that duty. But then we are told "it was a daily experience of every drawer in the section of the mine where this lye was situated to find when he brought a loaded hutch to the lye that the first line of rails above the block was full of loaded hutches, and that the loaded hutch which he had brought could not get into the lye, and stopped the way, so that it was impossible for him to get an empty hutch out of the lye. When this happened it was the practice of the drawer to 'let down' the loaded hutches."

Now when this lad let down the loaded hutches the arbitrator has expressly found that he was following the regular practice, and that he could not otherwise have performed the other part of his duty, which was to take the empty hutch from the lye to the working face. The arbitrator goes further, for he finds that intervals of a quarter of an hour, sometimes twenty minutes, and sometimes nearly an hour, elapsed during which the pony driver, whose regular duty it was to release the loaded hutches, was not at the place, and that if the drawer had not performed this duty the work of the pit would have been seriously interrupted. It further appears that the pony drivers were well aware that this was the practice of the drawer, and that there were no instructions of any kind given to the drawer not to perform this simple duty, which, it appears to me, was strictly incidental to and almost a necessary part of the duty which he was engaged to perform. And as I read the 19th finding, although no doubt the oversman and fireman may have deponed that they did not know of this practice, the learned arbitrator, whose findings, I repeat, are framed with scrupulous care and precision, does not hold that to be a proved fact.

It seems, therefore, that this was a case in which the lad was performing part of the duty which he was engaged to perform. He may have performed it negligently, or the mischief which befel him may have been a pure accident, for I observe that the arbitrator finds that the accident to the lad was due to some wholly unexplainable cause. But, at all events, the injury suffered by him was the result of an accident which arose out of and in the course of his employment. That appears to me to be beyond all doubt. I cannot, therefore, say that this case comes within hail of the cases which were cited to us by Mr Moncrieff, in which workmen were held disentitled to recover under the Act where they had arrogated to themselves duties for which they were not engaged and which they were not entitled to perform.

I propose to your Lordships, therefore, to answer both questions put to us in the affirmative.

LORD MACKENZIE — I am of the same opinion. The task imposed upon the appellants' counsel was a difficult one, because it was to convince the Court that when this workman met with the accident he was arrogating to himself duties which he was neither engaged nor entitled to perform. From one of the findings it appears that he was merely coping with what happened as a daily experience, for whenever the situation arose which is described in the findings it was his practice to let down the loaded hutches, and what he was doing on the day in question he was doing according to the usual practice of the pit.

Now in these circumstances it appears to me hopeless to endeavour to bring the present case within the category of the "shot-firing cases." or cases such as *Burns* v. *Summerlee Iron Company*, the hanger-on case. There was not in this case even a prohibition against his doing what he did, and there is no finding by the learned Sheriff-Substitute, who has dealt with the matter most exhaustively, that the oversman of the pit and the fireman in charge of the section where the respondent worked did not know that the practice was as described. in the findings.

LORD SKERRINGTON—I concur.

LORD JOHNSTON was absent.

The Court answered both questions of law in the case in the affirmative and dismissed the appeal.

Counsel for Appellants—Moncrieff, K.C. —Fenton. Agents — Simpson & Marwick, W.S.

Counsel for Respondent — Solicitor-General (Morison, K.C.) — Lippe. Agents —Macpherson & Mackay, S.S.C.

Tuesday, June 30.

FIRST DIVISION.

(SINGLE BILLS.)

H. R. MARSDEN, LIMITED *v.* ALEXANDER BRUNTON & SONS.

Expenses — Reclaiming Note — Appeal — Withdrawal of Reclaiming Note or Appeal.

"As a general rule, when a motion is made by the reclaimer or appellant for the refusal of a reclaiming note or an appeal which has already been sent to the roll, the respondent will be allowed, in the case of a reclaiming note two guineas, and in the case of an appeal three guineas, of expenses. But in certain exceptional cases a remit will be made to the Auditor to tax the respondent's expenses. Where an appeal or a reclaiming note has appeared in the roll, or in the ordinary course would soon appear in the rolls, then the respondent may, after communication with his opponent, proceed to print such documents as he thinks necessary for the presentation of his case to the Court, and if he does so then his expenses will be allowed if the Court, having regard to all the circumstances of the case, think that his preparations were reasonable."—*Per* the Lord President.

H. R. Marsden, Limited, *pursuers*, raised an action against Alexander Brunton &

Sons, *defenders*, and on 18th June 1913 the Lord Ordinary (DEWAR) decerned against the defenders in terms of the conclusions of the summons.

The defenders reclaimed, and on 9th July 1913 the case was sent to the roll. On Friday 12th June 1914 the case was put out in the roll for the week following. On the same day, 12th June, the reclaimers intimated to the respondents that they intended to abandon the reclaiming note, and, on 13th June, presented a note to the Lord President praying him "to move the Court to refuse the said reclaiming note, and to find the reclaimers liable in two pounds two shillings of modified expenses."

On 17th June 1914, on counsel for the reclaimers moving the Court to grant the prayer of the note, counsel for the respondents moved for full expenses and for a remit to the Auditor stating that though no documents had already been printed, nor counsel instructed, yet certain preparations had been made by the respondents for the hearing, and in particular that copies had been made for the printers of certain documents which the respondents considered necessary for their case. It was not stated that any notice of these preparations had been given to the reclaimers.

The Court stated that they would consult the other Division on the matter, and subsequently requested a note of the cases on which the parties relied.

Authorities for the reclaimers. — *Kirkwood* v. *Knox*, June 4, 1868, 6 Macph. 898; *Robertson* v. *Robertson's Executors*, November 8, 1899, 2 F. 77, 37 S.L.R. 58; *Davidson & Others* v. *Allen*, March 14, 1878, 5 R. 763; *Maclachlan* v. *Mackay*, November 24, 1899, 2 F. 163, 37 S.L.R. 118; *Gilchrist & Company* v. *Smith*, January 9, 1901, 3 F. 329, 38 S.L.R. 238; *Wyllie* v. *Richard*, November 28, 1837, 16 S. 111; *Gordon* v. *Kellie*, November 29, 1848, 11 D. 166; *Smith Sligo* v. *Knox*, November 20, 1880, 8 R. 41, 18 S.L.R. 39.

Authorities for the respondents—*Little Ormes Head Limestone Company, Limited* v. *Hendry & Company*, November 25, 1897, 25 R. 124, 35 S.L.R. 124; *Johnston* v. *Rae*, June 24, 1876, 3 R. 879; *M'Guire* v. *Union Cold Storage Company, Limited*, 1909 S.C. 384, 46 S.L.R. 323; *Gilchrist & Company* v. *Smith* (*cit. sup.*); *Smith Sligo* v. *Knox* (*cit. sup.*); *Henderson* v. *Menzies*, June 1, 1901, 3 F. 858, 38 S.L.R. 639.

LORD PRESIDENT—We have found that there has been considerable diversity in practice and fluctuation of judicial opinion relative to the allowance of expenses to a respondent in cases where appeals or reclaiming notes have been withdrawn before hearing. Accordingly we thought it advisable to consult the Judges of the Second Division, and the conclusion we have arrived at is this:—[*v. sup. passage quoted in rubric.*]

It is of course impossible to lay down any hard and fast rule with regard to the time within which such preparation may be considered justified and the expenses allowable. Each case must depend upon its own special circumstances.

We think that it ought to be a general rule, but not an invariable rule, that communication with the other side on the question of printing is indispensable, if there is to be a remit of the respondent's expenses to the Auditor.

The present case we think falls under the general rule, and the respondents should have two guineas of expenses, because they had not communicated with the other side before making such preparations as they say they had made in anticipation of the the hearing.

LORD JOHNSTON—I am of the same opinion. There is one aspect of this matter which has always impressed itself upon me in considering such questions, and that is the impropriety of sending to the Court a series of separate and supplementary prints of documents, confusing the process and making it extremely difficult for the Court to follow the speeches of counsel. There was a time in which what used to be called joint prints were quite common. It seems, so far as my experience goes, that recently agents have deemed it their interest rather to avoid a joint print, if not to resent the suggestion that there should be one.

When one considers the matter in principle and practice, there is no doubt in principle that documents put in evidence are part of the proof, and that strictly the reclaimer would be bound to print the documents just as much as the proof. But there is equally little doubt that the reclaimer is by practice allowed to select the documents which he considers necessary for his own case; still he cannot but know that the documents selected by him may require to be supplemented to include his opponent's case, and common sense, if not professional courtesy, requires that the reclaimer should submit to the respondent what he proposes to print in order that it may be supplemented if necessary.

Now that appears to me to be a duty the performance or non-performance of which should affect the question of expenses. But then I do not think that the respondent is entitled to incur expenses without communicating with the appellant as to what he wishes, and with a proper intimation that if he is not met he is to protect himself by printing what he requires. I think there ought to be reasonable communication between the parties, and that only on proof of such communication and intimation as I have referred to can a respondent claim expenses in such circumstances as we have here.

LORD SKERRINGTON—I concur.

LORD MACKENZIE was sitting in the Extra Division.

Counsel for the Pursuers and Respondents —Macquisten. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Reclaimers —Paton. Agents—Wallace & Pennell, S.S.C.