Friday, November 6.

EXTRA DIVISION.

[Sheriff Court at Glasgow.

MORRISON *v.* CLYDE NAVIGATION TRUSTEES.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1—*Accident Arising out of Employment—Workman Returning Home—Risk Incurred by Workman for his Own Pleasure.*

A workman was walking home for dinner through his employers' docks, which were traversed by lines of rails, part of the line of a railway company. While still within his employers' premises the workman endeavoured to climb on to a waggon, one of a train of waggons travelling on the rails. In doing so he fell and received injuries resulting in serious and permanent disablement. The arbiter, in an arbitration under the Workmen's Compensation Act 1906, found in fact that the workman "did not attempt to climb into the said waggon for any object of his employers, but for his own pleasure."

Held that the accident did not arise out of the employment.

This was a Stated Case on appeal in an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court at Glasgow, in which Donald Morrison, claimant (appellant), sought an award of compensation under the Act in respect of accidental injuries sustained by him, from the Trustees of the Clyde Navigation (respondents).

The following *facts* were given in the Stated Case as established—"1. The appellant was employed by respondents as a capstanman in the Prince's Dock, Glasgow, for some years prior to 9th April 1908, when he was injured as after mentioned—his duty being to work the hydraulic machinery by which waggons were moved to and from the coal shoot. 2. The hours during which the appellant was ordinarily employed extended from 6 a.m. to 6 p.m., with an hour off for breakfast, and another hour off for dinner. 3. The appellant was paid by the week, and his average weekly wage, including overtime, during the year preceding 9th April 1908, was 26s. 4. On 9th April the appellant knocked off work for dinner at about 2 p.m., and proceeded to walk towards the east gate of the docks on his way home. 5. This gate is at a distance of about 600 yards from the coal shoot where the appellant was employed. 6. Along the side of the docks there are rails, part of the joint line of the Glasgow and Paisley, and Glasgow, Barrhead and Kilmarnock Railway Companies, and when the appellant was about half-way to the gate an engine and waggons proceeding on these rails overtook him. 7. The said engine and waggons were travelling at considerably more than a walking pace. 8. As the said engine and waggons were passing him, the appellant, with the object of getting a lift to the dock gate, endeavoured to climb on to one of the waggons but missed his footing, with the result that he received serious injuries to his right leg. 9. As a result of these injuries it was found necessary to amputate the appellant's right leg above the knee. 10. The injuries which the appellant has sustained have thus resulted in his serious and permanent disablement. 11. The appellant did not attempt to climb into the said waggon for any object of his employers, but for his own pleasure."

On these facts the Sheriff-Substitute (MACKENZIE) "found in law that the accident to the appellant did not arise out of his employment with the respondents in the sense of section 1 of the Workmen's Compensation Act 1906, and that he was not entitled to compensation from the respondents under that Act." He therefore assoilzied the respondents with expenses.

The following *question of law* was stated for the opinion of the Court:—"Was the Sheriff-Substitute right in holding upon the facts found by him that the accident did not arise out of and in the course of the appellant's employment?"

Argued for appellant—It is not necessary that the particular action of the workman at the moment of the accident should be in his employer's interest—*Blovelt* v. *Sawyer*, [1904] 1 K.B. 271; *Keenan* v. *Flemington Oil Company*, December 2, 1902, 5 F. 164, 40 S.L.R. 144; *Goodlet* v. *Caledonian Railway*, July 10, 1902, 4 F. 986, 39 S.L.R. 759. Going and coming from work is included in the course of employment—*Todd* v. *Caledonian Railway*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784; *Mackenzie* v. *Coltness Iron Company*, October 21, 1903, 6 F. 8, 41 S.L.R. 6—even when a wrong method of going or coming is adopted—*Robertson* v. *Allan*, 1908, 124 L.T. 548. A workman who otherwise is in the course of employment does not place himself outside it by wrong and dangerous conduct—*Durham* v. *Brown Brothers & Company, Limited*—December 13, 1898, 1 F. 279, 36 S.L.R. 190—nor by altogether exceptional conduct—*London and Edinburgh Shipping Company* v. *Brown*, February 16, 1905, 7 F. 488, 42 S.L.R. 357. In this case any question of misconduct was precluded by the established fact of serious and permanent disablement in view of section 1, sub-section (ii) (*c*), of the Act.

Argued for respondents—The appellant's claim was precluded by the finding in fact that he did not attempt to climb into the waggon for any object of his employers but for his own pleasure; therefore the accident did not arise out of the employment. In the cases of *Blovelt*, *Keenan*, and *Goodlet* there was no voluntary dangerous act of the workman. An accident due to a voluntary act unconnected with the employer's service does not arise out of the employment—*Smith* v. *Lancashire and Yorkshire Railway*, [1899] 1 Q.B. 141; *Powell* v. *Lanarkshire Steel Company*, March 8, 1904, 6 F. 1039, 42 S.L.R. 231; *Benson* v. *Lancashire and Yorkshire Railway*, [1904] 1 K.B. 242.

At advising—

LORD M'LAREN—The appellant, at the time when he met with the disabling accident, was a capstanman in the employment of the Clyde Navigation Trustees, his duty being to work the hydraulic machinery by which waggons were moved to and from the coal-shoot which was used for loading vessels at Prince's Dock with coal. On 9th April of this year the appellant left his work about 2 p.m., being the commencement of the hour allowed for dinner, and proceeded to walk towards the east gate of the docks on his way home. This gate is distant about 600 yards from the coal-shoot where the appellant was employed, and when the appellant was about half-way to the gate he endeavoured to climb on to one of the waggons of a passing train, which is stated to have been travelling at considerably more than a walking pace, and in so doing he missed his footing and sustained injuries which have resulted in serious and permanent disablement. In fact it was found necessary to amputate the appellant's right leg above the knee.

These facts are all found by the Sheriff-Substitute, who has also found that the appellant did not climb the waggon for any object of his employers but for his own pleasure. In these circumstances the appellant challenges the decision of the Sheriff-Substitute assoilzieing the respondents, and claims the judgment of the Court on the question: "Was the Sheriff-Substitute right in holding upon the facts found by him that the accident did not arise out of and in the course of the appellant's employment?"

There are cases where a workman may be entitled to claim compensation for an injury received in circumstances which were only indirectly connected with the special duties of the workman; and in particular it has been recognised that a workman owes a duty to his employer to give occasional help to a fellow-workman, *e.g.*, in lifting heavy materials or removing obstructions; and if such assistance is given in the ordinary course of the business in which the workman is engaged, and in the furtherance of the business of the employer, it cannot be said, in a reasonable sense, that the workman has gone outside the course of his employment. Such cases when they arise will be considered on their merits, but the present case does not fall within any exceptional category, because it is expressly found that the appellant did not mount the waggon for any object of his employers.

We were referred, very properly, to various cases in which this question or something like it had been raised; but I prefer to rest my judgment on the facts of this case, because in a pure question of fact decisions on one set of facts are seldom useful as a guide to the decision of a case depending on different facts. I may add that there are no doubt many cases under the previous Act of Parliament where the defence would not be raised that the workman was outside the scope of his employment, because it was perfectly clear that the accident was the result of the workman's misconduct. But now, under the operation of the new statute, the Workmen's Compensation Act 1906, the defence of "serious and wilful misconduct" is not pleadable when the accident results in a permanent disablement, incapacitating the employee for work. In the present case, accordingly, we have no occasion to consider whether the appellant was chargeable with fault in mounting a waggon in motion; the only question is, whether the injury arose out of and in the course of his employment.

The best that can be said for the appellant's case is, that he was on his employers' premises within the dock-gates, and that he was within his contract in proceeding homewards for his dinner at 2 o'clock. But this does not advance his case very far. Under the present law we have not to consider whether the accident occurred in or about the employers' premises; the right to compensation will accrue independently of locality if the workman was at the time and place in question in the exercise of his employment. But this consideration only accentuates the condition that the party must satisfy the arbitrator that the accident arose out of and in the course of his employment, because it was not intended that the employer should be a universal insurer.

Now it was certainly not within the contemplation of parties when the appellant was engaged that he should get upon a moving waggon to enable him to go home to his dinner, and it is found that his doing so was not for any object of his employers; and this is just another way of saying that the act which led to the disablement of the appellant neither arose expressly nor by implication out of his employment. I come therefore without any difficulty to the conclusion which the Sheriff-Substitute has arrived at on the facts of the case.

If it is necessary to refer to authorities, the case of *Reed* v. *The Great Western Railway Company*, decided last week in the House of Lords, supports our judgment, because in that case an engine-driver who had crossed the main line to get a book from a fellow-servant and was run over in returning to his engine, was on this ground held disentitled to compensation. I am for answering the question in the affirmative and dismissing the appeal.

LORD PEARSON—At the time when this accident happened, the appellant had not left his employers' premises, but was on his way towards the gate to spend his dinner hour at home. It may be that by an extension of the term "employment" the liability of an employer will extend to an accident occurring to a workmen on his way to the exit after his actual work is over for the time. But in order to fix liability on an employer it is necessary that the accident should arise out of and in course of the employment; and whatever may be said here as to the appellant having been still in the course of his employment, which I

doubt, it is in my opinion clear that the facts of this case, as found by the Sheriff, exclude the idea that the accident arose out of the employment. When about halfway to the outer gate he was overtaken by an engine and waggons which were travelling at considerably more than a walking pace. I assume (without deciding it) that if he had been overtaken and run down he would have had a claim under the statute. But it is found, in fact, that with the object of getting a lift to the dock gate he endeavoured to climb on to one of the waggons in motion and unfortunately missed his footing. We were referred to several decided cases, but I do not think that they throw much light on the exact question we have to decide here, namely, whether the accident arose out of his employment. On the facts I am clearly of opinion that it did not.

LORD DUNDAS—I entirely concur. This Stated Case arises out of an arbitration under the Workmen's Compensation Act 1906, and not under the original Act of 1897. That fact, however, seems to be of no practical importance in this case, because (1) no question is raised as to whether or not the injured man was at the time of the accident "on, in, or about" the premises of his employment; and (2) no defence is maintained on the ground that the injury was attributable to his serious and wilful misconduct. Even if the facts stated were sufficient to ground such a defence, it could not here be pleaded, looking to the terms of section 1 (2) of the statute of 1906, and the tenth finding in the case. The vital question for our decision is whether or not the accident arose "out of" the appellant's employment, for if that is answered in the negative, as I think it ought to be, one need not consider or decide whether or not it could be said to have arisen "in the course of" the employment. Apart from authority I should have come clearly to the conclusion that this accident did not arise out of the man's employment, looking to the facts found in the Case, and particularly in the eleventh finding. Leaving out of account any idea of misconduct or negligence on the appellant's part, the eleventh finding seems to me to negative the question. I cannot see how it could be reasonably affirmed that the accident arose out of the employment. The man when he met his injury was about his own business (or pleasure) and not about the business of his employers. When one looks at the decided cases they seem to be in entire conformity with this view of the matter, and (so far as previous authority can usefully be appealed to) to illustrate its soundness. Those most nearly in point are, I think, *Smith*, 1899, 1 Q.B. 141; *Benson*, 1904, 1 K.B. 242; and *Reed* v. *Great Western Railway Company*, decided by the House of Lords, October 29, 1908, which (so far as I know) is as yet only reported in the "*Times*" newspaper.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Watt, K.C.—Macdonald. Agents—Paterson & Salmon, Solicitors.

Counsel for Respondents—Cooper, K.C.—Black. Agents—Webster, Will, & Co., S.S.C.

Friday, November 6.

SECOND DIVISION.

LITTLEJOHN *v.* JOHN BROWN & COMPANY, LIMITED.

Reparation — Master and Servant — Employment—Employers' Liability Act 1880 (*43 and 44 Vict. c.* 42), *sec.* 1—*Contract of Employment—Contractor—Piece-Work.*

A firm of shipbuilders were in the practice of having rivetting done by squads of rivetters. The shipbuilders supplied the whole material, plant, and tools. A squad consisted of two rivetters, a holder-on, and a rivet-heater, who was a lad. The rivetters were paid by the piece, so much per hundred rivets. They paid the holder-on and the rivet-heater, who were under their control; they engaged them and dismissed them, though there was some dubiety as to how far notice of engagement and dismissal was given to the foreman in the yard. The time of the squad was kept, but not, at least not separately, of the holder-on and rivet-heater. The foreman could not interfere with the squad so long as they did the work right enough, but when done with one job he would show them another, and if dissatisfied with the work he could complain to the rivetters, but to them alone. The squad was, like all workmen within the premises, subject to the rules of the yard.

A squad being in want of a rivet-heater applied to the foreman, who picked out a lad and sent him back with one of the rivetters to the ship they were working on, and the rivetter showed the lad the work he was to do. Having received injuries through, as he alleged, defective plant, the lad sued for damages from the shipbuilders under the Employers' Liability Act 1880.

On a rule, *held* that the Act did not apply, as the pursuer was not in the employment of the defenders.

Per Lord Guthrie—"But if the test is the direct and immediate selection, payment, control, and power of dismissal, the evidence is all one way."

Process—Pleadings—Record—Notice—Averments of Negligence—New Case Disclosed at Trial—Objection.

In an action of damages for personal injuries by a workman against his employers under the Employers' Liability Act 1880, the pursuer averred negligence in respect of the defective condition of the structure upon which he