Friday, February 7.

SECOND DIVISION.

[Sheriff-Substitute at Kilmarnock.

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

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—*Accident Arising out of and in the Course of the Employment—Accident Caused by Act of Fellow-Workman Outside his Employment.*

B, a "drawer" in a mine within the meaning of the Coal Mines Regulation Act 1887, and the Workmen's Compensation Act 1897, had brought a hutch to his working place. S and P, also "drawers," were taking an empty hutch to their working place, S driving the horse and P sitting on the back of the hutch, and on passing B's working place they took possession of his hutch and carried it away with them, P holding it with his hands while he continued to sit in the other hutch. B pursued them and took up a prop of wood and pushed it against P to make him let go. P retaliated by throwing a handful of rubbish at him. In avoiding this B struck his head against a projecting part of the narrow passage. *Held* that the accident did not arise "out of" his employment.

Falconer v. *London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381; and *Armitage* v. *Lancashire and Yorkshire Railway Company*, [1902] 2 K.B. 178, *approved* and *followed.*

This was an appeal by way of stated case from an award of the Sheriff-Substitute at Kilmarnock (MACKENZIE) in an arbitration under the Workmen's Compensation Act 1897 between James Burley, miner, Galston, claimant and respondent, and William Baird & Company, Limited, coalmasters, Hurlford, appellants.

The case stated—"This is an arbitration to fix the amount of compensation payable to the pursuer, in which I found the following facts proved, namely, that the pursuer is a drawer and was employed in the defenders' Maxwood Pit, Galston, which is a mine within the meaning of the Coal Mines Regulation Act 1887, and the Workmen's Compensation Act 1897; that on 31st May 1907 while in the course of his employment in said pit he sustained an injury to his eye; that two other lads named Smith and Paton, who were also drawers in said pit, were taking an empty hutch to their own working place, Smith sitting on the front of said hutch and driving the horse, while Paton was sitting on the back of the hutch; that on passing the entrance to pursuer's working place Smith and Paton found a hutch which pursuer had brought there for his own use, and that said hutch contained a tree or wooden prop about seven feet long; that Smith and Paton took possession of this hutch and proceeded to carry it along with them by Paton holding it with his hands while he continued to sit on the first hutch; that when they had passed through a trap door near at hand, the pursuer, returning to his place, found the hutch gone and went in pursuit of Smith and Paton to recover it; that the pursuer passed through the trap door after them and coming up to the hutch in which there was the said wooden prop he raised the end of this prop and pushed it with some force against the front of Paton's body in order to detach the hutch in dispute from his grasp; that Paton resenting this took up a handful of dust or rubbish and threw it at the pursuer; that in avoiding this missile the pursuer struck his head against a rough or projecting part of the side of the narrow passage in which they were and received the said injury."

"On these 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 on the facts proved the personal injury to the respondent was caused by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1897."

Argued for the appellants—The respondent was in no better position than if he had been injured by the rubbish thrown. The risk of being hit by things intentionally thrown at a workman by a fellow-workman was not a risk incidental to the employment of mining, and consequently the accident did not arise out of the employment—*Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381; *Armitage* v. *Lancashire and Yorkshire Railway Company*, [1902] 2 K.B. 178. In *M'Intyre* v. *Rodger & Company*, December 1, 1903, 6 F. 176, 41 S.L.R. 107, and *Challis* v. *London and South Western Railway Company*, [1905] 2 K.B. 154, the same test was applied, but in each it was held that the risk there involved, and occasioning the accident, was incidental to the employment.

Argued for the respondent—The accident did arise out of the employment. The matter of dispute was connected with their master's work. Smith and Paton on the one hand and the respondent on the other each desired the hutch for their master's work. The case was ruled by *M'Intyre* v. *Rodger & Company* (*cit. sup.*), and *Challis* v. *London and South-Western Railway Company* (*cit. sup.*) The grounds stated by Lord Trayner in *M'Intyre* at 6 F. p. 179, distinguished the present case equally with that of *M'Intyre* from *Falconer.*

At advising—

LORD JUSTICE-CLERK—In this case I have come to an opposite opinion from that arrived at by the Sheriff-Substitute. The facts as stated by him are that two other

men in the mine where the pursuer was employed carried off a hutch which the pursuer had brought to his own working place, by one of them sitting on their rake of hutches which was in motion and holding the pursuer's hutch by hand; that on the pursuer going forward and endeavouring to get possession of his hutch, by pushing a prop against the man who held it, so as to detach his hold, the other man took up a handful of rubbish out of the hutch and threw it at the pursuer, who, in avoiding being struck in the face by it, brought his head against the side of the passage and was injured. He was naturally alarmed by the other man's action, fearing to receive an injury by being struck by what was thrown, which might be a hard substance.

I am unable to hold that this injury was one arising out of or in the course of the pursuer's employment. What caused the injury was not in any sense an accidental cause but was a fault by a wrongdoer, who was acting in a wilful and unjustifiable manner, and the injury was caused by this wrongful personal act. It was not an accident occurring in the course of work. If a person throws a stone to strike another and he is injured, the fact that both men are workmen in the place of work where the injury is done will not make the injury one for which the master must pay compensation.

I am therefore of opinion that the question in the stated case should be answered in the negative.

LORD STORMONTH DARLING—I have the misfortune to differ from your Lordship. There is no dispute that personal injury by accident was here caused to a workman in the course of his employment; and the Sheriff-Substitute, holding that the injury arose out of as well as in the course of his employment, has awarded him compensation in terms of the Act. The sole question is whether the Sheriff was right in holding that the accident arose out of the employment. I am of opinion that he was, and therefore I should be in favour of sustaining his award.

The injury was to the workman's eye, and it was sustained by the man striking his head against a rough or projecting part of the side of the narrow passage through which he was then passing. No doubt he sustained this injury in trying to avoid a handful of dust and rubbish which another workman in the pit had thrown at the pursuer. And the Sheriff tells us very clearly how this came about. It seems to me that one difficulty in reversing a finding which the statutory arbitrator has come to on the facts—especially when he is so sound and sensible a judge of evidence, as we know from repeated experience this arbitrator to be—is, that in a matter like this a very little difference in the precise mode of stating the facts may make all the difference in the proper conclusion to be drawn from them. Now, I take the facts as stated here to be that the lads, who were all "drawers" in the pit, were not engaged in "horseplay" or anything of the nature of a "lark" at all, but were going about their proper business in the pit, though the lads called Smith and Paton had been guilty of a bit of mischief in carrying off a hutch which belonged to the pursuer—in the sense that he was entitled to the use of it—and that Paton was certainly in the wrong in throwing the handful of dust or rubbish at the pursuer, though the act might be very far short of a criminal act as was suggested in the course of the discussion. To that extent I am willing to take the case, as I think the Sheriff-Substitute must have taken it, on the footing that Paton in throwing the handful of dust or rubbish was the aggressor.

But is it the law that the moment you find that an injury sustained by a workman dutifully engaged in doing his master's work at the time when he received the injury was caused at some link in the chain of causation by the act of a fellow-workman, the employer is relieved of all liability under the Act? I put the question in that form because the proximate cause—the *causa causans*—of the injury in this case was the striking of the pursuer's head against the projecting part of the narrow passage. If there had been no projection there would have been no injury. But I am willing to take the case on the footing that what caused the pursuer to duck his head was the throwing of the missile. Even so, Is it the law, taking the decisions both in England and Scotland as a whole, that the circumstance of the injury being caused, though not immediately caused by the act of a fellow-workman, has the effect of relieving the employer from liability? Now I must rather demur to decisions upon a necessarily different set of facts being taken as if they ruled or governed the particular set of facts which are found by the arbitrator, and on which, so far as they are facts and not law, he is final. At all events these decisions can only be so taken as far as they can be said to lay down some definite or consistent rule of law.

What, then, are the decisions which are said to have this effect? There is first the case of *Falconer*, 3 F. 514, as to which I must be allowed to say that it was the judgment of two Judges of this Division against one, Lord Young being absent and Lord Moncreiff dissenting. In the subsequent case of *M'Intyre*, (1903) 6 F. 176, Lord Young, at p. 178, confessed that he would have had very great difficulty in agreeing with the judgment in the case of *Falconer*, and said that if he had been present he would have been disposed to concur with Lord Moncreiff. That learned Judge admitted in *Falconer's* case that the result might have been different if the proximate cause of the accident had been something wholly outwith the employment; and his Lordship's dissent was based on the ground, for which at least there was a great deal to be said, that the injured workman was engaged at his work, while the workman who caused the injury was engaged in something wholly different, viz., horseplay.

I admit that *Falconer* was approved of in the English case of *Armitage*, (1902) 2 Q.B. 178, in which it was decided that a workman who was injured through the tortious act of a fellow-workman, which had no relation whatever to their employment, had no claim against his employer because the injury did not arise out of the employment. The case was one of "larking" pure and simple, because the piece of iron which was thrown by one boy at another missed that other and injured the claimant. The accident was therefore treated as a tortious act, "having no relation whatever to the employment." These are the very words of the present Master of the Rolls. I do not think, for the reason I have given, that that could be said of the accident in the present case.

But what is to be said of the subsequent case of *M'Intyre, supra cit.*, in this Court? I greatly doubt whether the case of *Armitage* would have been decided as it was if the English Court of Appeal had had the case of *M'Intyre* before it, which it could not have, because it was later in date than *Armitage*. At all events, I think we are not bound, in deference to an English decision, to disregard a judgment of our own Courts. There the injury to the workman complaining was held to be one arising out of and in the course of his employment, though it was the direct result of a forcible act—pulling a brush out of the hand of the injured workman, which drew his hand across the sharp surface of a piece of machinery which was near, and so cutting his hand. Your Lordship in the chair, who had been one of the majority of this Court in *Falconer's* case, distinguished that case from *M'Intyre's* by pointing out that the workman whose act was the immediate cause of the injury had no intention of injuring M'Intyre; and Lord Trayner, who had been the other member of the majority, drew practically the same distinction, for he said that the act, however careless it was, might still be properly described as "incidental to the employment." That was undoubtedly "a fine distinction," as was admitted by your Lordship in the chair in *M'Intyre's* case; and I cannot doubt that the presence of Lord Young and Lord Moncreiff had something to do with the difference in result. But if the intention of the man who caused the injury had anything to do with the effect in law, what is to be said of *Armitage's* case, where there was no bad intention, for the man who threw the missile hit the wrong man?

What again is to be said of the later English case of *Challis* v. *London and South-Western Railway*, (1905) 2 Q.B. 154? There a stone wilfully dropped on a train by a boy from an overhead bridge injured the driver of the train, and it was held to be an accident arising out of as well as in the course of the employment, because it was a matter of common knowledge and experience in the opinion of the learned Judges of the Court of Appeal that boys should throw stones at passing trains; and therefore they held it to be a risk incidental to the employment of an engine-driver, although it was a matter over which the company had no control. But it was none the less a tortious act committed by a bystander, and therefore, if the element of tort was to decide the question whether an act was or was not to relieve the employer from liability, I do not see why the employer in that case should have been held liable. The case of *M'Intyre* does not appear to have been cited in *Challis's* case, although the older case of *Falconer* was.

On the whole matter, I do not think that the cases cited, when viewed as a whole, lay down any definite or consistent rule of law, and therefore I think that we should sustain the Sheriff-Substitute's decision. If there be any coherent rule of law derivable from the cases it must be subject to so many exceptions as practically to deprive it of all value as a working rule. For it can be no more than this, that an injury may arise out of as well as in the course of the employment although the act which causes the injury may be the act of a fellow-workman or of a bystander, whether malicious or not, and may have no relation to the employment except that it is one of the risks to which the injured workman is bound to submit as being a risk incidental to the employment in which he is engaged.

Lord Low—I am of opinion, in the first place, that it is immaterial that the injury which Burley sustained was occasioned not by his being struck by the missile which Paton threw at him, but by his head coming in contact with some projection when he was avoiding the missile. The question, in my judgment, would have been the same if the missile had struck him and caused the injury.

The question is whether this accident was one "arising out of" the employment, because it is not disputed that it arose "in the course of" the employment.

There are two decisions in which the meaning of the words "arising out of" the employment has been construed in reference to circumstances closely approaching those of the present case. The one is *Falconer* v. *London and Glasgow Engineering and Shipbuilding Company, Limited* (3 F. 564), which was decided in this Division, and the other is *Armitage* v. *Lancashire and Yorkshire Railway Company* (1902, 2 K.B. 178), which was decided in the Court of Appeal in England.

With the exception perhaps of Lord Moncreiff, the learned Judges in both of these cases took substantially the same view of the meaning and effect of the words "arising out of" the employment, and I think that the result may be accurately stated thus—If an accident arises by reason of a danger which is incidental to the employment, the workman will be entitled to compensation, but he will not be entitled to compensation if the accident is caused by something done by a fellow-workman outside the scope of the employment.

Now for a workman to throw something

at another is not a danger which is incidental to employment in a coal mine, and it is certainly an act which is entirely outside of the scope of the employment. I am accordingly of opinion that the question of law should be answered in the negative.

LORD ARDWALL — The accident which gives rise to this case was a very regrettable one, but the question which the Court has to decide is whether, in the words of section 1 (1) of the Workmen's Compensation Act 1897 the accident was one "arising out of and in the course of the employment" in which the workman was engaged. There is no question that it arose in the course of his employment, but the difficulty is with regard to the additional condition, which must be established in order to entitle him to compensation against his employers, namely, that it arose out of his employment.

I am of opinion that it did not, for the reason that it arose directly from the boy Paton throwing a handful of dust or rubbish at the pursuer, in avoiding which the pursuer suffered the injury complained of. It was certainly no part of Paton's employment to throw a missile at any of his fellow-workmen, nor was his doing so a risk incidental to the pursuer's employment which the employers might be supposed to have undertaken the chance of when they employed him. On the contrary, the throwing of the missile in question was a gratuitous piece of mischievous folly on the part of the boy Paton, and I cannot hold that it was such a piece of folly as is common among boys employed in mines.

I may add that, in my opinion, the present question is covered by decided cases, for I am unable to distinguish it, so far as principle is concerned, from the cases of *Falconer*, 3 F. 564, and *Armitage*, 1902, 2 K.B. 178. The latter case was very similar to the present, for there a boy named Smith pushed another boy named Harrop into a pit, and Harrop, becoming angry, picked up a piece of iron and threw it at Smith. It missed Smith and hit Armitage on the eye causing him considerable injuries, and there it was held that Armitage had no claim against the employers.

In the case of *Challis*, 1905, 2 K.B. 154, where an engine-driver was injured by being struck by the glass of the screen of the engine which had been broken by a stone wilfully dropped on a train by a boy from a bridge, the employers were held liable, on the ground that the risk of mischievous boys discharging missiles from bridges was a risk incidental to the employment of an engine-driver, and that the accident accordingly arose out of the employment; but that case, I do not think, can be held to apply to the present, because, as I have already said, the throwing of missiles by boys or others in mines at miners is not, according to common experience, a risk incidental to a miner's employment.

On the whole matter, I am of opinion that the accident arose, not out of the employment in which the pursuer was engaged, but out of the mischievous and illegal act on the part of the boy Paton, and that accordingly the only remedy he can have is against the wrongdoer, and not against his employers.

The Court found, in answer to the question, that the injury to the respondent was not one arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1897, recalled the award of the arbiter, and remitted to him to dismiss the claim.

Counsel for the Appellants — M'Clure, K.C.—Horne. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent — Hunter, K.C. — Munro. Agents — Macpherson & Mackay, S.S.C.

Friday, February 7.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

WILSON v. POTTINGER.

Property — Agreement — Encroachment — Bar — Dean of Guild — Appropriate Remedy for Building Encroachment — Equitable Jurisdiction of Court—Facts Constituting a Bar to Objecting to Encroachment.

P., the owner of a building stance in a town, upon which he proposed to erect a four-storey building, after a meeting, wrote to W., his neighbour, who had, entirely on his own stance, a two-storey building—"With regard to the gable between your house and my ground that I am to build upon, I am prepared to pay you whatever you're entitled to. The amount can be agreed on between you and myself, or any other party that we may appoint, on your approving of my plans. Yours faithfully, P. I will make good any damage done to your property by my operations, P." W. gave consent.

P.'s intention was merely to have raised W.'s existing gable, but to meet the requirements of the Dean of Guild it was found it would be necessary to build, in part, the upper or new portion of a greater width than, and consequently projecting about 4½ inches beyond, the lower or old portion. The projection was to W.'s side. The plans bore W.'s signature, and showed, though not very distinctly, the alterations, but it was questioned if these were on the plans when W. signed. W.'s attention was never called to the proposed encroachment. After the building was erected W. brought an action to have P. ordained to remove it so far as it encroached beyond the old portion of the gable.