liquidators on the whole claims set forth in the state of adjudication on claims No. 10 of process: Rank the claims of the creditors in accordance therewith, and decern."

Counsel for Petitioners — Macmillan. Agents—J. & J. Ross, W.S.

Saturday, October 21.

SECOND DIVISION.

[Sheriff Court at Glasgow.

BORLAND *v.* WATSON, GOW, & COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII., cap.* 58), *sec.* 1—*Injury by Accident Arising out of and in Course of Employment—Rupture of Cartilage of Knee—Previous "Wrench" to Knee—Recurrence—Onus of Proof.*

In arbitration proceedings to recover compensation under the Workmen's Compensation Act 1906 it was proved that the claimant, while in the course of his employment on 4th December 1908, felt a severe pain in his knee on rising from a kneeling position; that on examination one of the cartilages of the knee was found to be ruptured; that incapacity resulted; that three years previously, while in the employment of third parties, he had sustained a "wrench" to the knee which resulted in incapacity for some weeks; that on several subsequent occasions he felt momentary pain in the knee on rising from it, but was not thereby prevented from continuing to work.

Held that the claimant had suffered injury by accident on 4th December 1908 within the meaning of the statute.

Opinion (*per* Lord Dundas) that the *onus* lay on the employers to show that no new injury was sustained, but that anything suffered on 4th December 1908 was due to the former accident.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in the Sheriff Court at Glasgow, between John Borland (*appellant*) and Watson, Gow, & Company, Limited (*respondents*), the Sheriff-Substitute (FYFE) refused compensation and stated a case for appeal.

The following *facts* were found proved:—"(1) That appellant is a range-fitter to trade. (2) That about three years ago, whilst in the employment of Messrs Mechan & Son at Whiteinch, he sustained a wrench to his knee, and in respect thereof claimant received compensation under the Workmen's Compensation Act for a period of some weeks. (3) That subsequently on several occasions the result has been that, when at work upon his knees, the knee gave him trouble whilst in the act of raising his body from the ground, causing him pain at the moment, but not preventing him continuing to work. (4) That on 4th December last appellant was in the employment of the respondents. (5) That he was then, in the course of his work, kneeling upon the knee which had previously sustained the injury. (6) That in rising from the kneeling position he again felt the same kind of pain. (7) That on being taken to the infirmary it was found that the internal cartilage of the right knee joint was torn. (8) That an operation was performed on or about 22nd January. (9) That he was discharged from the infirmary on 27th February 1909. (10) That he was not then fit for work. (11) That he is not yet fit for work. (12) That the rupture of the knee cartilage on the 4th December 1908 was the result of the strain experienced when appellant was in other employment than that of the respondents."

On these facts the Sheriff-Substitute found that the appellant had failed to prove that he was injured by accident arising out of and in the course of his employment with the respondents, and refused the application.

The *question of law* for the opinion of the Court was—"Whether the injury which the appellant sustained on 4th December 1908 was an accident arising out of and in the course of his employment as a workman while with the respondents, entitling him to compensation under the Workmen's Compensation Act 1906."

On 6th July 1911, after counsel had been heard, the Court remitted to the Sheriff-Substitute to answer certain questions.

The questions and answers were as follows—"(Ques. 1) Was the cartilage in the appellant's knee ruptured when he was injured in the service of Messrs Mechan & Son at Whiteinch, and received compensation for a time for inability to work?—(Ans. 1) The evidence does not disclose whether the cartilage was ruptured then. (Ques. 2) If there was rupture, was it completed or was it increased, on 4th December 1908, by exertion made on that date?—(Ans. 2) Assuming there was a rupture, it was increased by the occurrence of 4th December 1908. (Ques. 3) Were the symptoms which showed themselves on 4th December in any way different from these which had shown themselves on previous occasions when the appellant required to kneel when working?—(Ans. 3) No. (Ques. 4) Did the appellant receive any new injury while in the respondent's employment, or was the condition in which his knee was found to be on 4th December 1908 produced by the accident three years before, as a natural result of that injury?—(Ans. 4) It is not possible from the evidence to say. (Ques. 5) In what circumstances, and by whom and when, was he taken to the infirmary?—(Ans. 5) On 4th December 1908, when he rose from the kneeling position and felt pain in knee, it was about twelve o'clock, but he stayed on till five, when he was assisted home. At home he was treated by his family doctor till 22nd January, when he was sent to the infirmary by his own doctor."

Argued for the appellant—On 4th December 1908 the condition of the appellant's knee changed for the worse, with the result

that he then became incapacitated. The cause of the incapacity was rupture of a cartilage. That was an "accident," or was the result of an accident—*Hamlyn* v. *Crown Accidental Insurance Company, Limited*, 1893, 1 Q.B. 750; *Stewart* v. *Wilsons and Clyde Coal Company, Limited*, November 14, 1902, 5 F. 120, 40 S.L.R. 80; *Fenton* v. *Thorley & Company, Limited*, 1903 A.C. 443. It was immaterial that the appellant was rendered peculiarly liable to the injury which he sustained on 4th December either by previous accident or disease—*Clover, Clayton, & Company, Limited* v. *Hughes*, 1910 A.C. 242; *Ismay, Imrie, & Company* v. *Williamson*, 1908 A.C. 437; *Golder* v. *Caledonian Railway Company*, November 14, 1902, 5 F. 120, 40 S.L.R. 89; *Martin* v. *Barnett*, 1910, 3 Butterworth's Workmen's Compensation Cases, 146.

Argued for the respondents—The *onus* of proving that he had been incapacitated by injury by accident arising out of and in the course of his employment lay on the appellant—*Pomfret* v. *Lancashire and Yorkshire Railway*, 1903, 2 K.B. 718. The appellant here had not discharged that *onus*, for the Sheriff had found that it was impossible to say whether the appellant's condition was due to a new injury on 4th December 1908 or whether it was the natural result of the previous accident. In any case there was nothing to which the appellant could point to as an accident as distinguished from a natural consequence of the condition caused by previous injury—*Hawkins* v. *Powell's Tilbury Steam Coal Company, Limited*, 1911, 1 K.B. 988; *Boardman* v. *Scott & Whitworth*, 1902, 1 K.B. 43; *Coe* v. *Fife Coal Company*, 1909 S.C. 393, 46 S.L.R. 328. The appellant could of course still claim compensation from his former employers—*Dempster* v. *Baird & Company, Limited*, 1908 S.C. 722, 45 S.L.R. 432.

LORD DUNDAS—This is a stated case under the Workmen's Compensation Act. There seems to have been an extraordinary amount of unexplained delay in the Court below, because I see that the Sheriff says that the case was heard before him and proof led in July and September 1909, and the appeal was not boxed to this Court till June 1911. When the case came here we found that, whether as the result of the delay or not I do not know, the facts were so imperfectly stated that we thought it necessary to adjust certain questions and remit them to the Sheriff-Substitute to answer. This the learned Sheriff-Substitute has done, and I am bound to say that, even with the further assistance we have got, the facts are not so clear as we could wish them to be, or as they ought to be. But I think we have sufficient matter before us to enable us to decide the case, and that it will not be necessary in doing so to advert to the numerous authorities that have been quite properly quoted to us at the discussion.

It appears that on the 4th of December 1908 the appellant, while engaged in his employment with the respondents, felt a severe pain as he was rising from a kneeling position, and on his being taken to the infirmary it was discovered that he had sustained rupture of the external cartilage of his right knee joint. *Prima facie* that looks very like a case for compensation, but then it is said that some three years before, while in another employment, he had sustained a wrench of that knee in respect of which he received compensation for some time from these former employers; and it was argued that this injury in December 1908 was really just a recurrence of the former injury sustained three years before. I do not think it is clear on the facts whether the later injury was or was not connected with the former, or to what extent it was connected; but as the new injury in December 1908 was apparently sustained while in the employment of the present respondents, and arising out of that employment, I think the *onus* was on the respondents to make it clear, if they could, that no new injury was really sustained, but that anything suffered on 4th December 1908 was due to the former accident. It seems to me enough for the decision of this case that this workman had, so far as we know, worked continuously as an ordinary workman for some three years prior to the 4th December 1908, and it is plain enough, I think, that the old injury must have subsided and disappeared to this extent that he was able to perform his ordinary work as a workman, whereas something occurred on the 4th December of so serious a nature as to incapacitate him from work. The facts seem to me to show that that injury arose in the course of his employment with the respondents, and out of it, and therefore I think this is a case where compensation ought to be given. Towards the close of his argument, indeed, Mr Duffus took courage and urged that there was here no "accident" at all; but I must say I think that argument, as I understood it, is negatived by decisions of the House of Lords with which your Lordships are familiar. On these short grounds I think we ought to answer the question put to us in the affirmative.

LORD SALVESEN—I think this a very clear case. The Sheriff-Substitute seems to have held that his inability to infer from the evidence whether the injury which the appellant suffered was the result of a strain which he experienced at the time, or was the result of some prior strain experienced three years before, made it impossible for him to reach a conclusion in favour of the appellant. I do not think that is so at all. There are only two alternatives. Either the man's cartilage was ruptured on the date on which he was obliged to cease work in the employment of the respondents, or it had been previously ruptured, and what happened then increased the rupture and unfitted him there and then for the very same kind of work which he had been doing for three years. On either view it is quite clear that this was an accident to which the Workmen's Compensation Act applies. I have

therefore no difficulty in reaching the same result as your Lordship.

LORD JUSTICE-CLERK — This man was engaged in work for some time with the defenders. On a certain day while employed on work which involved his being on his knees he found on rising that he had some injury which prevented his continuing to work, and which led to his being taken to hospital, where it was discovered that his knee cartilage was torn and that he was in consequence unfit for work.

These facts, if proved, would, in my opinion, entitle the injured man to compensation. He would not need to prove anything more than that the accident arose out of his employment. The facts seem to me to make it impossible to find otherwise. He is just a workman who on a certain day ceased to be able to work on account of something which had happened to him while at his work. That is the ordinary case of accident under the Act. He would need to prove nothing more than I have said. If he prove that, it is still open to the defenders to bring forward evidence that it was not an accident in their employment but something else which incapacitated him, and their case is that that something else happened three years before. I think there is no alternative except either that he met with an accident on the occasion libelled, having never had an accident to his knee before, or that having had a previous accident he had so recovered that he was able to do his own regular work for a considerable time, and then that something happened to the same part of his body. In both of these cases the ultimate and immediate cause of his being no longer able to work was what happened on the day in question, when, on rising from his knees, it was found that his cartilage was torn, and could not have been torn during the three years before, otherwise he would not have been able to work during that time, as we are told that he did. I think it is one of the clearest cases we have seen, and we do not need to go to the anthrax case in order to decide it. It was an injury by violence occurring to the workman during his work, producing incapacity from which he was not suffering before; and on these grounds I am of opinion that compensation falls to be given, and the proper course will be to answer the question in the affirmative and remit the case to the Sheriff-Substitute to assess the amount of compensation.

LORD ARDWALL was absent.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Moncrieff—Fenton. Agent—James G. Bryson, Solicitor.

Counsel for Respondents—Horne, K.C.—Duffus. Agents—Macpherson & Mackay, S.S.C.

Tuesday, October 24.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

FLANNIGAN *v.* THE FIFE COAL COMPANY, LIMITED.

Reparation — Master and Servant — Negligence—Statutory Obligation—Liability of Master at Common Law — Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. c.* 58), *sec.* 49, *General Rules* 4 *and* 21—*Averments —Relevancy.*

In an action of damages at common law, and also under the Employers' Liability Act 1880, brought by a labourer against a coal company in respect of the death of his son through a fall from the roof of the mine in which the son was employed, the defenders admitted the relevancy of the pursuer's case under the statute, but disputed its relevancy at common law. In support of his case the pursuer averred that the defenders had committed a breach of the Coal Mines Regulation Act in failing (1) to properly secure the roof as required by section 49, general rule 21 of that Act, and (2) to appoint a competent fireman and roadsman as required by section 49, general rule 4. He proposed an issue in ordinary form with alternative schedules.

Held that the relevancy of the pursuer's case at common law could not be properly discussed apart from the facts, and consequently that the case must go to trial, and issue *approved*.

The Coal Mines Regulation Act 1887 (50 and 51 Vict. c. 58), section 49, enacts—"The following general rules shall be observed so far as is reasonably practicable in every mine:— . . . . . .

"Rule 4. A station or stations shall be appointed at the entrance to the mine or to different parts of the mine as the case may require, and the following provisions shall have effect—(1) As to inspection before commencing work—A competent person or persons appointed by the owner, agent, or manager for the purpose, not being contractors for getting minerals in the mine, shall, within such time immediately before the commencement of each shift as shall be fixed by special rules made under this Act, inspect every part of the mine situate beyond the station or each of the stations and in which workmen are to work or pass during that shift, and shall ascertain the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are concerned . . .

"Rule 21. The roof and sides of every travelling road and working-place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such travelling road or working-place which is not so made secure."

Hugh Flannigan, labourer, High Street, Kinross, brought an action against the Fife