

effects of injuries by accident received by him on June 26, 1911, while in the employ of the respondents, and awarded compensation to the appellant.

The material facts are that between eight and nine o'clock on the morning of the 26th June 1911 all the men in the pit where Brown was working were ordered to ascend to the surface in consequence of a wreck in the shaft. On the way they were met by an official who told them to proceed by the communication road to the shaft of No. 1 Pit. They had to wait at a mid-landing for about an hour-and-a-half until the men from the lower seam, who usually ascended by this shaft, had been raised. At the mid-landing, during the period of waiting, a strong current of air blew in on Brown and his fellow miners. When the men reached the surface Brown complained of feeling cold, and died from pneumonia due to the chill incurred while waiting at the mid-landing. Under these circumstances the arbitrator awarded compensation to the appellant, but the Judges in the Second Division of the Court of Session in Scotland found that such award was not within the competency of the arbitrator.

It was not denied by counsel for the appellant that in order successfully to maintain a claim for compensation under the Workmen's Compensation Act 1906 there must be an accident in the ordinary popular meaning of that term, and an injury attributable to such accident. The accident relied upon is the wreckage of the shaft, and the injury the chill from which Brown took pneumonia and died. The answer of the respondents is that the wreckage of the shaft should be considered merely as an historical incident in the narrative of the case, and as too remote a factor to which to attribute the injury, and that in any case the injury cannot fairly be attributed to the wreckage of the shaft.

I cannot assent to this argument on behalf of the respondents. The delay in the landing where the chill was caught appears to me to be clearly attributable to the wreckage of the shaft, and but for such wreckage would not have occurred. The incidents are closely connected, and cannot be treated as independent and detached factors. On the other hand, it is not questioned that the delay on the landing in a draught did cause the injury which resulted in Brown's death. There are both the necessary elements to maintain a claim—a definite accident and injury fairly attributable thereto. It is not material that the wreckage of the shaft did not result in physical impact causing physical injury, or that no one could have foreseen the delay on the landing and the subsequent chill as a probable or natural result of the wreckage of the shaft. Such considerations do not arise in a claim under the Workmen's Compensation Act. The workman under the Act is as much entitled to compensation if death results from exposure consequent on and attributable to an accident as he would be if death had resulted from immediate physical injury.

A number of authorities were quoted by

the counsel for the appellant. It is only necessary to refer to two of them. The case of the *Victorian Railway Commissioners v. Coultas* was quoted as an authority for the doctrine that in ordinary accident cases some form of physical impact is a necessary element to found a claim for damage. The case does not appear to support this contention, nor do I think that any such contention could be supported. The following passage occurs in the judgment—“Their Lordships are of opinion that the first question, whether damages are too remote, should be answered in the affirmative, and on that ground, and without saying that impact is necessary, the judgment should have been for the defendants.”

The second case is the *Alloa Coal Company v. Drylie*. I am unable to distinguish this case from the present case. It cannot be material for the purpose of a claim under the Workmen's Compensation Act whether the chill resulted from exposure to a current of air or to cold water, so long as the exposure is attributable to the accident and has caused the injury on which the claim to compensation is founded.

In my opinion the appeal should be allowed, and the question of law stated by the arbitrator for the opinion of the Court should be answered in the affirmative.

Their Lordships, with expenses, reversed the interlocutor appealed against, and restored the award of the arbiter.

Counsel for the Appellant—A. Moncrieff, K.C.—Keith. Agents—Hay, Cassels, & Frame, Writers, Hamilton—Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

Counsel for the Respondents—The Lord Advocate (Munro, K.C.)—Harold Beveridge. Agents—W. T. Craig, Writer, Glasgow—W. & J. Burness, W.S., Edinburgh—Beveridge, Greig, & Company, Westminster.

Tuesday, April 28.

(Before Lord Dunedin, Lord Kinnear, Lord Atkinson, Lord Shaw, and Lord Parmoor.)

SMITH v. FIFE COAL COMPANY,  
LIMITED.

(In the Court of Session, February 21, 1913,  
50 S.L.R. 455, 1913 S.C. 662.)

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58)—Accident—“Arising Out of and in the Course of the Employment”—Mine.*

Under statutory rules a shot in a mine should have been fired in the following way:—The miner's duty was to insert and stem the detonator which was given to him by a duly appointed official called the shot-firer. The shot-firer's duty it then was to attach the end of the cable to the detonator, thereafter to couple up the other end of the cable, which had to be at least 20 yards in length, with

the electrical apparatus, having, however, before doing so seen that all persons in the vicinity had taken proper shelter.

A shot-firer was in the habit of getting the miners to attach the cable to the detonator. He handed a detonator and the end of the cable to a miner. The miner had inserted and stemmed the detonator and attached the end of the cable to it, and had turned round and was just going away for shelter when the charge was fired. The miner was seriously injured. The arbiter found that the accident arose out of the employment, and was not to be attributed to the miner having arrogated to himself duties outwith the sphere of his employment.

*Held* (rev. judgment of the Second Division) that the arbiter's finding was right.

*Kerr v. William Baird & Company, Limited*, 1911 S.C. 701, 48 S.L.R. 646, distinguished.

This case is reported *ante ut supra*.

The claimant Smith appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN—The facts as found by the arbitrator out of which this case arises are as follow—The appellant was a miner in the employment of the respondents. He worked at a working-face where from time to time blasting by means of a shot was necessary. On these occasions the proper procedure is as follows—The miner bores a hole, puts into it a detonator which is handed to him by the shot-firer—a duly appointed official—and stems or packs the detonator in the hole. The shot-firer then connects a cable with the detonator wire, which has been left protruding from the stemmed hole. Then proceeding to the other end of the cable, which is at least 20 yards in length, he couples the cable to an electric battery, and then, after seeing that all persons in the vicinity have taken proper shelter, he fires the shot by turning the handle of the electric apparatus.

What actually happened was this. The shot-firer, a man named Howard, in contravention of the regulations, permitted the appellant to connect the detonator wire with the cable. Thereafter, while the appellant was in the act of retiring from the face, Howard, deceived by a voice calling out, "All right, fire away," which voice was the voice of another man and not of the appellant, and without ocularly satisfying himself that the appellant was in safety, fired the shot. The result was that the appellant, who had not yet reached a place of safety, was severely injured.

In the circumstances the arbitrator found that the appellant had been injured by an accident arising out of and in the course of his employment.

An appeal was taken, and the learned Judges of the Second Division recalled the finding of the arbitrator.

I do not think it necessary to make any remarks of a general character upon the

phrase in the statute "arising out of the employment," because I did so with the approval of other members of your Lordships' House in the very recent case of *Plumb*, (1914, A.C. 62, at pp. 65-70) and I do not wish to repeat what I then said. Nor do I think that there was any divergence of opinion in the judgments of the learned Judges in this case from the law as then laid down. Taking the phrase as a test and not as a definition, it may, I think, be conceded that if the accident was due to the man arrogating to himself duties which he was not called on to perform and which he had no right to perform, then he was acting out of the sphere of his employment, and the injury by accident did not arise out of his employment. The sole question is, was this so in this case? or in other words, what is the true view of the facts?

I regret that I cannot come to the same conclusion as that come to by the learned Judges.

I think I can best make my view clear by taking the case of *Kerr v. Baird* (48 S.L.R. 646, 1911 S.C. 701) and contrasting it with this. In that case the miner arranged a shot and fired it entirely by himself—I mean without the presence or help of the shot-firer at any stage of the proceeding. It was held rightly that the accident was due to the action of the man, and that such action consisted in taking upon himself duties which he had no right to perform. Here, on the contrary, the miner did not arrange and fire the shot. One part of the composite action was his duty to insert and stem the detonator—and that he did. The next step—the connecting of the detonator wire to the cable—he had no business to do, and in doing it he did something which was not in the sphere of his employment. But two more stages are necessary before we arrive at the explosion which causes the injury and forms the accident, viz., the connecting of the cable to the battery and the putting the battery into efficient action by the turning of the handle, and both these stages are done by the shot-firer. In the circumstances I cannot bring myself to see that the efficient cause of the accident was connected with the arrogation of unauthorised duty by the miner.

It is true that no explosion could have taken place unless the cable had been connected with the detonator. But that is only a remote cause, *sine qua non*, and one in which the relation of the appellant to the act as distinguished from any other person is immaterial.

It seems to me that the question of fact which has got to be answered is this—Did the injury to the appellant arise out of the illicit and unauthorised action of the appellant? The answer to that, it seems to me, so far as the action of the appellant consisted in coupling the wire, is no. The injury arose from the premature explosion, and that premature explosion was caused by the action of the shot-firer.

The learned counsel for the respondents felt this difficulty and urged strenuously that the injury by the explosion to the appellant was really due to his, so to speak, *fingerüß*

in the place of danger, and that this lingering was due to the fact that he had taken upon himself the duty of connecting the wire to the cable. If he were right on the facts, I think his argument would be sound. But the facts are, in my judgment, as found by the arbitrator, against him. He was, I think, under the regulation, quite entitled to stay in the vicinity of his working-place till he was cleared out by the action of the shot-firer. As it was, he was in the act of leaving—an act which could only have been protracted for a few seconds by the connecting of the cable—and the whole mischief was caused by the premature action of the shot-firer.

I am therefore of opinion that the view of the facts taken by the arbitrator was correct, and that his finding should be restored.

LORD ATKINSON—I agree.

LORD SHAW—I concur. I have had the satisfaction of perusing the judgment which has just been read by my noble and learned friend Lord Dunedin and it exactly expresses my own view.

LORD PARMOOR—In an arbitration under the Workmen's Compensation Act 1906 the arbitrator has found that the appellant is entitled to compensation in respect of injury resulting from an accident arising out of and in course of his employment with the respondents. The Second Division of the Court of Session, upon a stated case, has negatived the appellant's right to hold the award of the arbitrator. The question of law for decision is whether there was evidence before the arbitrator upon which it could be competently found that the appellant sustained an accident arising out of and in the course of his employment. In answering this question it is necessary, in the first place, to ascertain what are the facts as stated or found by the arbitrator, and in the second place, to determine whether to the facts so stated or so found the arbitrator has rightly applied the provisions of the Workmen's Compensation Act.

The appellant was a miner in the employ of the respondents who suffered serious and permanent injury from the firing of a shot in the mine. When it was intended to fire a shot in the mine, the appellant as part of his ordinary employment would bore, charge, and stem the hole. In the present case he further attached the cable to the charge. In so doing he clearly acted outside the sphere of his employment, and in direct contravention of an Order of the 22nd February 1910 made by the Secretary of State for the Home Department under section 6 of the Coal Mines Act 1910. Under this Order a shot-firer had been properly appointed, whose duty it was to attach the cable to the charge, and to do so before coupling the cable to the firing apparatus. The shot-firer did not attach the cable to the charge, and before the cable was attached to the charge it had been coupled to the firing apparatus. There is a further provision in the Order that the shot-firer before firing a shot shall see that all persons in the vicinity have taken proper shelter. In this instance

the shot-firer heard a shout, "Right, fire away!" which he thought came from the appellant, but was in fact from a neighbouring miner, and addressed to that miner's drawer, who had informed him that a shot was to be fired in the vicinity. The shot was then fired. The appellant had not taken proper shelter and was seriously injured.

The arbitrator has found on the evidence before him that the cause of the accident was the connecting of the cable to the battery by the shot-firer before the cable was connected to the charge and before seeing that all persons in the vicinity had taken proper shelter, and firing the shot without ascertaining that all persons in the vicinity had taken proper shelter, and that at the time when the shot was fired the appellant was entitled to be at his working-place, and was proceeding to go to a place of safety.

The further consideration is, whether on this conclusion of fact it was competent for the arbitrator to award compensation under the Workmen's Compensation Act 1906, or, in other words, whether it was competent for the arbitrator to find that when the appellant suffered the injury on which he based his claim to compensation, he was doing some act arising out of or in the course of his employment. It is not seriously denied that the accident happened in the course of the employment of the appellant as a miner by the respondents. The real argument urged on behalf of the respondents is that the accident did not arise out of the employment of the appellant as a miner. If, however, the finding of the arbitrator is accepted, that the appellant was injured from the firing of a shot while proceeding to a place of safety, it appears to be impossible to maintain that the accident which caused the injury did not arise out of and in the course of his employment as a miner, and no such argument was directly advanced.

The argument for the respondents, when closely considered, is in reality based on a criticism of the finding of the arbitrator. It is said that the appellant in attaching the cable to the charge was doing something which he was never employed to do and which he was prohibited from doing at all. No doubt this is so, and if the accident had happened while the appellant was engaged in work outside the sphere of his employment, and which he was prohibited from doing at all, it would not have been competent for the arbitrator to award compensation either on principle or without contravening the authority of decided cases. The answer is that the arbitrator has negatived any such conclusion on the evidence before him, and that this finding was within his competence.

In my opinion the question of law should be answered in the affirmative and the appeal allowed.

LORD DUNEDIN—My noble and learned friend LORD KINNEAR desires me to say that he concurs in the judgment about to be pronounced.

Their Lordships, with expenses, reversed the interlocutor appealed against and restored the arbiter's award.

Counsel for the Appellant (Claimant)—The Lord Advocate (Munro, K.C.)—Hon. A. Shaw. Agents—Macbeth, Macbain, & Currie, Dunfermline—D. R. Tullo, S.S.C., Edinburgh—Walker, Son, & Field, London.

Counsel for the Respondents—The Solicitor-General (Morison, K.C.)—H. W. Beveridge. Agents—W. T. Craig, Glasgow—Wallace & Begg, W.S., Edinburgh—Beveridge, Greig, & Company, London.

## COURT OF SESSION.

Friday, March 27.

### FIRST DIVISION.

[Lord Cullen, Ordinary.]

MARTIN v. M'GHEE AND OTHERS.

(*Ante*, p. 223.)

*Process—Title to Sue—Interest—Expenses—Title of Pursuer's Representative to Sue on an Intransmissible Right.*

Where in the early stages of a case a pursuer dies, and there is no transmission of the right in respect of which the action is maintained to his representative, the Court will not allow the representative to follow out a litigation in which he can obtain no judgment on the proper subject-matter of the action.

James Martin, 75 Finnieston Street, Glasgow, *complainer*, presented a note of suspension and interdict against (first) Richard M'Ghee, 69 North Street, Lurgan, and another, the trustees of the National Sailors and Firemen's Union of Great Britain and Ireland, 178 Broomielaw, Glasgow, and (second) the said Union, *respondents*, in which he craved the Court to interdict the respondents from, *inter alia*, "asking, collecting, or receiving from the members or branches of said Union contributions or levies for the purpose of promoting labour representation in Parliament, or for the purpose of paying parliamentary election expenses for the purpose of securing or maintaining parliamentary representation, or for any other parliamentary or political purposes."

The complainer having died while the case was standing in the procedure roll, his widow, who had been appointed his executrix, lodged a minute stating that she desired to sist herself as complainer. On 29th November the Lord Ordinary (CULLEN) refused the minuter's motion. On January 31st the Court recalled the Lord Ordinary's interlocutor, sisted the minuter in terms of her minute, reserving all questions as to her right to insist in the cause, and continued the cause (see *ante*, p. 223).

Thereafter the cause was again heard, when it was argued for the reclamer—The case should be sent back to the Lord Ordinary to proceed. The Act of 1696, cap. 15,

took away the necessity for an act of transference in the case of representatives of a pursuer who were willing to sist themselves, and it substituted a minute and motion, and the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 96, provided similarly for the transference of actions against defenders—Mackay's Manual, 256-257; Shand's Practice, vol. ii, p. 538; *M'Culloch v. Hannay and Others*, December 24, 1829, 8 S. 122. When a pursuer died after litiscontestation, there was vested in his representatives a right to carry on the action—*Ritchie v. Ritchie*, March 11, 1874, 1 R. 826; *Stair*, iv, 40, 8; *Ersk.*, iv, 1, 69 and 70. If a pursuer had an interest when the action was raised, the Court did not minutely scrutinise his interest at later stages—*Goodall v. Bilsand*, 1909 S. C. 1152, 46 S. L. R. 555. Here the present pursuer had an interest to recover expenses incurred, and that was a sufficient interest—*Ammon v. Tod*, 1912 S. C. 306, 49 S. L. R. 244. But further, she had an interest in that if, as she maintained, the levies were illegal, the estate of her husband might be liable for his illegal actings, and it was to the interest of the estate to know that now rather than at some future date. Reference was also made to Consolidated Act of Sederunt, B I, 1 (p. 26).

Argued for the respondents—In the early stages of an action where no great expense had yet been incurred, and there was prospect if the action continued of considerable expense being incurred, the Court should not allow the representative of a deceased pursuer to insist in an action in the subject-matter of which the representative had not then either title or interest—*Dobie v. M'Farlane*, June 17, 1856, 18 D. 1043. The representative had not only no interest here but no title. She was not *eadem persona* with the deceased. The membership of the union was intransmissible, and accordingly, as she had no right in respect of which the action was maintained, she had no title to insist in it—Mackay's Manual, p. 259. In *Goodall (cit. sup.)* the question of interest was not argued, but in any case the pursuer there remained the same. In *Ritchie (cit. sup.)* it was clear that the trustees who were sisted had a patrimonial interest.

At advising—

LORD PRESIDENT—In this case we some time ago allowed the widow to be sisted as a party to the action in room and place of her husband. We expressly reserved the question of her right to insist in the action. She is the executrix-dative, and we considered that she was entitled, if she chose, to become a party to this action in order that she might state her case to us, and that we might have an opportunity of considering and deciding whether she should be allowed to prosecute the action to its end on the merits, or if not, whether she should be entitled to recover expenses. We have now heard a full argument upon that question, with the result that I am satisfied that the executrix-dative has no interest whatsoever in the merits of this action, and that a decree on the merits would be of no use or advantage to anybody. It would be idle