

purpose, and he did not cease to be in the course of his employment in so doing—*Keenan v. Flemington Coal Company, Limited*, December 2, 1902, 5 F. 164, 40 S.L.R. 144. Nor did he cease to be in the course of his employment because he took a wrong and dangerous method of doing what he was entitled to do—*Durham v. Brown Brothers & Company, Limited*, December 13, 1898, 1 F. 279, 36 S.L.R. 190; *Sneddon v. Greenfield Coal and Brick Company, Limited*, 1910 S.C. 362, 47 S.L.R. 337. The accident to the appellant must therefore be said to arise out of and in the course of his employment unless he could be held to be guilty of serious and wilful misconduct, and there was no finding to that effect.

Counsel for the respondents were not called on.

LORD JUSTICE-CLERK—I think this is a very clear case, and I do not think there is here any question of serious and wilful misconduct. That question might have arisen in circumstances such as these, but no such question arises here.

This man left the place where he was at work and went to another place for a necessary purpose. It cannot be said with any show of reason that he did that because the masters had not provided any suitable place for that purpose, for the masters had done so. He went into a place which is described by the arbitrator, the Sheriff, as being a place beneath the table engine, the space between the ground and the roof being from 3 feet 7 inches to 4 feet 5 inches, and the floor space being extremely small and uneven, and there being a quantity of hot water near the floor. What followed was that he made a mistake—he put his foot into the boiling escape water from the engine and scalded his foot badly.

Now I cannot hold that when he went into that place he did so in the course of his employment. It would be a different thing altogether if he had been going from one place to another in the works. If a man goes from his working place to another place in the works he must get back to his work, and if in going back he meets with an accident, that is an accident arising in the course of his employment, just as in the case of an accident happening after he has entered the works in the morning and while he is proceeding to his own place in the works.

But to say that a man going rashly and foolishly into any place in the master's works, and particularly into such a place as is described here, is necessarily in the course of his employment, unless you can say that he was guilty of serious and wilful misconduct in going to that place, is a proposition which I cannot for a moment accept.

I do not think the cases which have been quoted to us in the least touch the decision in this case. It seems to me that the decision in this case was the only decision which could be reasonably arrived at by the arbitrator, and I would move your Lordships to refuse this appeal.

LORD SALVESEN—I am clearly of the same opinion. I agree with your Lordship that the question here is whether the accident arose in the course of the employment, and it is quite clear from the circumstances detailed by the arbitrator that it did not.

If the question were one as to whether the appellant had been guilty of serious and wilful misconduct, I should not have hesitated to affirm, as at present advised, the proposition that a person going for a purpose such as this into a place so obviously unsuited for the purpose was guilty of serious and wilful misconduct, and must take the consequences of the risks to which he quite unnecessarily and most rashly exposed himself. But it is unnecessary for the decision of this case to pronounce definitely upon that matter, because it is sufficient that the accident did not arise in the course of his employment.

LORD SKERRINGTON concurred.

LORD ARDWALL and LORD DUNDAS were absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Watt, K.C.—T. D. King Murray. Agent—D. Maclean, Solicitor.

Counsel for the Respondents—Horne, K.C.—Strain. Agents—W. & J. Burness, W.S.

Tuesday, May 16.

## FIRST DIVISION.

(SINGLE BILLS.)

WALKER v. MURRAYS.

(Ante, March 8, 1911; *supra*, p. 575.)

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58)—Refusal to State a Case.—Circumstances in which the Court Refused an Application for an Order to State a Case on the Ground that it Failed to Disclose Facts from which an Accident was Necessarily to be Inferred.*

The case is reported *ante ut supra*.

On 16th May 1911 Ellen Storey Walker, the claimant, presented an amended note, in which she stated that the facts proved in respect of which the claim for compensation was founded were as follows:—“(1) The deceased, who was sixty-four years of age at the date of his death, suffered for many years from hernia, which in January 1909 necessitated the operation known as the radical cure. (2) He was discharged as cured, and thereafter resumed his work, part of it manual, as farm steward at Mervinlaw, Jedburgh, and for a year was free from symptoms of hernia and did not require or wear a truss. (3) In January 1910, on several occasions, a small rupture on his right side

came down after slight exertion but could be returned without assistance. Deceased accordingly resumed wearing a truss and was never off work owing to said rupture. (4) In February 1910 an improvement was made in the pad of said truss, and thereafter said rupture remained up until it came down on 27th April 1910. (5) On 12th April 1910 he had an attack of catarrhal jaundice, from which he recovered by 25th April. (6) On 27th April he walked, apparently quite well and wearing his truss, 2½ miles over moorland to Ashtrees Farm to fetch a sow belonging to respondents. (7) He drove said sow home loose in front of him, with the assistance—for about half the distance—of the farmer at Ashtrees. (8) The route taken was not that of the outward journey, but like it was a track over rough moorland crossed by sheep drains and gullies. (9) About a mile and a half from home, there being still to be traversed two gullies and several sheep drains and such heather bents and bracken as necessitated high-stepping and rendered stumbling more than probable, said farmer left deceased, who drove said sow the remainder of the journey alone. (10) During said mile and a half said rupture came down and became strangulated, as certified by medical certificate. Deceased intimated his condition to pursuer immediately after his return. He also complained of feeling 'fair done.' (11) Deceased was operated on for strangulation, but died of exhaustion following on the operation, all on 29th April. (12) Determining factors of hernia and strangulation are exertion and strain."

The note further stated— "The learned arbiter held that in the absence of evidence of something overt having occurred, such as a fall, jerk, or stumble, he was not entitled to draw the inference that deceased had met with an accident."

The questions of law proposed to be submitted for the opinion of the Court were— "Whether the arbiter was not entitled to draw the inference that there was an accident? and Whether on the facts above set forth such was not the necessary inference to be drawn, and that the claimant was accordingly entitled to compensation under said Act?"

The respondents objected to the amended note on the ground that it still failed to disclose any facts from which an accident was necessarily to be inferred.

Argued for appellant—The facts proved were such as would entitle an arbiter to infer that an accident had happened. The deceased, who was wearing a truss and who had in the course of his employment to traverse some very rough moorland, came home ruptured. *Esto* that no fall or stumble was averred, that was immaterial, for the mere slipping of the truss, and the consequent rupture, would be an accident in the sense of the statute—*Stewart v. Wilsons and Clyde Coal Company, Limited*, November 14, 1902, 5 F. 120, 40 S.L.R. 80. Direct evidence was not necessary, provided the reasonable inference was that an accident had happened—*Grant v. Glasgow*

and *South-Western Railway Company*, 1908 S.C. 187, 45 S.L.R. 128; *Mackinnon v. Miller*, 1909 S.C. 373, 46 S.L.R. 299. *Esto*, however, that something overt must be averred, enough was averred here, for very little would suffice—*Clover, Clayton, & Company, Limited v. Hughes*, [1910] A.C. 242. [LORD KINNEAR referred to *Wakelin v. London and South-Western Railway Company* (1886), L.R., 12 A.C. 41, per Lord Watson at p. 49.]

LORD PRESIDENT—I need not recapitulate the facts of this case, for they are dealt with in our judgment in the earlier stage of the case, which is fully reported.

Mr Gillon has taken advantage of the allowance given him to put in an additional minute, and that minute has been written with great frankness, and has carefully, I think, not gone one inch beyond what could be proved. I am therefore content to take it as if the facts stated in the minute had been embodied in findings by the Sheriff. All the facts in the minute were undoubtedly before the Sheriff, and the Sheriff found that there was no such proof of facts before him as drove him to the inference that the man's death was occasioned by an accident arising out of his employment. The Sheriff went on to say that he did not think it was necessary to state a case, because it was a mere question of fact. Whether he was right in that or not it is not necessary to inquire, if we are now taking it as if all these facts had been stated by him in a stated case; and I confess I think there is no material that would at all justify us in finding that the Sheriff was wrong.

The matter always remains that there is an *onus* of proof upon the applicant, and although, of course, the proof need not be direct, although it is enough if facts are proved from which any reasonable man ought to deduce a certain thing, still I think here the facts fall short of those that render any such inference a necessity. It is quite true, and I think it is quite consistent with the facts to suppose, that the inducing cause of the rupture might have been a strain which was met with by this man during the course of his employment; but, on the other hand, the strain might have been caused by something outside of his employment.

In the next place, I do not think it is shown that it may not be possible for an old rupture to come down without what I may call any peculiarly exciting cause exterior to the man; but apart from that it is quite evident that there might be forms of strain other than those arising out of his employment, such as, for instance, a severe attack of sickness or other things which might produce a strain sufficient to affect the rupture; and I confess I think the passage quoted by Lord Kinnear in the course of the debate from *Wakelin v. London and South-Western Railway Company*, 1866, 12 A.C. 41, is very much in point. There, in an action on the ground of negligence, Lord Watson pointed out that although it was very probable that the

accident was due to that negligence, yet it could not be shown that it was so. In other words, the man there, who met his death by being knocked down by a train, might and probably did go through the gates negligently left open, but he might also have got over a fence half-a-mile away and walked along the line. In this case the rupture might have come down because he ran after the straying sow, but it might have come down through disease or through a mere fit of sneezing; we know nothing about it, and on the whole I do not find facts here which drive me to the inference that the death was caused by an accident arising out of and in course of his employment. I am therefore of opinion that the note should be refused.

LORD KINNEAR— I am of the same opinion. I think the question must be considered in exactly the same way as if we had before us a statement of facts by the Sheriff in a special case to the same effect as the statement made by the applicant, and raising the same questions as the applicant desires to raise.

Now I think the result of the statement contained in the note really comes to this, that this man was ruptured; that the rupture became strangulated after he had, in the course of his employment, walked for five and a half miles over rough ground to fetch a sow belonging to his employer; that there were materials before the Sheriff from which he might have thought that there were strong reasons for conjecturing that the strangulation had been caused by the exertion and strain involved in this walk over the rough ground; but that the Sheriff also thought that although there might be ground for such conjecture there was no evidence before him from which he ought to draw the inference the strangulation was in fact so occasioned. Now if that was the state of the Sheriff's mind, the question for him was one of fact and of fact alone, and I do not think it is possible for this Court to say that the Sheriff was wrong. I think it would be quite out of the question to say that no reasonable judge could have come to the conclusion that the accident was not proved.

LORD JOHNSTON— Assuming, though by no means admitting, that, on the facts set forth, the Sheriff might have been entitled to draw the inference that an accident had occurred to the deceased, I do not think it is possible to say that on the facts set forth such was a necessary inference or one which in law the minister should have drawn, and, that being so, I agree with your Lordships that this note should be refused, as it would be futile to require the Sheriff to state a case which it is clear must be refused.

LORD MACKENZIE— I am of the same opinion, upon the ground that the facts set out in this note are not sufficient to entitle us to interfere with the conclusion reached by the Sheriff.

The Court refused the prayer of the note.

Counsel for Appellant— Gillon. Agent— James D. L. Melrose, W.S.

Counsel for Respondents— Moncrieff. Agents— Fraser, Stodart, & Ballingall, W.S.

Wednesday, May 17.

## SECOND DIVISION.

[Lord Mackenzie, Ordinary.]

STEELE (RAMSAY'S JUDICIAL FACTOR) v. KER AND OTHERS (SMITH'S TRUSTEES).

*Process— Multiplepoinding— Lodging of Claims— Claim Lodged after Decree of Ranking and Preferring had Become Final— Claim by Judicial Factor to Administer— Competency.*

In an action of multiplepoinding raised by the judicial factor on a trust estate an interlocutor was pronounced on 22nd January 1910 which, *inter alia*, ranked and preferred a bank as assignees of A to one-half of the fund *in medio*. No reclaiming note was presented against this interlocutor. On 19th March 1910 the judicial factor lodged a claim in which he founded on an assignation by A, in favour of the testamentary trustees whom he represented, prior in date to that in favour of the bank, and claimed to be ranked and preferred to a certain extent on any sum to which the bank should be found entitled.

*Held* that the interlocutor of 22nd January 1910 having become final, the claim for the judicial factor could not be received either by the Lord Ordinary, or in the Inner House on a reclaiming note against the interlocutor of the Lord Ordinary rejecting the claim.

*Dymond v. Scott, &c.*, November 23, 1877, 5 R. 196, 15 S.L.R. 96; *Hall's Trustees v. Macdonald*, March 8, 1892, 19 R. 567, 29 S.L.R. 465, *distinguished*.

In 1909 Henry Moncrieff Steele, C.A., judicial factor on the trust estate of the late Andrew Ramsay, raised an action of multiplepoinding with reference to the fee of part of the testator's estate.

A claim to be ranked and preferred to one-half of the fund *in medio* was lodged by the British Linen Bank, who maintained that in terms of the residuary clause in the trust-disposition and settlement of the deceased Andrew Ramsay one-half of the fund *in medio* vested in John Crawford Hunter, who died in 1890, and was transferred to the bank by a bond and disposition in security for a cash credit of £17,000 dated 25th December 1878, by which the said John Crawford Hunter conveyed to the bank his whole right and interest in the residue of the deceased Andrew Ramsay's estate, and in which the balance due in 1909 exceeded £9000.