Saturday, June 27.

FIRST DIVISION.

[Sheriff Court at Ayr.

WILLIAM BAIRD & COMPANY, LIMITED *v.* ROBSON.

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*"—*Mine.*

A drawer whose duty it was to wheel loaded hutches to a lye and to take the empty hutches from the lye to the working face, found on arriving at the lye with a loaded hutch that it was impossible, owing to the lye being full, to get out an empty one. Instead of waiting for the pony driver, whose duty it was to remove the loaded hutches from the lye, he proceeded, in order to get out an empty hutch, to "let down" the loaded hutches himself, and in doing so was injured. The evidence showed that it was the practice for the drawers, when they found the lye full and wished to get out an empty hutch, not to wait for the pony driver but to "let down" the loaded hutches themselves. There was no written rule or order against "letting down," and it was not proved that the practice was unknown to the managers.

Held that the accident arose out of and in the course of the employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in which Arthur Robson, drawer, Auchinleck, *respondent*, claimed compensation from William Baird & Company, Limited, coalmasters, Auchinleck, *appellants*, the Sheriff-Substitute (BROUN) at Ayr awarded compensation and at the defenders' request stated a case for appeal.

The Case set forth the following *facts* as admitted or proved:—"1. The respondent was a pit drawer employed by the appellants in No. 2 Highhouse Pit, Lugar, belonging to them. 2. Each miner at the coal face is assisted by a pit drawer. Besides other duties, the drawer wheels the hutch, after it has been loaded at the coal face, along a line of rails to the lye, and brings back in its place an empty hutch from the lye. From the other end of the lye the rake or row of loaded hutches is removed from time to time by the pony driver with his pony after he has brought a string of empty hutches into the lye. 3. The line of rails on which the loaded hutch is taken to the lye by the drawer runs right through the lye, and on the same line of rails after it passes through the lye the pony driver takes away the loaded hutches. 4. In the lye there is a second line of rails alongside the first line. This second line of rails joins the first line at the end of the lye furthest from the coal face. On to this second line of rails the string of empty hutches is run by the pony driver. At the end of the lye nearest the coal face the second line of rails stops at an iron plate placed on the ground between the two lines of rails. Over this plate the drawer, after bringing in his loaded hutch, has to pull the empty hutch in order to get it on to the first line of rails and take it back to the coal face. 5. The lye dealt with in this case was on a slope so that the drawer brought the loaded hutch downhill into the lye and took away the empty hutch uphill. For the same reason the pony driver brought the line of empty hutches uphill into the lye, and removed the loaded hutches downhill. 6. In order to prevent the loaded hutches running out of the lye by the force of gravitation, a fixed block with a hinged arm stretched across the rails was placed on the first line of rails. 7. Seven or eight loaded hutches could be placed in the lye above the block on the first line of rails. The second line of rails, from where it diverged from the first till it stopped at the iron plate, could hold nine or ten hutches. 8. When the pony driver removed the rake of loaded hutches from the lie he coupled together the hutches he intended to remove, then he put four snibbles or short bars of iron, with which he was provided, between the spokes of the hutch wheels to prevent the wheels running round. He then with his foot moved the swinging arm of the block off the rails, and pulled the rake of hutches out of the lye with his pony. He then came back and replaced the arm of the block across the rails before finally going away. 9. It was a daily experience of every drawer in the section of the mine where this lye was situated to find when he brought a loaded hutch to the lye that the first line of rails above the block was full of loaded hutches, and that the loaded hutch which he had brought could not get into the lye and stopped the way so that it was impossible for him to get an empty hutch out of the lye. When this happened it was the practice of the drawer to 'let down' the loaded hutches. 10. The letting down was performed thus—The drawer put an iron coupling in front of the loaded hutches, so as to act as a stop or drag. Then standing in front of the loaded hutches and holding back the foremost hutch he kicked aside the arm of the block and made the loaded hutches slide down the rails till the one which he had brought had entered the lye and ceased to obstruct the passage of the empty hutch out of the lye. Then leaving the loaded hutches resting on the coupling he came out from in front of the first hutch and replaced the arm of the block, which was thus put in front of the second hutch. He then went back to the iron plate and took out the empty hutch. 11. If the drawer had not let down the loaded hutches when he found that the entrance to the lye was obstructed and he could not get out an empty hutch, he would have required to wait sometimes a quarter of an hour, sometimes twenty minutes, and sometimes nearly an hour for the arrival of the pony driver, and if he had waited in this way the work of the pit would have been seriously interrupted. 12. The letting down of the loaded hutches was not a difficult matter if properly performed, but of course there was always the danger that if, through carelessness, the loaded hutches had got free and run down

the incline when the pony driver was coming up towards the lye with the empty hutches, he would have been run into. 13. The position of the loaded hutches after being let down did not cause any inconvenience to the pony driver either in bringing the empty hutches into the lye or taking out the loaded hutches. The pony drivers knew about the letting down of hutches by the drawers, and treated it as an ordinary practice and as unobjectionable. 14. There was no written rule or order or notice against letting down, and none of the drawers had received verbal instruction not to do it. 15. On 29th May 1913 the respondent wheeled a loaded hutch from the coal face to the lye, but found that the first line of rails above the block was full of loaded hutches, so that the loaded hutch which he had brought was unable to get into the lye, and prevented him from getting out an empty hutch. 16. The respondent, therefore, according to the usual practice, proceeded to 'let down' the loaded hutches in the manner above described. While so doing, for some unexplained cause (perhaps through the first hutch jumping the coupling), the rake of loaded hutches came away on the top of him. He was knocked down, and pushed along some yards, the first hutch passing over him, and the second being stopped by his body. 17. Serious injury was caused thereby to the respondent's legs and other parts of his body, and he was totally incapacitated for work, and at the date of the proof he was still totally incapacitated. 18. It was not proved that the injury has resulted or will result in permanent disablement. 19. After the accident the oversman of the pit and the fireman in charge of the section where the respondent worked (both of whom stated at the proof that they knew nothing of the practice of letting down, and that they would have objected if they had known of it) put down a moveable 'dan' between the rails in front of the block and the loaded waggons. A 'dan' is a thick triangular piece of wood, about four feet in length, which would have prevented the loaded hutches running down the slope out of the lye when the arm of the block was swung free of the rails. 20. The 'dan' was of no use to the pony drivers, as they had to remove it out of the way before they snibbled the wheels of the loaded hutches, and pushed the arm of the block free of the rails in order to remove the rake of loaded hutches. 21. After the accident the practice of letting down the loaded hutches in order to get out the empties was continued by the drawers, the only difference being that they used the 'dan' as a stop or drag in place of the coupling. 22. The respondent's average weekly wages were 36s.

"On 24th February 1914 I *found* that on 29th May 1913 the respondent sustained injuries to his legs and other parts of his body by accident arising out of and in the course of his employment by the appellants; that the injuries were not attributable to the serious and wilful misconduct of the respondent; and that, on account of the accident, the respondent became totally incapacitated on said date and was still totally incapacitated. I assessed the compensation at 18s. per week and found the appellants liable in expenses."

The *questions of law* for the opinion of the Court were—"(1) On the facts above set forth was I entitled to hold that the respondent was injured by accident arising out of and in the course of his employment? and (2) On the facts above set forth was I entitled to hold that the respondent's injuries were not attributable to his serious and wilful misconduct?"

Argued for appellants—It was no part of respondent's duty to "let down" hutches—he was a mere wheeler of hutches to and from the lye. To him the lye was a closed line of rails. In "letting down" hutches he was arrogating to himself duties which he was neither engaged nor entitled to perform. That being so the appellants were not liable—*Plumb* v. *Cobden Flour Mills Company, Limited*, [1914] A.C. 62; *Burns* v. *Summerlee Iron Company, Limited*, 1913 S.C. 227, 50 S.L.R. 164; *Kerr* v. *William Baird & Company, Limited*, 1911 S.C. 701, 48 S.L.R. 646. The case of *Smith* v. *Fife Coal Company*, April 28, 1914, 51 S.L.R. 496 was distinguishable, for there the efficient cause of the accident was not, as it was here, the arrogation of an unauthorised duty.

Counsel for respondent were not called upon.

LORD PRESIDENT—This case is stated with admirable perspicacity and clearness. It is, it appears to me, a model of the way in which a case under this statute ought to be stated by an arbitrator to this Court. I have no hesitation in coming to the conclusion that the arbitrator was right when he found that the accident which befel this lad on the 29th May 1913 arose out of and in the course of his employment. He was employed as a drawer in a pit, and the case expressly finds that, *inter alia*, his duties were to take loaded hutches from the working face to a lye or part of the line of rails provided for their reception, and to remove empty hutches from another line of rails in the lye to the working face there to be filled. Only a limited number of loaded hutches could be accommodated in the lye, and when this number was exceeded it was impossible, owing to the situation of the rails, to remove empty hutches from their line of rails to the working face; and this case expressly finds that frequently when the drawer took the loaded hutch to the lye he found it in that overcrowded condition, and that it was the regular practice of the drawer, when he found that situation, to relieve it by removing a block with the hinged arm and letting down the loaded hutches so as to make room for the empty hutch to be passed back to the working face.

Now it is quite true that it was part of the regular duty, apparently, of the pony drivers to release the loaded hutches from the lye where they were placed, and if the pony driver had been at the place at the time no doubt he would have performed

that duty. But then we are told "it was a daily experience of every drawer in the section of the mine where this lye was situated to find when he brought a loaded hutch to the lye that the first line of rails above the block was full of loaded hutches, and that the loaded hutch which he had brought could not get into the lye, and stopped the way, so that it was impossible for him to get an empty hutch out of the lye. When this happened it was the practice of the drawer to 'let down' the loaded hutches."

Now when this lad let down the loaded hutches the arbitrator has expressly found that he was following the regular practice, and that he could not otherwise have performed the other part of his duty, which was to take the empty hutch from the lye to the working face. The arbitrator goes further, for he finds that intervals of a quarter of an hour, sometimes twenty minutes, and sometimes nearly an hour, elapsed during which the pony driver, whose regular duty it was to release the loaded hutches, was not at the place, and that if the drawer had not performed this duty the work of the pit would have been seriously interrupted. It further appears that the pony drivers were well aware that this was the practice of the drawer, and that there were no instructions of any kind given to the drawer not to perform this simple duty, which, it appears to me, was strictly incidental to and almost a necessary part of the duty which he was engaged to perform. And as I read the 19th finding, although no doubt the oversman and fireman may have deponed that they did not know of this practice, the learned arbitrator, whose findings, I repeat, are framed with scrupulous care and precision, does not hold that to be a proved fact.

It seems, therefore, that this was a case in which the lad was performing part of the duty which he was engaged to perform. He may have performed it negligently, or the mischief which befel him may have been a pure accident, for I observe that the arbitrator finds that the accident to the lad was due to some wholly unexplainable cause. But, at all events, the injury suffered by him was the result of an accident which arose out of and in the course of his employment. That appears to me to be beyond all doubt. I cannot, therefore, say that this case comes within hail of the cases which were cited to us by Mr Moncrieff, in which workmen were held disentitled to recover under the Act where they had arrogated to themselves duties for which they were not engaged and which they were not entitled to perform.

I propose to your Lordships, therefore, to answer both questions put to us in the affirmative.

LORD MACKENZIE — I am of the same opinion. The task imposed upon the appellants' counsel was a difficult one, because it was to convince the Court that when this workman met with the accident he was arrogating to himself duties which he was neither engaged nor entitled to perform. From one of the findings it appears that he was merely coping with what happened as a daily experience, for whenever the situation arose which is described in the findings it was his practice to let down the loaded hutches, and what he was doing on the day in question he was doing according to the usual practice of the pit.

Now in these circumstances it appears to me hopeless to endeavour to bring the present case within the category of the "shot-firing cases." or cases such as *Burns* v. *Summerlee Iron Company*, the hanger-on case. There was not in this case even a prohibition against his doing what he did, and there is no finding by the learned Sheriff-Substitute, who has dealt with the matter most exhaustively, that the oversman of the pit and the fireman in charge of the section where the respondent worked did not know that the practice was as described. in the findings.

LORD SKERRINGTON—I concur.

LORD JOHNSTON was absent.

The Court answered both questions of law in the case in the affirmative and dismissed the appeal.

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

Counsel for Respondent — Solicitor-General (Morison, K.C.) — Lippe. Agents —Macpherson & Mackay, S.S.C.

Tuesday, June 30.

FIRST DIVISION.

(SINGLE BILLS.)

H. R. MARSDEN, LIMITED *v.* ALEXANDER BRUNTON & SONS.

Expenses — Reclaiming Note — Appeal — Withdrawal of Reclaiming Note or Appeal.

"As a general rule, when a motion is made by the reclaimer or appellant for the refusal of a reclaiming note or an appeal which has already been sent to the roll, the respondent will be allowed, in the case of a reclaiming note two guineas, and in the case of an appeal three guineas, of expenses. But in certain exceptional cases a remit will be made to the Auditor to tax the respondent's expenses. Where an appeal or a reclaiming note has appeared in the roll, or in the ordinary course would soon appear in the rolls, then the respondent may, after communication with his opponent, proceed to print such documents as he thinks necessary for the presentation of his case to the Court, and if he does so then his expenses will be allowed if the Court, having regard to all the circumstances of the case, think that his preparations were reasonable."—*Per* the Lord President.

H. R. Marsden, Limited, *pursuers*, raised an action against Alexander Brunton &