give effect to this opinion. . . . Upon the whole matter I think that the interlocutors of the Sheriff and Sheriff-Substitute should be recalled and that we should find that the pursuer has failed to prove that the defender is the father of her child.

LORD KINNEAR—I entirely agree. . . . I only wish to add that I agree with the view expressed by Lord Mackenzie as to the course which the learned Sheriff has thought it right to follow in this case. Whether an appeal should be allowed or not upon questions of fact is not for the Courts but for the Legislature to determine. And so long as an appeal on a matter of fact is allowed, it is the plain duty of the judge of appeal to apply his own mind to all the materials of fact which may be brought before him and to pronounce his own judgment. I do not think a judge of appeal, before whom a question of fact is properly laid, is entitled to withhold the benefit which the law gives to the person aggrieved by the judgment below and to refuse to give his own opinion upon the evidence. Of course he may attach—as we always do attach—the greatest possible weight to the opinion of the judge who has seen and heard the witnesses, and there may be particular facts upon which the Court of Appeal may reasonably accept the opinion of the judge simply because it is his, but that is only when it is apparent from the judgment that he has been moved by considerations which cannot be brought fully, if at all, before the Court of Appeal. It is a totally different thing to say that the Court of Appeal is to suppress its own perception of the ordinary probabilities of conduct and results, out of deference to an opinion which it is called upon to review.

LORD PRESIDENT—I agree, and I do not think it necessary to repeat what Lord Mackenzie has said.

LORD JOHNSTON was not present.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, found that the pursuer had failed to prove that the defender was the father of her illegitimate child, and therefore assoilzied the defender from the conclusions of the action.

Counsel for Pursuer and Respondent—Solicitor-General (Anderson, K.C.)—Wark. Agents—Menzies, Bruce Low, & Thomson, W.S.

Counsel for Defender and Appellant—D. Anderson, K.C.—C. H. Brown. Agents—Macpherson & Mackay, S.S.C.

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*Wednesday, July* 16.

## FIRST DIVISION.

[Sheriff Court at Forfar.

## M'DIARMID *v.* OGILVY BROTHERS.

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

A was employed to work at a mangle, his duties being to bring the cloth to the machine and to help in putting it on and in taking it off the roller. It was no part of his duty to be inside the rails in front of the mangle or to interfere with the machine while the cloth was in it. On certain days and at certain fixed times A had to assist B, the headman, in cleaning the machinery when it was stopped for the purpose. Cleaning the machinery when in motion was strictly prohibited, and a notice to that effect was placed opposite the mangle. On a day which was not one of the cleaning days, and when B was out of sight, A placed himself within the rails and attempted to clean the mangle, and was injured.

*Held* that the accident did not arise out of and in the course of his employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Robert M'Diarmid, factory worker, Kirriemuir, *respondent*, and Messrs Ogilvy Brothers, manufacturers, Kirriemuir, *appellants*, the Sheriff-Substitute (TAYLOR) awarded compensation, and stated a Case for appeal.

The *facts* were as follows:—"1. That the respondent was in the employment of the appellants at a weekly wage of 19s. He entered their employment on 2nd December 1912. 2. That the respondent worked at a mangle as underman or beamer along with and under William Burnett as headman. 3. That the mangle at which they worked has three rollers. 4. That at a distance of 4 feet from the mangle there are rails. 5. That the middle roller, called the beamer-roller, moves on slides, and is moved out for the cloth to be passed over the rails and rolled on to it. 6. That while the process of mangling the cloth is going on there is no motion on the slides. 7. That after the cloth is on the beamer-roller it is moved back between the two other rollers. 8. That the cloth is then mangled by an alternate forward and reverse motion of the mangle. 9. That after it is mangled the cloth is rolled on to a fourth roller, called the stripper-roller, which is fixed above the mangle, and this is then unfixed and carried away to a rack with the cloth on it. 10. That part of the beamer's duties is to bring the cloth to the machine, to help to put it on the beamer-roller, to help to take it off on to the stripper-roller, and to carry the latter to the rack with the assistance of the head-

man. In addition he is under the general orders of the headman. 11. That it is no part of the beamer's duty to be inside the rails while the machine is working. 12. That it is no part of the beamer's duty to interfere with the machine while the cloth is in it. 13. That it was part of the respondent's duty to assist Burnett in cleaning the machinery of the mangle at certain fixed times, viz., Tuesday, 4·30 to 5·30 a.m., and Friday, 4·30 to 5·30 a.m., when the machinery was stopped for the purpose. 14. That there are also fixed times during the day-shift on Wednesdays and Saturdays, when the machinery is stopped for the purpose of having it cleaned. Respondent was engaged during the night. 15. That when engaged on 2nd December 1912 the respondent was told by the foreman, John Farquhar, who engaged him, on no account to clean anything while the machinery was in motion. The respondent had no previous experience of factory work. 16. That there was a notice opposite the mangle at which respondent worked in the following terms:—'Cleaning machinery in motion and cleaning or any other work (except by specially engaged sweepers) during meal hours strictly prohibited.' 17. That on 23rd January 1913, while Burnett was out of his sight on the other side of the mangle, the respondent, acting without any orders from Burnett, placed himself within the rails and attempted to clean the slide of the mangle with a piece of waste, whereupon the loose waste was caught by the roller and his right hand was drawn into the machine by the motion of the rollers. 18. That the respondent's right hand was severely injured by the accident, and after treatment was required to be amputated as a result of the accident, and was amputated on 26th January 1913."

The Sheriff-Substitute further stated—"On these facts as proved I found that the accident to the respondent was one arising out of and in the course of his employment with the appellants, and awarded compensation to the respondent accordingly."

The *question of law* was—"Whether I was right in holding that the respondent was injured by accident arising out of and in the course of his employment?"

Argued for appellant—The respondent had exposed himself to risks which were not reasonably incident to his employment by arrogating to himself duties which he was neither engaged nor entitled to perform. That being so, the Sheriff-Substitute was in error in awarding compensation—*O'Brien* v. *Star Line, Limited*, 1908 S.C. 1258, 45 S.L.R. 935; *Lowe* v. *Pearson*, [1899] 1 Q.B. 261; *Furniss* v. *Gartside & Company, Limited*, (1910) 3 B.C.C. 411; *Revie* v. *Cumming*, 1911 S.C. 1032, 48 S.L.R. 831; *Kerr* v. *William Baird & Company, Limited*, 1911 S.C. 701, 48 S.L.R. 646; *Naylor* v. *Musgrave Spinning Company, Limited*, (1911) 4 B.C.C. 286; *Barnes* v. *Nunnery Colliery Company, Limited*, [1912] A.C. 44; *Burns* v. *Summerlee Iron Company, Limited*, 1913 S.C. 227, 50 S.L.R. 164; *Smith* v. *Fife Coal Company, Limited*, 1913 S.C. 662, 50 S.L.R. 455. The cases of *Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 661, 48 S.L.R. 632; *Harding* v. *The Brynddu Colliery Company, Limited*, [1911] 2 K.B. 747; and *Mawdsley* v. *West Leigh Colliery Company, Limited*, (1911) 5 B.C.C. 80, were distinguishable, for there the workman was acting within the sphere of his own employment. It was no part of the respondent's general duty to clean the mangle. He was only entitled to assist in cleaning it, and that at certain fixed hours and on certain days. The day on which he was injured was not a cleaning day. *Esto* that if in furtherance of the work he was engaged to perform he had disobeyed an order and been injured he would have been entitled to compensation, it was otherwise where, as here, he had arrogated to himself duties he was not entitled to perform.

Argued for respondent—*Esto* that the respondent was not entitled to clean the machinery on that particular day and at that particular time, it was part of his general duty to act as assistant cleaner. He had not therefore, as the appellants maintained, arrogated to himself duties outside the scope of his employment. *Esto* that he would not have been entitled to compensation if (1) he had engaged in work other than that he had been engaged to perform—*Lowe* (*cit.*), *Kerr* (*cit.*)—or (2) if in doing his own work he had gone into territory with which he had nothing to do—*O'Brien* (*cit.*)—or (3) if he had acted solely for his own purposes—*Barnes* (*cit.*), *Naylor* (*cit.*)—he had not done so here. The mere fact that he had disobeyed an order and had attempted to clean the machinery when in motion was not sufficient to disentitle him to compensation—*Conway* (*cit.*), *Harding* (*cit.*), *Mawdsley* (*cit.*).

At advising—

LORD PRESIDENT—The facts here are exceedingly clearly set forth by the learned Sheriff who acted as arbitrator. The respondent worked at a mangle as an underman or beamer. The duties of the underman or beamer are set forth, and are "to bring cloth to the machine, to help to put it on the beamer-roller, to help to take it off on to the stripper-roller, and to carry the latter to the rack with the assistance of the headman." And then the learned Sheriff adds—"It is no part of the beamer's duty to be inside the rails while the machine is working. It is no part of the beamer's duty to interfere with the machine while the cloth is in it." Now what happened was that while the machine was working and the cloth was in it, the respondent, without any orders from his superior, placed himself within the rails and attempted to clean the slide of the mangle with a piece of waste, whereupon his hand was caught by the roller and was injured.

In these circumstances I am very clearly of opinion that the respondent was acting outside the scope of his employment, and that there is no liability. There are various other things said which it is necessary that I should advert to. There was a notice put

up beside the mangle that cleaning of machinery in motion was strictly prohibited. The respondent had also been told that he was never to clean the machinery when in motion. I do not think that the disregard of those prohibitions would have taken away the liability if it had existed. It has often been held that mere disobedience is not enough. The point is, Was the workman within the scope of his employment? Now it was no part of the respondent's duty—it is so found by the arbitrator—to clean the machine at all except that upon certain days, namely, on Tuesday from 4·30 to 5·30 A.M., and on Friday from 4·30 to 5·30 A.M., it was his duty to help somebody else to clean it, the machinery being stopped for that purpose. Now the time when he was hurt was not at one of those times; it was a different time altogether.

I think that that is what distinguishes this case entirely from the case which, not unnaturally, was cited by the learned counsel for the respondent, namely, the case of *Mawdsley* v. *West Leigh Colliery Company* (5 B.W.C.C. 80). There the deceased workman was employed to oil a mortar mill, but was told not to oil it while it was in motion. He did oil it while it was in motion, and he was hurt. The point of the case is put by Lord Justice Fletcher Moulton, and their Lordships held that it was a mere disobedience of an order. Now in this case the respondent had no general employment to clean the machine, but a special employment to clean the machine for an hour early on the morning of Tuesday and an hour early on the morning of Friday, when special preparations were made. What I wish to say is this, that the respondent could be under no mistake as to whether he was doing his duty. He could not think he was doing the duty of a Tuesday or a Friday morning; he was doing something on another day which he knew was not his duty.

The test has often been put—I do not know that I need say much more about it, because I have said every thing that I could say in the two cases of *Conway* v. *Pumpherston Oil Company Limited* (1911 S.C. 660), and *Kerr* v. *William Baird & Company Limited* (1911 S.C. 701). In *Kerr's* case I expressed it in this way—whether the man was arrogating to himself duties which he was neither engaged nor entitled to perform. The matter is put still more briefly by Lord Moulton, then Lord Justice Fletcher Moulton, in the case of *Barnes* v. *The Nunnery Colliery Company, Limited* (4 B.W.C.C. 43). His Lordship says this—"The boy was only guilty of disobedience. Was this out of the scope of his employment, or only a piece of misconduct in his employment?" Now I think that is the test, and taking that test I have no doubt whatsoever upon the facts here that this was not a piece of misconduct in the employment, but that the respondent was doing something which he knew perfectly well he was not engaged to perform and that he was not entitled to perform. I am of opinion that the appeal here must be allowed.

LORD KINNEAR — I am of the same opinion.

LORD JOHNSTON—The Sheriff as arbitrator found, in the circumstances which your Lordship has fully narrated, that the accident which occasioned the injury to the respondent in this case, was one arising out of and in the course of M'Diarmid's employment, and awarded compensation accordingly.

I do not think that this award can be supported. As the respondent deliberately engaged in work which he was not employed to do, but on the contrary was forbidden to do, and which there was no emerging necessity for his doing, notwithstanding that the accident may have occurred in the course of his employment, it cannot be said to have arisen out of his employment. By his own unauthorised act he created a risk which was not incidental to his employment. The case is *a fortiori* of *Smith* v. *Fife Coal Company*.

LORD MACKENZIE—I agree with your Lordship in the chair. As I read the facts stated in the case this is not the case of a workman making a mistake while doing his own work, but the case of a workman doing what was not his own work.

The Court answered the question of law in the negative.

Counsel for Appellants—Sandeman, K.C.—A. R. Brown. Agent—Francis G. Sutherland, W.S.

Counsel for Respondents—Wark—T. G. Robertson. Agents—J. & J. Galletly, S.S.C.

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*Thursday, July 17.*

## FIRST DIVISION.

[Lord Ormidale, Ordinary.

## KENNEDY *v.* SHOTTS IRON COMPANY, LIMITED, AND OTHERS.

*Reparation — Property — Common Stair — Accident Caused by Defective Railing — Sub-Lease — Liability of Landlord and Mid-Tenant respectively—Possession and Control.*

A landlord let a block of buildings consisting of eight houses to a tenant, who sub-let the houses. A child visiting one of the sub-tenants met with an accident through the defective condition of the railing of an outside stair which constituted the approach to two of the said houses. The father of the child sued both the landlord and the mid-tenant for damages in respect of the accident.

*Circumstances* in which *held* that the mid-tenant had possession and control of the stair to the exclusion of the landlord, and was accordingly alone liable.