the fund held by the pursuers and real raisers. It appears to me that these facts speak for themselves. There is a question between Brown and Poole & Company, and therefore the case falls within the principles already referred to. The argument was used that there was only one arrestment and therefore no double distress, but I am unable to see why, if in the case of an assignation a true competition has been held to arise between the assignor and the assignee, which was the case in *Fraser's Executrix*, 20 R. 374, there should not equally be double distress here. An intimated assignation interpels the debtor from paying just as a duly executed arrestment. I therefore agree that there is here double distress and that the Lord Ordinary is right.

LORD DUNDAS was absent, and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court refused the reclaiming note, adhered to the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary to proceed therein.

Counsel for Pursuers and Real Raisers (Respondents)—M. P. Fraser. Agents—Fyfe, Ireland, & Co., W.S.

Counsel for the Compearing Defenders (Appellants)—M'Kechnie, K.C.—A. A. Fraser. Agent—Sterling Craig, S.S.C.

Tuesday, February 7.

SECOND DIVISION.

[Sheriff Court at Hamilton.

KANE *v.* MERRY & CUNINGHAME, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident "Arising Out of" Employment.*

A brusher in a mine who had finished his work for the day jumped on the last of three hutches which were being taken by a pony to the pit bottom. On the way he was knocked off the hutch by his head coming into contact with two crowns which were below the ordinary pit level, and he sustained serious and permanent injury. A special rule, of which the injured man was cognisant, forbade miners from riding on the hutches. *Held* that the injury was not caused by an accident "arising out of" the workman's employment within the meaning of the Workmen's Compensation Act 1906.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1), enacts—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation. . . ."

Simon Kane, Motherwell, having claimed compensation under the Workmen's Compensation Act 1906 from his employers Merry & Cuninghame, Limited, coalmasters, Glasgow, the matter was referred to the arbitration of the Sheriff-Substitute at Hamilton (A. S. D. THOMSON), who assoilzied the defenders, and at the request of the appellant stated a case for appeal.

The following *facts* were admitted or proved—"(1) That the pursuer on 30th October 1909 was employed in the respondents' pit as a brusher, and on said date, having finished his work for the day about 10·30 p.m., came with the other workmen to a lie on his way to the pit bottom. (2) That the pony-driver at this time was proceeding to draw three hutches of dirt from the lie to the pit bottom, and the appellant seeing the rake of hutches going off jumped on the rearmost hutch for the purpose of getting a ride to the pit bottom. (3) That in getting on to the hutch his lamp in some way went out, and the pony-driver failed to notice that he was riding on the hutch. (4) That on the way to the pit bottom the appellant was knocked off the hutch by his head coming in contact with two crowns which were considerably below the ordinary pit level, and that he in consequence sustained a fracture of the spine which involves a serious and permanent injury. (5) That it is one of the special rules in said pit (and notices thereof are duly posted up in the pit) that miners are forbidden to ride on hutches, and that this rule is well known to the miners and was well known to the appellant. (6) That in these circumstances the accident did not arise out of and in the course of the appellant's employment, and that he is not entitled to compensation. I therefore assoilzied the defenders and found them entitled to expenses."

The *questions of law* were—"(1) In the circumstances was the arbiter right in holding that the appellant was guilty of a breach of the special rules of said pit? (2) Assuming that the appellant was guilty of such breach, was the arbiter right in deciding that in the circumstances above stated the appellant was not injured by accident arising out of and in the course of his employment?"

Argued for appellant—The first question was clearly one of fact, and the arbiter's finding in regard to it was not challenged, but he had erred in his finding on the second question. Breach of a special rule, even in the circumstances here found proved, did not take a man out of his employment. "Employment" was not limited to the period of effective work. Even if he adopted a wrong and dangerous method of doing his work he was not thereby taken outside his employment—*Durham* v. *Brown Brothers & Company, Limited*, December 13, 1898, 1 F. 279, 36 S.L.R. 190. Breach of a rule might be serious and wilful misconduct—*Dobson* v. *United Collieries, Limited*, December 16, 1905, 8 F. 241, 43 S.L.R. 260—but that was not the question at issue here. The present case came very near the case of *Glasgow Coal Company, Limited* v. *Sneddon*, Feb.

ruary 14, 1905, 7 F. 485, 42 S.L.R. 365, where breach of a rule had been held not to bar the widow of a miner from claiming compensation. Reference was also made to *M'Lauchlan* v. *Anderson*, February 1, 1911, *supra*, p. 349.

Counsel for the respondents were not called on.

LORD JUSTICE-CLERK—In this case it cannot possibly be said that the Sheriff-Substitute had no reasonable grounds for holding that the accident did not arise out of and in the course of the workman's employment. This is a totally different case from that of the *Glasgow Coal Company* v. *Sneddon*, 7 F. 485, which has been cited to us, because here we have a breach of a rule and in direct connection with the breach the accident happens. The workman had finished his work for the day when he saw a pony-driver proceeding to draw three hutches to the pit bottom, and he jumped on the rearmost hutch for the purpose of getting a ride. The driver did not notice him as his lamp had gone out, and on the way to the pit bottom he was knocked off the hutch by his head coming in contact with two crowns which were considerably below the ordinary pit level. It was one of the special rules of the pit that miners were forbidden to ride on the hutches, and of this the workman was well aware. In this state of the facts, although it may be said that the workman was in the course of his employment while in the act of leaving his work, I have no doubt that the accident did not arise out of his employment in the sense of the Act.

LORD ARDWALL—I am of the same opinion. Undoubtedly while a man is going to or coming from his work he is still in the course of his employment, but it is quite another question whether the accident in this case can be said to have arisen "out of the employment." I am of opinion it did not, but, on the contrary, that it happened in consequence of something which the appellant did, purely for his own ease or pleasure, and in direct and flagrant breach of rules which the employers had enacted under statutory authority for the protection alike of their workmen and themselves. In these circumstances I am satisfied that the result at which the Sheriff-Substitute has arrived is right.

LORD MACKENZIE—In this case the arbiter has found that the accident did not arise out of and in the course of the employment of the appellant. Before this Court can interfere with that decision we must be satisfied that there was no evidence on which he could reasonably reach this conclusion. In this case I think that not only was there evidence on which the arbiter could reach that conclusion, but the facts plainly show it was the proper conclusion to reach. It is not every breach of rules which places a workman outside the sphere of his employment. In each case that is a question of circumstances, and the arbiter has so regarded it. Here I think the accident did not arise "out of," although it may have arisen "in the course of" the workman's employment. The accident was due to an unfortunate act of the workman himself. For purposes of his own, instead of walking to the pit bottom as he should have done, he got on a hutch, with the result, that on the way his head came into contact with two crowns which were below the ordinary pit level. In these circumstances I think the Sheriff-Substitute has reached the proper conclusion.

LORD DUNDAS was absent, and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court answered the first and second questions of law in the affirmative, and affirmed the dismissal of the claim by the arbitrator.

Counsel for Appellant—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

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

Tuesday, February 7.

SECOND DIVISION.

(SINGLE BILLS.)

MACKENDRICK *v.* NATIONAL UNION OF DOCK LABOURERS OF GREAT BRITAIN AND IRELAND.

(Reported *ante*, November 1, 1910, at p. 17.)

Expenses — Appeal to House of Lords — Withdrawal of Appeal — Respondent's Additional Expenses Prior to Withdrawal.

Where a cause had been disposed of on a reclaiming note and the pursuer found entitled to expenses, *held* that the Court had no power to award additional expenses incurred by the pursuer in consequence of an appeal to the House of Lords having been taken by the unsuccessful defenders and afterwards withdrawn.

The case is reported *ante ut supra*.

Alexander Brownlie Mackendrick, writer, Glasgow, sued the National Union of Dock Labourers in Great Britain and Ireland for £425, 5s. 1d., being the amount of certain accounts for professional work.

On 1st November 1910 the Second Division found, *inter alia*, that the defenders were liable in payment of the accounts sued for in so far as the same were properly charged, remitted the same to the Auditor of Court to tax and report, and found the pursuer entitled to expenses, both in the Outer and Inner House, so far as not already disposed of by a previous interlocutor.

On 12th November 1910 the defenders presented a petition for leave to appeal to the House of Lords, and on 15th November leave to appeal was granted as craved.

On 20th January 1911 defenders' agents