SUMMER SESSION, 1911.

COURT OF SESSION.

Saturday, May 12, 1911.

SECOND DIVISION.

[Sheriff Court at Hamilton.

THOMSON *v.* FLEMINGTON COAL COMPANY, LIMITED.

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*"—*Workman Leaving Work for Necessary Purpose and Going to Unsuitable Place Instead of Place Provided.*

A workman while on duty attending to boilers at a colliery left his work for a necessary purpose, and instead of going to the nearest w.-c. went into a confined space underneath a table engine, where he accidentally plunged his foot into boiling water in a cistern, which, sunk in the ground underneath the engine, was used to receive the escape hot water from the engine.

Held that the accident did not arise out of and in the course of the employment within the meaning of section 1 (1) of the Workmen's Compensation Act 1906.

Opinion (*per* Lord Salvesen) that in any event the workman had been guilty of "serious and wilful misconduct" within the meaning of section 1 (2) (c) of the Workmen's Compensation Act 1906.

In an arbitration in the Sheriff Court at Hamilton under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in which William Thomson claimed compensation from the Flemington Coal Company, Limited, the Sheriff-Substitute (THOMSON) refused compensation, and at the request of the claimant stated a case for appeal.

The following *facts* were found proved or admitted—"(1) That the appellant, who was employed to attend to the boilers at defenders' Gateside Colliery, on 2nd June 1910, about 2 A.M., left his work for a necessary purpose. (2) That instead of going to the nearest w.-c., which was about 70 yards away, he went into a place below 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. (3) That in the floor of this place there is, and has been for years, an uncovered brick-lined cistern or receptacle about 3 feet in length, by 2 feet 6 inches in width and 2 feet in depth, which is sunk into the ground, and receives hot escape water from the engine above; the water usually stands about 2 feet in depth in this cistern, and is always hot, and sometimes approaches the boiling point. (4) That the appellant, who says he was only once before in this place for such a purpose, in some way plunged his foot into the water in the cistern, with the result that his foot was scalded, and he has since been incapacitated for work. (5) That water-closets are provided for the men, and that the two which were nearest to the appellant's working-place were found to be in good order on the morning of the accident. (6) That the men, however, frequently resort for necessary purposes to the adjoining field or to the top of the bing instead of going to the water-closets, but there is no evidence that anyone ever before resorted to the place where the accident happened for such a purpose."

On these facts the Sheriff-Substitute found that the accident did not arise out of and in the course of the employment, and dismissed the application, with expenses.

The *question of law* for the opinion of the Court was—"Was the Court right in holding in the circumstances that the accident to the appellant did not arise out of and in the course of his employment?"

Argued for the appellant—The accident was in the course of the appellant's employment if it occurred while he was doing what he might reasonably do—*Moore* v. *Manchester Liners, Limited*, 1910 A.C. 498, *per* Lord Chancellor Loreburn at p. 500; *M'Lauchlan* v. *Anderson*, February 1, 1911, 48 S.L.R. 349. The appellant here might reasonably leave his work for a necessary

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 Mervinslaw, 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