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Friday, October 15, 1915.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

M'KENNA *v.* NIDDRIE AND BENHAR COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (2) (*c*)—*Serious and Wilful Misconduct—Explosives in Coal Mines Order of* 1*st September* 1913, *Rule* 3 (*a*)—*Breach of Rule.*

The Explosives in Coal Mines Order of 1st September 1913 provides—Rule 3—"If a shot misses fire—(*a*) the person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

A brusher in a coal mine charged two shot-holes with explosives and attached a fuse to each. He iguited the fuses at the same time, and retired to a place of shelter. About one minute after he had ignited the fuses one of the shots exploded. Within one minute and a half after the explosion of the shot the workman left his place of shelter, returned to his working-place, and approached the shot-hole of the shot which had not exploded. When the workman reached his working-place the second shot exploded and injured him. An arbiter finding that there was no evidence to show what was in the workman's mind refused compensation on the ground of serious and wilful misconduct.

Held that there was evidence upon which the arbiter could find that the workman's injuries were due to his serious and wilful misconduct.

Opinion per curiam that the workman's breach of the rule was serious and wilful misconduct in the sense of the Act.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* (17) (*b*)—*Stated Case—Codifying Act of Sederunt,* 1913, *D, iii, and L, xiii* (17) (*f*)—*Transmission of Process from Sheriff Court.*

Observed per curiam—"With regard to the evidence which has been before us in consequence of the order we pronounced for the transmission of the process, . . . I think we are entitled to look at it for the purpose of ascertaining whether there is any evidence in support of the findings in the case, but for no other purpose." Lord Dunedin in *Lendrum* v. *Ayr Steam Shipping Company, Limited,* 1914 S.C. (H.L.) 91 at p. 102, 51 S.L.R. 733 at p. 739, *approved.*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Section (1) (2) (*c*)—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed." Second Schedule (17) (*b*)—"Any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act 1876, . . . subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by Act of Sederunt to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same, and remit to the Sheriff with instruction as to the judgment to be pronounced. . . ."

The Codifying Act of Sederunt 1913 enacts

—L, xiii (17)—"The following regulations shall apply to cases to be stated by a Sheriff in virtue of the provisions contained in paragraph 17(*b*) of the Second Schedule appended to the Act: . . . (*f*) The regulations as to the printing of appeals from the Sheriff Courts contained in Book D, chapter iii hereof, shall apply to cases stated under the Act, provided always that it shall not be necessary to print any document except the case without a special order from the Court, and provided also that either party may move for an order on the sheriff clerk to transmit the process."

Francis M'Kenna, brusher, Maryfield, Portobello, *appellant*, claimed in the Sheriff Court at Edinburgh compensation under the Workmen's Compensation Act 1906 from the Niddrie and Benhar Coal Company, Limited, Niddrie, Portobello, *respondents*, in respect of injuries sustained by him while employed in one of their pits.

The Sheriff-Substitute (PITMAN) assoilzied the respondents and at the request of the workman stated a Case for appeal.

The Case stated—"The *facts* admitted or proved are as follows:—On 7th August 1914 the appellant was in the employment of the respondents as a brusher at their Woolmet Pit, Niddrie. On that day two shot-holes had been bored by a fellow-workman of the appellant in the appellant's working-place, said shot-holes being six feet apart or thereby. The appellant, who was a person authorised to use explosives in said pit, charged both of said shot-holes with explosives and attached a fuse to each, one of the fuses being shorter than the other. About 11·55 p.m. the appellant ignited both of said fuses at the same time and retired to a place of shelter. About one minute after the appellant had ignited said fuses one of the shots exploded. The appellant heard the explosion and knew it was one of his shots. Within one minute and a half after the explosion of said shot the appellant, thinking that he had only lit one of said shots, left his place of shelter and returned to his working-place where the two shots had been ignited, and approached the shot-hole of the shot which had not exploded. On reaching his working-place and approaching the shot-hole of the shot which had not exploded the said shot exploded and injured the appellant. By rule 3 (*a*) of the Explosives in Coal Mines Order 1913 it is provided—'3. If a shot misses fire—(*a*) The person firing the shot shall not approach or allow anyone to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means.' A copy of said rule was posted up at the pit. The appellant was aware of said rule. Before the expiry of one hour after he had ignited the shot which went off and injured him he returned to his working-place and approached the said shot-hole, contrary to said rule.

"Through the accident the appellant sustained a fracture of the right humerus, injury to his left arm, and minor injuries to his face, chest, and upper part of the abdomen. The fracture is now healed, but the right arm is still stiff, and muscular movement of it is restricted. Said stiffness and restriction of muscular movement will pass away with exercise. A small scar in the left arm is still discharging, but this is curable by proper treatment. The appellant has recovered from the other minor injuries which were of the nature of bruises. With exercise of the right arm and proper treatment the appellant will soon regain his full capacity for work. He is at present fit for light work. The said injuries have not resulted in serious and permanent disablement of the appellant.

"After consultation with the medical assessor who sat with me at the trial of the application I issued my award on 10th February 1915. I found that the appellant's said injuries were attributable to his serious and wilful misconduct, and that they had not resulted in his serious and permanent disablement. I therefore held that the appellant was not entitled to compensation from the respondents in respect of said injuries, assoilzied the respondents, and found the appellant liable to them in expenses."

The *question of law* for the opinion of the Court was—"In the circumstances stated was I right in holding that the appellant had been guilty of serious and wilful misconduct?"

On 24th June 1915, the case being partly heard, the Court (the LORD PRESIDENT, LORDS JOHNSTON, MACKENZIE, and SKERRINGTON) pronounced this interlocutor—"The Lords remit to the Sheriff-Substitute as arbitrator to state whether he found it proved that the appellant believed he had applied a light to one only of the two fuses, or whether he found it proved that the appellant believed that, although he had applied a light to both fuses, yet he had succeeded in effectively lighting only one."

The arbitrator reported—"No evidence was laid before me which enables me to state positively what was in the mind of the appellant when he returned to the working face. When giving evidence the appellant stated that he had only lit one of the fuses because bad air made his lamp go out. The relative position, however, of the two shot-holes and the other evidence adduced, including the evidence of experts, convinced me that he lit both fuses.

"It appeared to me that the precise state of the claimant's mind was not a safe basis on which to decide the case, because he alone could know what was in his mind. He might have thought that he had not attempted to light the second fuse, or that he had not succeeded in lighting the second fuse, or that both had exploded at once. Any one of these alternatives is consistent with his action in returning to the face at the very moment when, in ordinary course, the second charge would have exploded, that is to say, to almost certain death. One of the holes was about 18 inches deeper than the other, and the interval between the two explosions corresponded approximately to the time which the extra 18 inches of fuse would take to burn.

"It humbly appears to me that the appellant's state of mind could only be inferred from what he did, and was not capable of positive proof. The inference which I drew from the appellant's action was that he must have forgotten that he had even attempted to light the second fuse, but I refused to award him compensation upon the ground that in fact he had returned to the shot-hole contrary to the rule quoted in the case, and must be held in law to be guilty of serious and wilful misconduct."

On 20th July 1915, on the motion of respondents and after hearing counsel, the Court (the LORD PRESIDENT, LORDS JOHNSTON and MACKENZIE, LORD SKERRINGTON absent) ordered the transmission of the process.

Argued for respondents—The arbiter was not entitled on the evidence before him to find that the workman was guilty of forgetfulness. His finding was mere inference, and the arbiter was not entitled to draw such an inference without evidence—*Marshall* v. *Owners of s.s.* "*Wild Rose*," [1910] A.C. 486. The arbiter found that the workman had lit both fuses and there was no explanation—forgetfulness being gone—why he had returned to his working-place. By going back in breach of the rule the workman was guilty of serious and wilful misconduct—*Waddell* v. *Coltness Iron Company, Limited*, 1912, 50 S.L.R. 29. Forgetfulness, if the arbiter was entitled to infer it, was serious and wilful misconduct when, as here, there was no explanation given of it—*Bastable* v. *North British Railway Company*, 1912 S.C. 555, 49 S.L.R. 446; *United Collieries, Limited* v. *M'Ghie*, 1904, 6 F. 808, 41 S.L.R. 705; *George* v. *Glasgow Coal Company, Limited*, 1909 S.C. (H.L.) 1, 46 S.L.R. 28. The Court could consider the evidence. There could be no other purpose in the provision for transmission in C.A.S. 1913, L, xiii 17 (*f*). The dicta in *Lendrum* v. *Ayr Steam Shipping Company, Limited*, 1914 S.C. (H.L.) 91, 51 S.L.R. 733, did not apply, as in that case there was no order for the transmission of the process.

Argued for appellant—On the question of forgetfulness the arbiter had evidence on which he was entitled to find as he did. The Court was not entitled to consider the evidence. That would be to usurp the function of the arbiter—*Lendrum* v. *Ayr Steam Shipping Company, Limited* (*cit.*). The arbiter was entitled to find that the workman thought he had only lit one of the fuses, and in such circumstances the rule could not apply. Forgetfulness was not serious and wilful misconduct. Misconduct, however reckless, was not serious and wilful in the sense of the Act unless the wrong was done consciously—*Johnson* v. *Marshall, Sons, & Company, Limited*, [1906] A.C. 409; *Bist* v. *London & South-Western Railway Company*, [1907] A.C. 209; *Lewis* v. *Great Western Railway Company* (1877), 3 Q.B.D. 195. The arbiter had found that there was no conscious wrongdoing and his finding of serious and wilful misconduct could not stand.

LORD PRESIDENT—In this case the learned arbitrator has denied the appellant compensation in respect of the accident which befell him on the 7th August 1914, and the question which we are called upon to decide is whether or no there was adequate evidence in law to support the conclusion at which the arbiter arrived. If the appellant was guilty of serious and wilful misconduct on the occasion in question the arbitrator's decision was right; if he was not it was wrong.

The facts found proved by the arbitrator were briefly these—that it was in the course of the appellant's employment that day to fire two shots, that he required to apply a light to two fuses—first one and then the other—that he did in fact apply lights to both these fuses, and that, within two minutes and a half after he had fired them, he had returned to his working-place, whereas there is a rule (well known to the appellant) that he is not permitted to return to his working-place until a period of a whole hour has elapsed. The arbitrator, although he came to the conclusion that, in these circumstances, the appellant had been guilty of serious and wilful misconduct in respect that he had committed a breach of this rule, in a parenthesis found that the appellant thought that he had only lit one of said shots, and accordingly left his place of shelter believing that all was well.

Now we considered, when the case was first heard, that there might be an ambiguity about the expression "lit one of the shots," that it might mean either that he had applied a light to one of the shots or that he had effectively lighted one of the shots, and accordingly we remitted the case to the arbitrator to say which of the two he found proved.

The answer of the arbitrator, disclosed in the report now before us, is in short this, that he found neither the one nor the other proved. The arbitrator tells us in plain and direct language that there was no evidence at all before him to support the view that the appellant believed either the one thing or the other. On the contrary, the arbitrator tells us that the evidence before him disclosed that the appellant himself said that he lit only one of the fuses, and, he added, had a very good reason for having abstained from lighting the other. But the arbitrator went on to justify the finding in the case as originally stated upon the ground that unless the appellant had believed that he lit only one of the fuses he would never have returned to his working-place because to do so meant to face certain death. But the appellant did return and was not killed. Accordingly we now see that what professes to be a finding in fact, in the case as originally stated, is a conjecture rested upon a baseless hypothesis. In other words, there is no evidence whatever to support the view that the man believed either one thing or another regarding the lighting of these two fuses; and accordingly that the case as originally stated ought to have run thus—"There being no evidence that the appellant thought that he had only lit one of the said shots," and so on to the end of the sentence.

In these circumstances it appears to me that we have presented to us a simple case of a workman deliberately committing a breach of a rule of the pit, well known to him, a breach of which was undoubtedly an act of serious misconduct, and, unexplained as it is here, is undoubtedly wilful misconduct.

With regard to the evidence which has been before us in consequence of the order we pronounced for the transmission of the process all I say is this, that I think we are entitled to look at it for the purpose of ascertaining whether there is any evidence in support of the findings in the case, but for no other purpose. And here I desire to express my entire concurrence with the views expressed by Lord Dunedin in the case of *Lendrum*, 1914 S.C. (H.L.) 91, at p. 102, 51 S.L.R. 733, at p. 739. His Lordship there states, I think with perfect precision, the scope of the duty of an Appeal Court in considering a process the transmission of which they have ordered in a case under the Workmen's Compensation Act.

On the ground, then, that there was evidence adequate in law to support the conclusion at which the arbitrator arrived, I propose to your Lordships that we should answer the question put to us in the affirmative.

LORD MACKENZIE—I am of the same opinion and on the same grounds.

LORD SKERRINGTON concurred.

LORD JOHNSTON was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant — Anderson, K.C.—Patrick. Agent—Thomas J. Connolly, Solicitor.

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

Thursday, April 22.

BILL CHAMBER.

[Lord Hunter.

MACDONALD *v.* BOARD OF AGRICULTURE FOR SCOTLAND.

Landlord and Tenant—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49)—*Compensation—Interest on Sum Received by Landlord for Buildings Taken over Set off against Claim for Compensation for Damage to Letting Value owing to Constitution of Small Holding.*

Held (*per* Lord Hunter) that, in assessing the compensation due to a landlord in respect of damage to the letting value of a farm due to part of it having been appropriated to a small holding, the arbiter was entitled to set off against the reduction in rental interest at 4 per cent. on the capital sum paid to the landlord as the value of the farm buildings taken over from him.

A Special Case was stated by an arbiter acting in an arbitration under the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) between Mr Macdonald of Glenlonen, in the county of Argyll, *claimant*, and the Board of Agriculture for Scotland, *respondents*. The arbiter's duty was to assess the amount of compensation to which the claimant was entitled in respect of the formation of a small holding on the farm of Glenamacrie, proposed to be carried out by the respondents in terms of a scheme sanctioned by the Scottish Land Court conform to order dated 30th November 1914. The claimant made, *inter alia*, the following claims in the arbitration:—Head III—"For damage or injury to the letting value of the land to be occupied by the new holder, £400." Head IV—"For damage or injury to farm of which such lands (*i.e.*, the lands taken for the new holding) form part, £1000."

After proof had been led the arbiter disallowed the claim made under head III, and under head IV he allowed £200 as compensation to the claimant under deduction of £125, being the capitalised appreciation in the return upon capital to the claimant which he held fell to be credited to the respondents.

In his note the arbiter stated the grounds of his decision thus—"As regards the claim of £1000, being damage to the farm of which the holding forms part, this is an item which requires detailed consideration. . . .

"A large amount of evidence was adduced to show that the southern portion of the farm could not be worked along with either of the adjoining sheep farms belonging to and in the personal occupation of the claimant. After considering the evidence and giving effect to my own practical knowledge I have come to the conclusion that the southern portion, carrying a comparatively small stock, could without much inconvenience be worked along with either of the adjoining farms of Torinturk or Clachadhu. I recognise, however, that there will be additional expense in so working this portion of the farm, and I propose to allow as compensation under this item the sum of £200, subject to the deduction aftermentioned.

"It will be observed that from my proposed allowance for damage to the farm of which the lands taken form part (head IV of claim) I have deducted a sum of £125, being the capitalised appreciation in the return upon capital through the constitution of the new holding. Upon the assumption that the southern portion was worth £30 per annum, and after crediting 4 per cent. interest on the value as estimated of the buildings and fences, the respondents made out an increased return to the claimant of £19 per annum, which capitalised at twenty-five years showed a capital appreciation in the value of the farm of £475, which they properly claimed as a credit item. This figure, of course, varies with the valuation of the buildings and fences, and with the rent allowed for the southern portion of the farm, which they stated at £30, whilst claimant's witnesses made it out to be prac-