COURT OF SESSION.

Wednesday, March 8.

FIRST DIVISION.

[Sheriff Court at Paisley.

DUNNIGAN *v.* CAVAN & LIND.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c. 58*), *First Sched.* (1)—"*Results from the Injury*"—*Natural or Probable Consequence—Acceleration of Death by Conduct of Workman.*

A workman while engaged in laying drain pipes was struck on the back by a stone falling from the surface and was injured. A day or two afterwards he was seen by a doctor, who diagnosed pneumonia and sent him to hospital, where he remained for three days, when he insisted on being taken home. He was accordingly assisted home—a distance of some ten minutes' walk—by some neighbours. This was done in spite of warning by the doctor in attendance at the hospital that such a course was dangerous to life. He died two days afterwards.

In an application by his widow for compensation under the Workmen's Compensation Act 1906 the Sheriff-Substitute, acting as arbiter, found that on a consideration of the whole case, together with the report by a medical referee, "but for the accident the deceased would not have died at the time at which, and in the way in which, he did die," and that the injury by accident was thus the cause of death.

Held that the arbiter had not discharged the duty imposed on him by the Act of considering whether the death did "result" from the injury by accident, and case remitted to him to determine that question and to report.

Held further—the Sheriff-Substitute having reported that he found as a fact that the man's death resulted from the accident libelled—that there was evidence on which the Sheriff-Substitute might competently find as he did.

This was an appeal by way of stated case from a decision of the Sheriff-Substitute (LYELL) at Paisley in an arbitration under the Workmen's Compensation Act 1906 between Cavan & Lind, contractors; Johnstone, *appellants*, and Mrs Ann Herbertson or Spence or Dunnigan, widow, Beith Road, Elderslie, *respondent*.

The *facts* were as follows—"1. The deceased Samuel Dunnigan, husband of the respondent, was a labourer in the employment of the appellants, and on Tuesday, 18th May 1909, sustained injury by accident arising out of and in the course of his employment in these circumstances. He was working at the laying of drain pipes in a trench from 7 to 11 feet deep, in Gourock, when a stone some 7 lbs. in weight fell from the surface, struck him on the back while he was in a stooping position, and knocked him down.

"2. After a few moments he lighted his pipe and resumed work in the drain for about twenty minutes till dinner-time. He was unable to eat all of his dinner, but threw some of it away, and contrary to his usual custom did not smoke after dinner. He returned to his work after dinner and wrought on till the usual stopping time. He also wrought the whole of the following two days, Wednesday and Thursday.

"3. During this time he made no complaint to his foreman or his masters of feeling any bad effects from the injury caused by the blow from the stone, but he did complain to his fellow-workmen.

"4. On the Tuesday night he requested a fellow-workman, who was lodging in the lodging-house in which he was living, to foment and rub his back, which was discoloured and swollen 'a little between the shoulders on the right side.' On the Wednesday night the mark on the back was of a darkish hue and slightly more swollen. On the Thursday night he refused to have his back rubbed on account of the pain, and complained of the tightness of a flannel bandage wrapped round him. The discolouration then was described as 'something the same as a black eye.' On the Wednesday night he spat up blood—a large spoonful.

"5. On the Friday, 21st May 1909, he was unable to work, and was seen to be spitting blood.

"6. On the last-mentioned day, he went home by train to his house in Elderslie, where he complained that his ribs had been broken by the blow from the stone. He was seen by a doctor, who diagnosed pneumonia, and sent him to hospital, where he remained until the night of the following Monday, 24th May, when he insisted on being taken home. He was accordingly assisted home—a distance of some ten minutes' walk—by some neighbours. This was done in spite of warning by the doctor in attendance at the hospital that such a course was dangerous to life. He died in his house on Wednesday, 26th May 1909, about 9 p.m.

"7. That the immediate cause of death was pneumonia."

The case further stated—"The medical evidence on the question whether the pneumonia was traumatic or not was conflicting; and being of opinion that it was desirable to obtain a report from the medical referee, I took advantage of the power conferred on me by paragraph 15 of the second schedule of the statute, and submitted to the medical referee to report whether, in his opinion, on a consideration of the facts as above stated, and the medical evidence which was submitted to him in terms of the regulations, the death of the said Samuel Dunnigan was—(1) caused, (2) materially contributed to, or (3) accelerated by the accidental injury above set forth.

"The medical referee reported that in his opinion the pneumonia was caused by

the accidental injury, and that the death was materially contributed to by the accidental injury, and stated his reasons for so thinking. At the end of a note attached to his report he stated—'The pre-existing lung disease discovered at the autopsy, viz., the abscess at the left apex, and the old pleuritic adhesions, doubtless rendered it easier for pneumonia to supervene upon the injury, and the deceased man's own folly in leaving the hospital probably accelerated his death, but these circumstances cannot disestablish the conclusion that, but for the accident, Samuel Dunnigan would not have died how and when he did die.'

"On a consideratiou of the whole case, together with the report of the medical referee, I found in fact that, but for the accident the deceased would not have died at the time at which and in the way in which he did die, and found in fact and law that the said injury by accident was thus the cause of the death in the sense of the Workmen's Compensation Act 1906."

The *questions of law* were—"1. Whether the Sheriff-Substitute was right in holding that the injury by accident was, in the sense of the statute, the cause of Samuel Dunnigan's death? 2. Whether the respondent is precluded from making the present claim in consequence of the deceased having left the hospital as above narrated against medical advice."

Argued for appellants—An injured workman was bound to take all reasonable means to expedite his recovery. Where, as here, he acted unreasonably, and where his doing so seriously or adversely affected his illness, the *onus* lay on him to show that the act of folly did not accelerate his death. The deceased's death was not the result of the accident but of his own rashness, *i.e.* a *novus actus interveniens*, and that being so his employers were not liable —*Dunham* v. *Clare* [1902], 2 K.B. 292, at p. 296; *Donnelly* v. *Baird & Company, Limited*, 1908 S.C. 536, *per* Lord M'Laren at p. 541, 45 S.L.R. 394; *Warncken* v. *R. Moreland & Son, Limited* [1909], 1 K.B. 184. The case of *Marshall* v. *Orient Steam Navigation Company, Limited* [1910], 1 K.B. 79, relied on by the respondent, was distinguishable, for there the facts showed that the workman had not acted unreasonably in refusing to undergo the operation in question. *Alternatively*, the case should be sent back to the Sheriff for a finding as to the cause of death.

Argued for respondent—The appellants could not succeed unless they proved that the deceased's conduct in leaving the hospital caused his death—*Marshall* (*cit. sup.*), *per* Cozens-Hardy, M.R., at p. 82 foot. This they were foreclosed from doing, for the arbiter had found in fact that but for the accident the deceased would not have died when he did—in other words, that the accident had shortened his life. That being so, he was clearly entitled to compensation — *Golder* v. *Caledonian Railway Company*, November 14, 1902, 5 F. 123, 40 S.L.R. 89.

At advising—

LORD PRESIDENT—The deceased Samuel Dunnigan, the husband of the respondent, was a labourer in the employment of the appellants, and was injured on 18th May 1909 by an accident arising out of and in the course of his employment. The injury was caused by a stone falling on his back while he was engaged in laying a drain pipe in a trench. He felt unwell after the accident; and he complained of the pain caused by the bruise. On 21st May he was seen by a doctor, who diagnosed pneumonia and sent him to hospital, where he remained till 24th May. On that day, while still suffering from pneumonia, he insisted on being taken home, and went home with the assistance of some neighbours, although he was warned by the hospital doctor that such a course was dangerous to life; and he died in his house on 26th May.

The learned Sheriff, after setting forth these facts, goes on to say thatas the medical evidence on the question whether the pneumonia was traumatic or not was conflicting, and as he was of opinion that it was desirable to obtain a report from the medical referee, he took advantage of the power conferred by paragraph 15 of the Second Schedule of the Act. That paragraph provides that any arbitrator may "submit to a medical referee for report any matter which seems material to any question arising in the arbitration." The matter submitted to the medical referee for report here was "whether in his opinion, on a consideration of the facts as above stated"—which I have already mentioned—" and the medical evidence, which was submitted to him, in terms of the regulations, the death of the said Samuel Dunnigan was (1) caused, (2) materially contributed to, or (3) accelerated by the accidental injury above set forth." The medical referee reported (as stated in the case) that, in his opinion, the pneumonia was caused by the accidental injury, and that the death was materially contributed to by the accidental injury, and stated his reasons for so thinking. At the end of a note attached to his report he stated—"The pre-existing lung disease discovered at the autopsy, viz., the abscess at the left apex, and the old pleuritic adhesions, doubtless rendered it easier for pneumonia to supervene upon the injury, and the deceased man's own folly in leaving the hospital probably accelerated his death, but these circumstances cannot disestablish the conclusion that but for the accident Samuel Dunnigan would not have died how and when he did die." And then the learned Sheriff goes on to say that he "found in fact that, but for the accident, the deceased would not have died at the time at which and in the way in which he did die, and found in fact and law that the said injury by accident was thus the cause of the death in the sense of the Workmen's Compensation Act 1906. The question of law in the case is whether the Sheriff was right in so holding.

Now I have a strong impression as to what the Sheriff really meant to find. But

I think it is quite impossible for us to allow the case to remain on the finding as it stands, because, if we did so, a bad example would be afforded to other arbiters. The Sheriff apparently was attracted by the formula given by the medical referee at the end of his report, and he has adopted the dangerous course of paraphrasing the statute and applying his paraphrase as a test instead of the actual words of the statute.

The first section of the statute enacts that "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman "— and on the facts these conditions were satisfied here — " his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." That sends you to the First Schedule, and the first article of that schedule provides for the amount of compensation " where death results from the injury." Accordingly what the arbiter has to find is whether as a matter of fact death did result from the injury; and however difficult that question may be in the circumstances of the case it must be decided one way or the other. But here the Sheriff has not brought himself face to face with that proposition, but instead of it has substituted another proposition, namely, that but for the accident the man would not have died how and when he did die, and it is on this proposition that his finding is based. Now a single illustration will show that the two propositions are not identical. Suppose a workman has met with an accident and has been put on a stretcher in order to be removed to the hospital; and then on the way to the hospital, he is killed by lightning, or is shot by a lunatic, or is run over by an omnibus—in all of these cases it would be true to say what the Sheriff has said here, that but for the accident the man would not have died at the time at which and in the way in which he did die, because if the accident had not happened the man would have been at work and not on the stretcher. But, nevertheless, in all these cases a new cause was introduced, and it would be out of the question to say that death resulted from the accident.

The true question on the merits here is whether the man died from the accident or from a new cause which was introduced viz. his own foolish action—to say nothing more—in persisting in leaving the hospital and going to his own house when he was suffering from acute pneumonia.

The Sheriff and the medical referee had to face that question; and it is not an easy question. We cannot tell with certainty what would have happened had the man not left his bed at the time when he did; we cannot say absolutely either that he would have died or that he would have recovered. But still we have got to determine as a matter of common sense whether the death was due to the accident which brought on the pneumonia or to the man's own foolish action subsequently.

As I have said, I think I can extract from certain expressions in the stated case what the Sheriff's view was, but I am not entitled to do so. It would be *pessimi exempli* to leave the proposition standing as it is, because it might tempt other Sheriffs to get out easily of what is often a difficult situation by substituting for the proposition of the statute another proposition not given in the statute at all. I think therefore that the case must go back to the Sheriff in order that he may find categorically whether the man's death did or did not "result" from the accident.

LORD KINNEAR—I agree, although I regret that further procedure should be necessary in a case of this kind.

The statutory duty of the Sheriff is to decide the question of fact whether the accidental injury was the cause of the death. That is a question of mixed fact and law, and it is often very difficult for the Sheriff in stating a case for the opinion of this Court to avoid putting questions of mixed fact and law; but then I think it has generally been found quite possible for us to disengage for ourselves the question of law from that of fact, because the Sheriff usually prefaces his statement of the point to be taken to appeal by a specific statement of the determining facts which he finds proved. But we do not have the advantage of such a specific statement in this case. We have here no finding on the one question of fact which it was his duty to decide; he has only given us materials from which it may be possible for us to conjecture, not so much what the fact was, but what the Sheriff thought it was. But then that is not a duty within our jurisdiction; he must find for himself whether or not the death resulted from the accident. I think that the necessity for this was brought out very clearly by the argument we heard in the case, because a great part of it on one side and the other turned on the question whether the man had lost his remedy by his own foolish and unreasonable conduct. If there is any such question, that is a question of law, assuming his conduct to be foolish and unreasonable; but the question of fact which the Sheriff has to decide is whether the death was caused by the accident or was the result of some supervening cause which could be described as the direct cause of death. Now if there was such a supervening cause it is not necessary to inquire whether it was a foolish and unreasonable act on the part of the man himself or on the part of anyone else. The question of fact would have been exactly the same if, instead of saying that the man had disobeyed the doctor's orders, it had been found that the doctor had given wrong and unskilful orders. The question of fact must always be what really was the cause of the man's death, and the Sheriff must make up his mind to face that question and say whether the accident was or was not the cause.

LORD MACKENZIE—The question which the Sheriff has to consider—and apply his mind to—is whether the chain of causation between the injury by accident and the

death has been broken, or, as it is put by Collins, M.R., in *Dunham* v. *Clare* ([1902] 2 K.B. 292), whether there has been a *novus actus interveniens* so that the old cause goes and a new one is substituted for it. I agree with your Lordship that the case must go back to the Sheriff to determine the question whether the man's death did in fact result from the injury.

LORD JOHNSTON was not present at the advising.

The Court remitted the case back to the Sheriff-Substitute as arbitrator to state whether in all the circumstances he found as a fact that death did or did not result from the accident, and to report.

On 24th February 1911 the Sheriff-Substitute reported as follows—"The Sheriff-Substitute begs respectfully to report to the Court that he finds as a fact that the death of the respondent's husband Samuel Dunnigan resulted from the accident libelled."

The case was further heard on 8th March, when counsel for the appellants stated that in view of the finding in the Sheriff-Substitute's report he did not intend to submit further argument.

LORD PRESIDENT—The whole matter has been dealt with in the previous stage of the case. We have now got an answer from the Sheriff-Substitute which is strictly in terms of the statute, and looking to the fact which he there finds—whether we would agree with him or not—I have no doubt that there was evidence on which he was justified in coming to the conclusion which he has reached. That ends the matter.

LORD KINNEAR — I am of the same opinion.

LORD JOHNSTON—I concur.

LORD MACKENZIE—I also concur.

The Court pronounced this interlocutor—

"Refuse to answer the questions of law as stated in the case: Affirm the determination of the Sheriff-Substitute as arbitrator: Dismiss the appeal, and decern: Find the respondent entitled to the expenses of the stated case on appeal, and remit," &c.

Counsel for Appellants—M'Lennan, K.C. —Aitchison. Agents — Balfour & Manson, S.S.C.

Counsel for Respondent — M'Kechnie, K.C. — Maclaren. Agents — Sturrock & Sturrock, S.S.C.

Friday, March 10.

EXTRA DIVISION.

(Before Lord Kinnear, Lord Dundas, and Lord Mackenzie.)

YOUNG *v.* BROWNLEE & COMPANY.

Company—Management—Directors' Powers —Balance Sheet—Undervaluation of Stock —Concealed Assets—Ultra vires—Action by Objecting Shareholder — Relevancy — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *secs.* 113 *and* 281.

A shareholder in a limited company, carrying on the business of timber merchants, brought an action of declarator and interdict against the company, in which he averred that the balance sheet issued by the directors and passed by a general meeting was false and *ultra vires*, in respect that the stock of timber was entered therein at less than its true market value, whereby a part of the profits earned by the company were concealed from the shareholders, but he made no averment of fraud on the part of the directors.

Held that the valuation of the stock of timber was an administrative matter within the discretion of the directors in connection with which they were answerable alone to the general body of shareholders of the company, that there were no relevant averments of *ultra vires* actings on the part of the company or the directors, and the action *dismissed.*

Newton v. *Birmingham Small Arms Company*, [1906] 2 Ch. 378, *distinguished* (*per* Lord Kinnear) and *commented on.*

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), enacts—Section 113—"(1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors. (2) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office, and the report shall state (*a*) whether or not they have obtained all the information and explanations they have required; and (*b*) whether in their opinion the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information, and the explanations given to them, and as shown by the books of the company. (3) The balance-sheet shall be signed on behalf of the board by two of the directors of the company, or if there is only one director, by that director, and the auditor's report shall be