BRYDON, WIDOW AND HER CHILDREN, APPELLANTS.
STEWART . . . . . RESPONDENT.

1855.
13*th March.*

Master's Liability for Injury to his Servant.—A master is bound to take all reasonable precautions to secure the safety of his workmen.

It is no answer to the claim of damages by the surviving relatives of a workman accidentally killed in a mine, "which was not in a safe and sufficient state," to say that he was at that moment of time in the act of leaving the work for a purpose of his own.

The master who lets the workman down his mine is bound to bring him up safely, even though he come up on his own business, and not for that of his master.

Pleas in Law followed by Issues.—When an Issue has been directed, and the question is whether the Judge's charge to the Jury was correct, the Court will not look back to the Pleas in Law.

THE Appellant, Mrs. Brydon, sought by an action in the Court of Session to recover damages for the loss of her husband, who was accidentally killed in the coal and iron works of the Respondent. The children joined as Pursuers.

The case having been reported by the *Lord Ordinary* to the Second Division of the Court of Session, their Lordships held the Record as finally closed, and settled the following Issue for trial of the case:—

"Whether the death of the same James Marshall, miner at Bellside, in the parish of Shotts and county of Lanark, while working in a coal pit belonging to and in the occupation of the defender, was occasioned by injuries, arising from the shaft of the said pit being in an unsafe state, from causes for which the Defender, as the employer of the said James Marshall, is responsible."

"Schedule of Damages claimed—

"400*l.* to Mrs. Marshall.

"100*l.* to each of the Children."

At the trial before the *Lord Justice-Clerk*, on the 6th January 1852, the following Minute of Admission was put in for the Defender :—

December 1851.

The Defender, Mr. Stewart, admits on the requisition of the Pursuer, that the deceased James Marshall was, at the date of the accident libelled on, in receipt of wages from the Defender, being in the Defender's employment as a miner or collier.

Thereafter the amount of damages having been settled by the following Minute:—

January 6, 1851.

Macfarlane, for the Defender, agrees, that (150*l.*) one hundred and fifty pounds be paid by him as the amount of damages, supposing that he is ultimately found liable in damages—one hundred to the widow and fifty pounds to the children.

Wood, for the Pursuer, consented to the above.

The presiding Judge gave the Jury the following direction:

1. That if they were satisfied, in point of fact, that on the morning of the 11th January 1849, the men left the mine without working, from no apprehension of danger, but of their own accord, for a purpose of their own, against their employer's interest, and in a body, in order to make some complaint tell more effectually with the manager or the Defender, and not in the ordinary course of their occupations—then, in point of law, the Defender is not answerable for a casualty caased by a single stone falling at that particular moment when the men were so leaving, and that the Jury must, if so satisfied in point of fact, find for the Defender, and state their ground for doing so—even if they should be satisfied that the death was caused by that stone, or other substance, falling on the deceased, through some insufficiency in the planking.

2. That in case the Court should differ as to this point of law, the Jury would go on to consider whether the death was caused in the manner contended for the Pursuers, in consequence of the shaft being in an unsafe and insufficient state; and if the Jury think that the death was not caused by the shaft being in such a state, then they will find so in their verdict. If the Jury think that the death was caused by the unsafe and insufficient state of the shaft, then they will so find, and find damages to be due, as settled by Minute of the parties, as the Defender, in point of law, is responsible for the death, if so caused, and if not relieved on the first ground.

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3. In the last view of the case, if the Jury think that the death was caused by the shaft being in an unsafe and insufficient state, then the Jury will further consider and find, whether John Craig was, in point of fact, properly a contractor, or truly a servant, paid for his labour, in regard to the lining of the shank, in a particular manner, convenient for his master.

And the Lord Justice-Clerk, as arranged with the counsel, informed the Jury, that he reserved to the Pursuers, in the event of the verdict being adverse to them on the first point, but in their favour on the second, to move the Court to enter up the verdict for them, for the amount of damages agreed on, on the ground that the direction on the first point was wrong in point of law, and that the Defender was not relieved from his responsibility in respect of the facts referred to in that direction.

And reserved to the Defender, in the event of the verdict being unfavourable to him on the second point, to argue to the Court, that the question whether John Craig was to be considered, for the purpose of this issue, as a contractor, or properly as a servant, was a question of law for the Court, on which the Court is to pronounce judgment, notwithstanding the finding of the Jury, if they consider it a point of law; and also reserved to the Defender to contend, that on the evidence he is not responsible for neglect in matters falling within the contract or duty of Craig, whether he is to be taken as a contractor or as a servant, and to move the Court to enter the verdict as one in his favour, if he prevails on that ground, in point of law.

The Jury returned the following verdict: —

At Edinburgh, the 6th day of January, in the year 1852—In presence of the Right Honourable the Lord Justice-Clerk, Compeared the said pursuers and the said Defender, by their respective counsel and agents, and a Jury having been empanelled and sworn to try the Issue between the said parties, say upon their oath, That in respect of the matters proved before them, they find as follows—On the first point they find for the Defender, and that the men had no proper cause for leaving their work. On the second point, they find, that the pit was not in a safe and sufficient state, and that the death arose from injuries thereby caused; and in terms of the joint minute lodged for the parties, they assess the damages at the sum of 150*l.*, being 100*l.* for the widow and 50*l.* for the children of the deceased James Marshall. On the third point they find, that Craig was not a proper contractor, but properly a servant of the Defender.

The Appellants, in terms of the right reserved to them in the charge of the presiding Judge, applied by motion to the Second Division of the Court, to have

the verdict opened up in their favour. The Court pronounced the following Interlocutor :—

3d March 1852.—The Lords having heard Counsel at the bar, refuse the motion for the Pursuers on the question reserved for them, namely, to move, on the ground, that the direction on the first point was wrong in point of law, and that the verdict should on that ground be entered up for them on the second branch of the verdict, namely, as a verdict for damages in their favour; and on the motion of the Defender, find, in respect of the said deliverance, that the verdict must be entered up on the first part of the verdict as one for the Defender; and therefore assoilzies the Defender from the conclusions of the action, and decerns.

(Signed) J. HOPE, *I.P.D.*

Against this last interlocutor, sustaining the ruling in point of law of the presiding Judge, the present appeal was presented.

Mr. *Anderson* and Mr. *W. P. Hale* for the Appellant: It is a fact found that the deceased wa s kille by reason of the unsafe state of the machinery. For this the Respondent, as owner of the works, was clearly liable. *Heslop* v. *Durham* (*a*), *Dickson* v. *Neilson* (*b*).

The *Solicitor General* (*c*) and Mr. *Roundell Palmer* for the Respondent: The master is not liable in this case. The *Lord Justice-Clerk's* direction is perfectly correct. His Lordship goes on the circumstance that the men had left their work improperly. The direction, therefore, is plain, simple, and appropriate, and was understood by the Jury in the sense in which it was conveyed. The law of both countries on questions of this sort is the same, excepting that in Scotland it would appear that a master is responsible for injuries done by a fellow-workman (*d*). The real question here is, whether the deceased was at the time of this unhappy accident fairly and really engaged in the

(*a*) 14 March 1842. (*b*) 14 New Ser. 420.
(*c*) Sir R. Bethell.
(*d*) *Paterson* v. *Wallace, ante*, vol. 1. p. 748.

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work of the Respondent. Now, just suppose that the workmen were to start off in a fit of mutiny, and, rushing through a tunnel, there be met by an opposing train; could it be contended that the master would be liable? The act of the workmen here was a wrongful act. They were *versantes in illicito*; and, therefore, no claim arises against the Respondent.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

We cannot look at all at what the Pleas were. The Pleas resulted in the direction for a trial, and an issue was framed accordingly. All, therefore, that we have to look to is, whether proper directions were given to the Jury upon the trial of that issue.

Now Mr. *Roundell Palmer* has, for the first time, pointed our attention to what the facts proved were. I do not repudiate that, because I quite agree that in looking to the question whether the direction was right or not, it is extremely necessary to ascertain that what is alleged to have been said really was said.

The facts of the case appear to be these: There had been a dispute among the workmen in the pit upon several points, one of which was as to "the lining" (I think they call it) at the mouth of the pit not being safe, and unhappily it turns out that they were correct as to that. They contended further that there was not proper provision for supplying air, and there had been disputes on this subject for some days prior to the accident. It is stated by one of the witnesses that the men went down on that day with the determination not to work. That, however, is a matter of controversy; for some who went down did work unquestionably. But I will put this point in the strongest way, and suppose that they all went down

(*a*) Lord Cranworth.

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meaning to be recusant. The work is said to have been in the nature of *piecework*. I will suppose, therefore, that these men descended with the determination to remonstrate, and also with the determination to refuse to work unless those remonstrances were attended to; and in that sense, probably anticipating that they would not be attended to, they may be said to have intended not to work. They went down safely, and proceeded to hold their meeting, as they called it. First, however, one refused to come, and went to work; and then another, and so on; but finally they had a meeting, and discussed their grievances, which might be well or ill-founded, and resolving not to work, they made the proper signals for being drawn up; and in being drawn up the accident happened.

It was contended on the part of the Respondents, and to this the direction of the learned Judge had pointed, that in such circumstances there is no responsibility by the law of Scotland in respect of an injury occasioned by the defect of machinery.

Now, my Lords, in my opinion, not only is there that responsibility by the law of Scotland, but clearly also by the law of England, which is thought to be less strict on this point. A master, by the laws of both countries, is liable for accidents occasioned by his neglect towards those whom he employs. I quite adopt the argument of the *Solicitor General*, that a master is only responsible while the servant is engaged in his employment; but then we must take a great latitude in the construction of the phrase "being engaged in his employ." It would be a monstrous proposition indeed, if, having sent a workman down into my mine to work for me, and he, choosing no longer to be employed there and ceasing to work, requires me to take him up again, but that the taking

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up should in that case be without my being liable for the same due caution for which I was liable when I let him down. That is not the meaning of the law. If, having taken him up, I afterwards dismiss him, or if he remains in my employ, intending to go down to-morrow into the mine again, but in the interval he does something not in the course of my employ, I am not by the law of Scotland or the law of England responsible for an accident befalling him during that interval. But whatever the man does in the course of his master's employ, according to the fair interpretation of these words *eundo, morando, redeundo,* the master is responsible; and it does not, in my opinion, make the slightest difference that the workmen had, according to the finding of the Jury, no lawful excuse or proper cause for leaving their work; that is to say, that there was not, as the Jury thought, that danger in respect of the air or of the "lining" which ought to have induced the men to say they would not work. I do not know upon what facts it was that they arrived at the conclusion about the "lining," but the result was, that within a few minutes after commencing the ascent a man unfortunately lost his life. It would seem, therefore, that they had a proper ground for apprehension.

Mr. *Roundell Palmer:* I think your Lordship is under error in supposing that to be one of their grievances; wages and drawers are the only subjects of which they complain.

Mr. *Anderson:* They complained of the air, not of the "lining."

Mr. *Roundell Palmer:* There is a good deal of evidence as to the state of the "lining."

The LORD CHANCELLOR: I thought there was evidence about the "lining."

Mr. *Anderson*: The planking.

The LORD CHANCELLOR:

The planking—they found that the planking was defective in some places; that, I think, makes my view of the case stronger. Let it be supposed that they made no objection upon that head. However, they made objections upon other points, rightly or wrongly; and suppose they were entirely wrong, and having gone down there, chose to say, "We will work no longer," it would not seem that there was any breach of contract with respect to the piece-work they were engaged in; it would be only that they did not do it, and therefore did not earn anything. Even if they had been employed as daily labourers, and wrongfully chose to say, "We will not work any more;" and if, without proper, cause, they had said, "We will terminate our contract, now take us up again," it was as unquestionably the duty of the master, *quà* master, in his capacity of master, to take them up safely as to have brought them down safely. For that purpose the obligation of the master continues after they have, in truth, ceased to work in his employ, but while they were causing themselves to be removed from it.

It appears to me, therefore, that the direction of the learned Judge on the first issue was not sound, as, indeed, the learned Judge himself seems to think it might probably turn out; and, consequently, that the verdict ought to have been given upon the second issue. The learned Judge's direction was, that if the Jury were satisfied that the men ceased to work, and left the mine without apprehension of danger, of their own accord, and for a purpose of their own, then the master is not liable for the accident. All this is clearly wrong. It might have been a most legitimate purpose

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of their own; it might be that they went up because the agent, or whoever was managing in the mine, had told them that unless they worked double they should not have their wages; or some wrong direction of that sort might have been given. I do not mean that there is any notion that that was the truth, but if we look merely at the words, it is clear it was wrong. If, instead of that, we take a more liberal construction, and look at what the facts were then. The facts were, that the workmen were down there; that, whether rightly or wrongly, they chose to say they would not work any longer unless some grievances that they had, or supposed that they had, should be redressed; that they directed themselves to be taken up again; and that they were accordingly taken up, and in the course of being so taken up the accident happened. In my opinion, it is quite clear, by the law of England and by the law of Scotland, that the injury happened to this man from the neglect of his master, while he was sustaining the character of master towards him, and, consequently, the verdict ought to be entered up upon the second point, and not upon the first.

Lord Chancellor's opinion.

Lord Brougham's opinion.

The Lord BROUGHAM: My Lords, I am entirely of the same opinion. It obviously makes no difference whatever in this case, whether there was that want of proper cause for going up from the mine which the Jury have found by the verdict upon the first issue. The master who lets them down is bound to bring them up, even if they come up for their own business, and not for his. He is answerable for the state of his tackle, which, in the present instance, was defective, and had occasioned this lamentable accident.

The LORD CHANCELLOR: My Lords, I move that this case be remitted to the Court of Session, with a direc-

tion to enter the verdict upon the second point for the Pursuer, with costs.

Ordered and *Adjudged*, That the said interlocutor of the 3rd of March 1852, complained of in the said Appeal, be, and the same is hereby reversed. And it is further ordered, that the case be and the same is hereby remitted back to the Court of Session in Scotland, with a direction to enter up the verdict upon the second branch or point thereof for the Pursuers, with Costs in the Court below.