*Saturday, February* 23.

## SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

## THE LONDON AND GLASGOW ENGINEERING AND IRON SHIPBUILDING COMPANY, LIMITED *v.* FALCONER.

*Reparation — Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-section* 1—"*Accident Arising out of and in the Course of the Employment*"—*Injury Caused by Horseplay of Fellow-Workmen.*

A blacksmith in the employment of a firm of shipbuilders at their works, which were a "factory" within the meaning of the Workmen's Compensation Act 1897, while working at his anvil, was knocked over and injured by two of his fellow-workmen who were engaging in horse-play.

*Held* (*diss.* Lord Moncreiff) that the accident was not one "arising out of and in the course of" the workman's employment, within the meaning of sec. 1 (1) of the Workmen's Compensation Act 1897, and that his employers were not liable in compensation under that Act.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897, between The London and Glasgow Engineering and Iron Shipbuilding Company, Limited, Govan, appellants, and Andrew Falconer, blacksmith, claimant and respondent.

The facts admitted or proved, as stated by the Sheriff-Substitute at Glasgow (BOYD), were as follows:—"That the respondent was employed as a blacksmith in the works of the appellants, which are a factory within the meaning of the Workmen's Compensation Act 1897. That on 10th April 1900 the respondent was working at an anvil in said works when two of his fellow-workmen, who were engaged in horse-play, stumbled against him and knocked him over a bucket of water, whereby his left leg was broken. The respondent was no party to the pushing or knocking that took place."

On the foregoing facts the Sheriff-Substitute found that the accident arose out of and in the course of the respondent's employment, and that the appellants were liable in compensation.

The question of law for the opinion of the Court was—"Whether the injury sustained by the respondent was caused by 'accident arising out of and in the course of the employment,' in the sense of section 1 (1) of the Workmen's Compensation Act 1897?"

The Workmen's Compensation Act 1897, sec. 1, sub-sec. 1, enacts—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment, is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation." . . .

Argued for the appellants—A workman could not recover compensation under the Act unless the accident occurred not only in the course of but arose out of his employment. The facts here excluded the idea that the accident arose out of his employment. It was due to the act of a fellow-workman, who was not doing his employer's work. Such an accident was not incidental to the work of a shipbuilding yard, and might equally have happened after he had left his work. The case was distinguished from those where the accident was due to the careless or improper handling of machinery, which clearly arose out of the employment. The wording of the clause showed that the Legislature had in view, and intended to exclude, such a case of fortuitous accident as the present.

Argued for the claimant and respondent—It was sufficient to entitle the workman to compensation that he was engaged at the employer's work, and had been injured, no matter how, provided he was not guilty of serious and wilful misconduct—*Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732; *Monaghan* v. *United Collieries, Limited*, Nov. 27, 1900, 38 S.L.R. 92. The respondent here was engaged in his master's work, and was in no way to blame for the accident. Admittedly an injury caused by a fellow-workman carelessly doing his work would be an accident "arising out of" the employment, and it was too critical a reading of the clause to say that such an injury caused by the same man momentarily neglecting his work did not fall within the Act.

At advising—

LORD JUSTICE-CLERK—The facts with which we have to deal are that a workman engaged at his work in a factory to which the Workmen's Compensation Act applies was injured by the act of fellow-workmen. In ordinary circumstances such a case would present no difficulty. But the case is peculiar. According to the facts as stated by the Sheriff, the fellow-workmen were not at the time of the occurrence doing their master's work, or doing anything in the course of their employment. They were engaged in amusing themselves by indulging in horseplay. No detail is given, but the word itself used by the Sheriff sufficiently indicates that they were not working, or doing anything having relation to their work, but were doing something inconsistent with relation to work. The question is whether an accident so caused can be held to have in the words of the Act arisen "out of and in the course of the employment." I recognise to the full that the statute in question, which is remedial in its character, must receive a liberal interpretation. But I have considered the case again and again, and have not been able to find it possible to hold that the words of the statute can cover the case stated. I cannot read the statute as if it had said there should be liability for every accident occurring to a workman when engaged at his work in the factory, no matter how the accident occurred, unless it was through his own

wilful fault or negligence. It must I think have arisen "out of" his employment in a more exact sense than that it occurred to him when at or going about his own employment in or about the factory. Here the facts seem to me to point to the accident not having arisen out of the employment. Two men, not doing their master's work, or in course of doing it, but leaving their work aside, and engaging in play, which was not what they were there for at all, threw the respondent down, with the result that he was injured. It was not "out of" the employment, but out of proceedings outside the scope of the employment that the accident occurred. I am unable to hold that the statute covers such a case. The object of the statute was to secure compensation to workmen who were engaged in occupations which exposed the employees to danger from which other occupations were free. But it was as against accidents incidental to the special employment that the benefit of the statute was given. In this case there was nothing of that kind. The accident which happened was directly and solely caused by fellow-workmen engaging in play, leaving their work for and doing something which had nothing to do with their work, for their own pleasure. There is nothing in the Act from which it can be gathered that such a case was intended to be covered. The words actually used seem to me not only not to cover it, but to exclude it, and I am therefore of opinion that the question put in the case should be answered in the negative.

LORD TRAYNER—The Workmen's Compensation Act 1897 imposes upon employers a liability for the consequences of accidental injury happening to their workmen. It is not a general liability, but a restricted liability. It is not imposed on all employers, nor is the liability imposed for the consequences of all accidents. The employers who are subjected in this liability are enumerated in the Act, and the accidents for the consequences of which they are made liable are accidents only "arising out of and in the course of the employment." The purpose of the Act appears to have been to lay on certain employers, the execution of whose work and business was more than ordinarily hazardous, and from the nature of it more than usually attended with accidental injury to their servants, a liability from which the employers of labour in other and less hazardous employments were exempt; and even then only to impose the liability for accidental injury which arose out of and in the course of the hazardous employment.

The present appellants are within the class of persons on whom the statutory liability is imposed. The only question therefore is, was the accident from which the respondent suffered one which arose out of and in the course of his employment. I think both of these qualities or conditions of the accident must be predicable of any accident before it can be made the ground of a claim under this statute—first, because they are conjoined in the statute and we are not at liberty to disjoin them; and second, because many accidents may happen to a workman "in the course of the employment," for which his employer would incur no liability. For example, a servant engaged in a foundry-yard in the course of his employment, if struck by lightning and seriously maimed would have no claim for compensation under the Act, nor would his representatives have a claim if he was killed. Or again, if a workman so engaged was injured by a stone thrown mischievously over the wall of the yard, or by a pistol fired into the yard by an outsider, no liability for the consequences would attach to the employer, because such accidents in no sense arise out of the employment, are in no sense incidental to such employment, and might equally happen to workmen engaged in employments which are not within the employments enumerated in the statute.

Now, here the accident which happened to the respondent happened in the course of his employment—while he was engaged in his work. But did it "arise out of the employment?" I think not. It arose from the improper or inconsiderate conduct of his fellow-workmen, who were not at the time engaged in their employment but neglecting it. If the accident had arisen from the fault or neglect of a fellow servant when engaged in his work, that is, his employer's work, liability would have attached, because in that case it would have arisen out of the employment—out of the employment it may be badly or carelessly executed, but still out of the employment—it was properly incidental to the employment. But if some servants leave their work and indulge in horse-play to the injury of a fellow servant, that does not infer liability on the employer. It cannot be said to be incidental to his business or one of the hazards attached to it. It might equally happen in any work. To make the employer liable in the present case would, I think, be stretching the statute beyond its purpose and its provisions. It would result in making an employer liable for the consequences of any accident except one arising from the injured servant's own wilful misconduct. The statute does not go that length; and I am therefore of opinion that the judgment appealed against should be recalled, and the Sheriff directed to dismiss the application.

LORD MONCREIFF—This case raises a difficult and delicate question. At the close of the discussion my impression was against the Sheriff's judgment, substantially upon the grounds which your Lordships have indicated, but after repeated consideration I have, though with hesitation, come to a different conclusion.

The question which we are asked to decide is, whether the personal injury which was sustained by the respondent was caused by "accident arising out of and in the course of the employment"—that is, employment in a factory as defined by the 7th section of

the Workmen's Compensation Act 1897. It may be doubted whether this is a question of law. It is much the same kind of question as often arises as to whether a servant has acted within the scope of his authority. It is a jury question depending on the special circumstances of the case, and the Sheriff, in the knowledge of all the facts proved before him, has answered it in the affirmative. Whether the question is to be regarded as one of fact or of mixed fact and law, his decision is not to be set aside unless we must affirm that no facts are stated which will in law support his decision. This I am not prepared to do.

All that we are told in this case as to the cause of the accident is "that on 10th April 1900 the respondent was working at an anvil in said works, when two of his fellow-workmen, who were engaged in horseplay, stumbled against him and knocked him over a bucket of water, whereby his left leg was broken. The respondent was no party to the pushing or knocking that took place." I regret that we have not been given fuller particulars; but taking the statement as it stands, I read it as meaning that these two workmen were in company with, and should have been working with, the respondent, and that in horseplay they pushed and jostled each other, and in doing so knocked the respondent over.

Under this statute a workman's right to recover damages from the undertaker is not dependent upon the accident being proved to be due to fault on the part of the undertaker or of those for whom he would at common law or under other statutes have been responsible. Compensation is due whether in respect of casualties for which no one is to blame or accidents caused through the negligence or fault of fellow-workmen or other persons engaged in the undertaking, provided always that it is proved that the accident occurred in or about the factory, and that it in a reasonable sense arose out of and in the course of the employment, and was not due to the injured workman's serious and wilful misconduct.

Now in the present case it is proved (1) that the accident occurred in the appellants' factory; (2) that the respondent was injured in the course of his employment while he was doing his employers' work; and (3) that he was in no way to blame. This of itself would not, in my opinion, be sufficient to entitle him to compensation under the statute, but it carries him a very long way towards that result. All that is required to complete his case is to show that in a reasonable sense the cause of the accident was connected with the employment. Now the cause of the accident was simply the negligence of two of the respondent's fellow-workmen, who, instead of attending to their work, engaged in horseplay, pushed against him, and knocked him over. It is maintained that because they were romping, and not working, the accident did not arise out of the employment. I think that this is too fine a distinction. The same might be said of most cases of negligence on the part of a servant. Negligence consists in the servant neglecting—that is, not attending to—his master's work. It may take many shapes. If in the course of their work the respondent's fellow-workmen had through carelessness or clumsiness pushed against the respondent and knocked him over, it is conceded that the appellants would have been liable. Does it make any material difference that the push was given in horseplay? I think not. The negligence of a fellow-workman is a risk of the common employment against which the statute insures the workman, and I am not prepared to hold that the workman's right to recover depends on the precise shape which his fellow-workmen's negligence takes, provided always that it occurs in the factory while the workman injured is at his work, and while the fellow-workman who causes the injury is or ought to be engaged in working along with him or in the common employment.

It is unnecessary to multiply illustrations, but many may be readily figured. For instance, a miner works with a naked light and causes an explosion. His employers are admittedly liable, but the appellants would maintain that if instead of using a naked light for the purposes of his work, he uses it to light his pipe and smoke contrary to regulation, and thus causes an explosion, the employers are not liable, because the servant is not engaged on his master's work, and therefore the accident cannot be said to arise out of the employment.

Again, take the case of an engine-driver. If through absent mindedness he runs past a danger signal, the railway company is liable to any fellow-workman who is injured; but if his inattention to the signal is due to his reading a newspaper, or gossiping or bear fighting with the fireman, according to the appellants the result is different.

I do not think that for the purposes of this statute there is any solid distinction between such alternative cases. In all of them the accident was due *ex hypothesi* to the negligence of a fellow-workman with whom the man who was injured was bound to work.

The result would be different if the proximate cause of the accident were something wholly outwith the employment; for instance, as suggested by Lord Trayner, a a flash of lightning or a shot fired into the factory by an assassin, or even, it may be, some criminal or tortious act on the part of a fellow-servant sufficiently unconnected to liberate his employer.

But in the simple case we have here I am of opinion that the appeal should be dismissed and the judgment of the Sheriff affirmed.

LORD YOUNG was absent.

The Court answered the question of law in the negative, and remitted to the Sheriff-Substitute to dismiss the application.

Counsel for the Appellants—W. Campbell, K.C.—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Craigie. Agents—Emslie & Guthrie, S.S.C.