I do not attach any value to that report, because it is a direct contradiction of what the same arbitrator had already said upon the same facts. In his original note, which is just as good for the purposes of this case as his report, he expressly held himself unable to find that the fuse was not lit. He said—what he has repeated—that the man honestly believed that it was not lit, but he found it impossible to go further than that. What is there that has changed his view upon that matter which was apparently plain to him then, and upon evidence that was fresher in his recollection than it could have been when he came to write his report? I find nothing except that there was a statement that it was possible that the fuse might have been ignited by the flame from the second shot which had gone off thirty or forty minutes before. But the honest belief that it was not lit, plus a possibility that it might be ignited in another way, is in my judgment no ground for inferring in fact and as a certainty that it was not lit—a thing that the arbitrator felt himself perfectly unable to say when he originally dealt with the case. I think his first opinion is the only one which could reasonably be pronounced on the evidence which he has summarised.

I think it would make this rule absolutely useless for the purpose for which it is framed—which is primarily the protection of the men against their own errors of judgment—if it received any other interpretation than that put upon it by the learned President of the First Division. It must always be a matter of uncertainty in such cases whether, when a light has been applied, it has been effectually applied. The statute says you cannot answer that satisfactorily until an interval of an hour has elapsed; you are not safe to go back until an interval of an hour has elapsed. After

that it may be assumed—it can never be a matter of absolute proof—that the fuse has not been effectually lit. Up to that time that cannot be assumed. That, I think, is the meaning of the rule, and I entirely agree with and adopt the reasoning of the Lord President in the case of *Smith* when he so decided, and gave what is to us an authoritative decision upon the true construction of this rule which has given rise to so much controversy in the past.

LORD ORMDALE did not hear the case.

The Court answered the question of law in the negative, sustained the appeal, reversed the determination of the Sheriff-Substitute as arbitrator, and remitted to him to dismiss the claim.

Counsel for the Appellants—Sandeman, K.C.—Graham Robertson. Agents—W. & J. Burness, W.S.

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

Wednesday, January 5.

FIRST DIVISION.

[Sheriff Court at Ayr.]

MARQUIS OF BUTE v. PRENDERLEITH.

Master and Servant—Landlord and Tenant—Ejection—Occupancy of House in virtue of Contract of Service—Termination of Service—Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 and 11 Geo. V, cap. 17), sec. 5 (1) (d), and proviso (i).

The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 and 11 Geo. V, cap. 17) enacts:—Section 5—“(1) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejection of a tenant therefrom, shall be made or given unless . . . (d) the dwelling-house is reasonably required by the landlord for occupation as a residence for . . . some person in his whole time employment . . . , and . . . the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available. . . . The existence of alternative accommodation shall not be a condition of an order or judgment on any of the grounds specified in paragraph (d) of this sub-section—(i) where the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment. . . .”

A gamekeeper whose contract of service had come to an end refused to vacate the house which he had occupied solely in virtue of his employment, and the occupation of which composed part of the remuneration paid to him for his

services, basing his right to remain on the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. *Held* that as he had occupied the house *qua* servant and not *qua* tenant, the Act had no application to his occupancy of the house, and warrant of ejection *granted*.

The Marquis of Bute brought an action in the Sheriff Court at Ayr against Andrew Prenderleith, craving warrant to summarily eject him from a house known as Pennylands, Auchinleck.

The parties averred, *inter alia*—“(Cond. 1) The defender was till 10th November 1919 in the employment of pursuer as a gamekeeper at a weekly wage of 35s., and in addition he occupied in virtue of his employment the house known as Pennylands foresaid belonging to pursuer, with fuel and cow's grass. Defender's answer is denied so far as inconsistent herewith. (Ans. 1) Admitted that the defender was in the employment of the pursuer as a gamekeeper from July 1907 till 10th November 1919, latterly at the weekly wage stated, and with fuel and cow's grass. Admitted further that the house Pennylands was let to him in virtue of his employment, and the rent thereof was counted in his remuneration. Explained that the said house is a dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 applies. The rateable value of said dwelling-house is £4 per annum. (Cond. 2) On or about 26th August 1919 the pursuer, through his head gamekeeper Andrew Law, gave verbal notice to the defender that in view of the sale of a large proportion of the farms on the estate his services would not be required after 10th November 1919, and that his occupancy of said house would terminate with his employment. (Ans. 2) Admitted that the head gamekeeper Andrew Law on or about the date mentioned intimated to the defender that his services would probably be dispensed with at 10th November 1919. Nothing, however, was said as to terminating the occupancy of house. (Cond. 3) The defender's employment with pursuer accordingly terminated on said 10th November 1919, although the pursuer paid him wages up till the end of November 1919. Defender's answer is denied so far as inconsistent herewith. (Ans. 3) Admitted that on 7th November 1919 the said Andrew Law intimated to the defender that his employment would cease on 10th November 1919. Admitted that wages were paid up till end of November 1919. Explained that on and after 11th November 1919 the defender continued to occupy said house. Averred that from and after said date defender became a yearly tenant of said house.”

The pursuer pleaded—“1. The defences are irrelevant. 2. The defender's possession of the said subjects having been incident solely to his service with pursuer, now terminated, and defender having no title to possess said subjects otherwise, pursuer is entitled to warrant with expenses as craved.”

The defender pleaded—“1. The defender's occupancy of said house being still current, and not having been ended by legal notice,