Tuesday, June 1.

EXTRA DIVISION.

[Sheriff Court at Glasgow.

MILLERS *v.* THE NORTH BRITISH LOCOMOTIVE COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising out of and in the Course of Employment—Workman Found Dead where he had no Right to be—Onus.*

A craneman in locomotive works in charge of two overhead cranes in one of two neighbouring bays was found dead in the other bay. His employment was intermittent. The arbiter found that the deceased had no right whatever to be there, unless he had been called across by the night foreman for something special, or unless there were no other craneman on duty; that no evidence had been adduced of any request having been made by the night foreman, that official not having been called as a witness, and that the other craneman was on duty. *Held* that the accident was not one arising out of and in the course of the deceased's employment.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Procedure—Witness Omitted to be Called—Motion to Remit to the Arbiter for Further Evidence.*

In a Stated Case on appeal under the Workmen's Compensation Act 1906 the appellant moved the Court to remit the case to the Sheriff to take the evidence of a witness omitted to be called. Motion *refused.*

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 Jane Carrick or Miller, widow of Edward Miller, lately a craneman in the respondent's employment, in her own interest and as tutor and administrator-at-law of her pupil children, and Hugh Miller and Jeanie Miller, her minor children (appellants), sought an award of compensation under the Act in respect of the death of the said Edward Miller, from The North British Locomotive Company, Limited (respondents.)

The following *facts* were given in the Stated Case as established:—"(1) That the deceased Edward Miller was a craneman in the employment of the respondents, and at 7·40 p.m. on 15th June 1908, he met with an accident in the respondents' Atlas Locomotive Works at Springburn, which resulted in his death. (2) That his average weekly earnings for the three years preceding the accident amounted to £220, 0s. 6d., and the appellants, who are his widow and children, were wholly dependent on his earnings at the time of his death. (3) That the deceased, who came on duty on said date at 6 p.m., was working on the night shift in the boiler shop of the respondents' works, and in the boiler shop there are what are known as two bays, one being the middle bay and the other the heavy bay, and there are two overhead cranes in each of these bays. (4) That a man called Thomas Callan had charge of the two cranes in the heavy bay, and the deceased Edward Miller had charge of the two cranes in the middle bay. (5) That on the night in question, and immediately before the accident, Callan heard a whistle directing him to give a lift on one of the cranes in the heavy bay, and he went to the crane, and having got the signal he moved the crane towards his right hand, and after it had proceeded about four or five inches he felt that there was something wrong by the crane becoming jammed, and he looked up and saw the deceased Edward Miller's leg hanging down over the side of the platform. (6) That Callan then eased off the crane and ran up to the top and found the deceased on the top of the axle-box with his head and shoulders jammed in against the window, and with one leg hanging down the front of the axle-box and the other stretched across on the top of it, and he was lying half on his back and half on his side. (7) That there were only about four inches clearance between the crane and the wall of the boiler shop, and Callan found deceased's head and shoulders in front of the crane. (8) That the deceased had no right whatever to be on the two cranes in the heavy bay unless he had been called across by the night foreman for something special or unless there were no other craneman on duty. (9) That the other craneman, Callan, was on duty and had charge of the cranes in the heavy bay, and no evidence has been adduced by the appellants that any request was made by the night foreman, that official not having been called as a witness. (10) That the crane was in perfect order and the deceased had no duties to perform in connection with the cranes in the heavy bay in the way of oiling or adjusting slack bolts or otherwise, and his presence on the crane where he was killed is quite unaccounted for. (11) That a football match was going on at the time of the accident in a field adjoining the works and opposite the window where the deceased was found, between teams from the Atlas Works (where the deceased worked) and the Hyde Park Works. (12) That it was not proved that the deceased was interested in that football match, or was looking at it at the time of the accident, and that the balance of evidence was in favour of it having been impossible for him to see the football match from that window."

On these facts the Sheriff-Substitute (BALFOUR) found, under the whole circumstances, that the appellants, on whom the *onus* lay, had failed to prove that the accident arose out of and in the course of the deceased's employment.

The following *questions of law* were stated for the opinion of the Court:—"(1) Whether the accident to the deceased Edward Miller arose out of and in the course of his employment? (2) Whether

the respondents are liable in the circumstances found proved to pay compensation to the appellants in accordance with the provisions of the Workmen's Compensation Act 1906."

Argued for appellants—The arbiter was wrong in law, and on a sound construction of the facts the accident was one arising out of and in the course of deceased's employment. The *onus* lay on the defenders to show that deceased was not within the scope of his employment—*Grant* v. *Glasgow and South-Western Railway Company*, 1908 S.C. 187, 45 S.L.R. 128; *Mackinnon* v. *Miller*, 1909 S.C. 373, 46 S.L.R. 299; *M'Nicholas* v. *Dawson & Son*, 1899, 1 Q.B. 773. (2) In any event, should it be held that the *onus* lay on the appellants and that it had not been discharged, the appellants were entitled to have the case sent back to the arbiter to have the evidence of the night foreman taken, and they moved accordingly for such a remit. Such a remit was competent when necessary to do justice between the parties and if the statement of facts was not complete—*Pomfret* v. *Lancashire and Yorkshire Railway Company*, 1903, 2 K.B. 718; *O'Brien* v. *Star Line, Limited*, 1908 S.C. 1258, 45 S.L.R. 935.

Argued for respondents—The *onus* of proving that the accident arose out of the employment lay on the appellants. That *onus* had not been discharged. This case belonged to the class where a workman without leaving his employer's premises goes to another part of the premises for some purpose of his own and meets with an accident—*Reed* v. *Great Western Railway Company*, 1909, A.C. 31; *O'Brien* v. *Star Line, Limited* (*sup.*); *Mackinnon* v. *Miller* (*sup.*); *Pomfret* v. *Lancashire and Yorkshire Railway Company* (*sup.*). (2) A remit to the arbiter to take the evidence of the night foreman was incompetent. The Act of Sederunt of 26th June 1907, sec. 17 (g) allowed a remit for purposes of amendment. Such a remit was illustrated in the case of *Dobson* v. *United Collieries, Limited*, 8 F. 241, 43 S.L.R. 260. The purpose of such remit was only to clear up some obscurity in the statement of the case, and this might possibly involve further evidence. But this was different from a remit to get further evidence to bolster up the case.

LORD M'LAREN—This case belongs to a class of which there have been several examples in the Courts here and in England, the case of a person being found dead, evidently as the result of an accident, and the question is whether the accident arose "out of and in the course of" his employment. In this case the deceased Miller was a night cranesman whose business it was to attend to travelling cranes in the North British Locomotive Company's works. The establishment is a large one, and in the yard containing the travelling cranes, which are necessary for handling heavy material, are two bays, the heavy bay and the middle bay. The deceased had charge of two cranes in the middle bay, and a man named Thomas Callan had charge of two in the heavy bay. The deceased Miller during part of the night was not in constant employment; he had to be there during the night shift, but while the work went on the cranes were not necessarily in constant use. It was a case of intermittent occupation, and that was also the case with Callan.

The circumstances of the accident are these. Directed by a whistle, Callan proceeded to set his crane in motion, but had not gone very far when he met with an obstruction, and stopping his crane found the body of Miller jammed between the travelling crane and the wall.

On that statement of what was found and seen it is obvious that Miller, rightly or wrongly, had left the floor of the yard, where he should have been waiting until he got the signal for duty, and had climbed on to one of the cranes. It was not found, and apparently there is nothing to suggest, that he had any duty to mount the crane. It was suggested that he wanted to look out of the window at the finish of a football match, but that is not proved.

On the facts stated, there is nothing to show that this was an accident arising out of the deceased's employment. No doubt, in a case of intermittent occupation, where the intervals of rest may amount to hours, it could be maintained that a workman does not cease to be "in the course of" his employment, and that an accident may arise "out of" his employment even if he moves temporarily from his station, provided it can be shown that he had some reasonable ground for moving, and did not expose himself to unnecessary danger.

In one of the cases cited (*Mackinnon*, 1909 S.C. 373) the judgment was to the effect that an engineer, who had to sleep on board ship so as to be ready for work at an early hour in the morning, might leave his bunk and go on deck without thereby exposing himself to a risk which would entitle the employer to say that he was outside his contract. In various other cases it was held that when a new risk was undertaken the employer was not liable because the accident did not arise out of the employment. The second proposition may be taken to be settled by the highest authority in the case of *Reed* v. *The Great Western Railway Company* [1909] A.C. 31. That was the case of an engine driver, who, no doubt, constantly had occasion to cross the line; on this particular occasion, when his engine had legitimately stopped, he crossed the rails to get a book from another engine driver whom he recognised. The character of the risk was exactly the same as what was undertaken by him many times in the day, but the distinction was taken that he exposed himself to it on that occasion for his own purposes, and was not within the scope of his employment.

We do not know what motive led Miller to undertake that unfortunate and perilous visit to the upper part of the crane, but it is quite evident from the findings that it had nothing to do with the employers' business. His duty was to remain at his

post until he got a signal to work the crane, though if he left it for an innocent purpose and took no risk, a court of law might come to the conclusion that an accident happening to him arose out of his employment. But the facts here show that Miller by climbing on to the crane did expose himself to serious and unnecessary risk. I therefore come without difficulty to the conclusion that the Sheriff's finding is right upon the facts which he has found proved.

We have been asked to remit the case for further evidence on the suggestion that the foreman, if examined, might throw light on the cause of the accident, or might show that the crane was moved in consequence of a message from him. We have no express power to remit for further evidence. The evidence taken by the arbiter is, like proof in all other cases, intended to be final. If the Sheriff holds certain facts established he gives decree, and we should not be entitled to open up the inquiry except in the case of *res noviter veniens ad notitiam*. We have power under the Act of Sederunt to send a stated case back for amendment, *e.g.*, if we think that some material fact has been omitted or that the findings do not bring out the questions about which the parties are disputing. In such a case supplementary proof might possibly be required. Those conditions do not arise here. There is no precedent for the motion that has been made, and I think it undesirable to give countenance to the suggestion that we should open up the closed proof when we are satisfied with the case as stated by the Sheriff. I think the Sheriff has put his award on the right ground, and I therefore move your Lordships to dismiss the appeal.

LORD PEARSON—I am of the same opinion on both points. The important finding of the Sheriff-Substitute is "that the appellants, on whom the *onus* lay, had failed to prove that the accident arose out of and in the course of the deceased's employment." Now that is mainly a question of fact, though there is a question of law connected with the *onus probandi*. I think it is well settled that the *onus* lies in the first instance on the claimant, and to shift the *onus* we must find that there are facts proved from which a reasonable inference can be drawn that the accident was one arising out of and in the course of the employment. Now, looking to the facts proved here, I think it clear that that proposition could not be maintained. The Sheriff-Substitute has found that the deceased had "no right whatever" to be where he was. It was not one of the places to which the main course of his business led him at all. It was suggested that he might have had a subsidiary duty to perform such as oiling or adjusting bolts, but it seems to me that that also is excluded by a true reading of articles (8), (9), and (10) of the case, which show that the deceased was quite outside of his sphere of duty when the accident happened. The problem therefore remains unsolved, and the *onus* undischarged. It is said, in the second place, that we might remit to the Sheriff-Substitute for further proof. I agree with your Lordship that it would be out of the question for us to do so here. I think it would only be done when the facts stated are themselves obscure, or in order to clear up a defect in the statement of the case.

LORD DUNDAS—I have arrived without difficulty at the same conclusion. It seems to me that the facts found under heads 8, 9, and 10 of the case are fatal to the appellants. The Sheriff-Substitute finds that the presence of the deceased on the crane where he was killed is "quite unaccounted for." But he also finds that the deceased had no duties to perform in connection with the crane, and that he had "no right whatever," which I suppose just means "no business at all," to be on the crane where he met his death, unless upon one or other of two hypotheses. One hypothesis is that there was no other craneman on duty, but this is negatived by the fact that Callan was on duty. The other hypothesis is that the deceased "had been called across by the night foreman for something special," but the Sheriff-Substitute finds that there is no evidence of this. That seems to me an end of the case. There is no question of misconduct, but only as to whether the accident arose out of and in the course of the employment. The whole aspect and presumptions of the case are adverse to the appellant's view that the accident so arose, and there is nothing to rebut these. The case is easily distinguished from cases such as *Grant* v. *Glasgow and South-Western Railway Company*, 1908 S.C. 187, that of the station policeman, because there the deceased man's body was found at a place where he might legitimately have been in the execution of his duty—he was, if I may so put it, within his own jurisdiction. This case more nearly resembles that of *O'Brien* v. *Star Line Company*, 1908 S.C. 1258, where an intoxicated seaman was found mortally injured in a part of the ship where he had no right to be.

I entirely agree on the second point that this is not a case for a remit, because it really comes to this, that the appellant wants an opportunity of now examining a witness whom they might have examined at the proof, and whom they ought to have examined if they supposed that his testimony would aid their case.

The Court, refusing a remit, answered both questions in the negative.

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