

The respondent moved that the petition be dismissed, and argued that, on the authority of *M'Callum v. M'Callum*, January 24, 1893, 20 R. 293, when the petition was presented after the action was raised, that was the proper course.

The Court sisted the petition.

Counsel for the Petitioner—J. C. Watt.  
Agent—W. H. Farquharson, S.S.C.

Counsel for the Respondent—A. M. Anderson. Agent—R. G. Bowie, S.S.C.

Friday, November 10.

FIRST DIVISION.

BARCLAY, CURLE, & COMPANY,  
LIMITED v. M'MILLAN.

*Reparation—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 7, sub-sec. 3, and Schedule 2, sec. 14 (c)—Question of Fact or Law—Dock "Near" a Yard.*

A workman was injured while working on a ship which had been removed from the shipbuilding yard to a dock about two miles away in order to be completed. In a claim under the Workmen's Compensation Act 1897, the Sheriff held that the dock was "near" the yard within the meaning of sub-section 3 of section 7 of the Act, and awarded compensation.

In a case stated for appeal, held that the decision of the Sheriff was right, and (*dub.* Lord M'Laren) that the question whether a dock was near a yard was one of fact and not of law, and that the appeal was therefore incompetent.

The Workmen's Compensation Act 1897 provides, section 7, sub-section 3—"A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon any vessel in any dock, river, or tidal water near the yard."

Section 14 (c) of Schedule 2 provides—"Any application to the Sheriff as arbitrator shall be heard summarily," . . . "subject to the declaration that it shall be competent to either party" . . . "to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the Sheriff with instructions as to the judgment to be pronounced.

This was a case stated by the Sheriff-Substitute of Lanarkshire (SPENS) in an arbitration under the Workmen's Compensation Act 1897, at the instance of Barclay, Curle, & Company, shipbuilders, in an application at the instance of Donald M'Millan, shipwright, a workman in their employment.

The following facts were stated by the Sheriff to be admitted as proved:—(1) That the respondent was on 25th April last employed as a shipwright by the appellants, who are shipbuilders, and on that date was working on board the ship 'Ismore' in the Prince's Dock. (2) That said vessel had been launched from the appellants' shipbuilding yard sometime before, and had thereupon been taken up the river to Finnieston Quay, or near thereto, and been furnished with engines, and thereafter again removed to the Prince's Dock, for the purpose of having its internal fittings adjusted and finished, and otherwise for its total completion as a ship. (3) That the above arrangement was for the convenience of the appellants, who had no private dock of their own in which said vessel could be conveniently completed. (4) That the respondent was on the foresaid date (25th April) injured while working at said ship by an accident arising out of and in the course of his employment, and admittedly had it happened in the appellants' shipbuilding yard there was liability. (5) That said Prince's Dock and Queen's Dock are situated on opposite banks of the river Clyde and about two miles from the appellants' shipbuilding yard, and are the nearest public docks thereto. The Queen's Dock is about 100 yards nearer said shipbuilding yard than Prince's Dock. (6) That up to the hearing of the case the respondent from the date of the accident was wholly incapacitated. (7) That the average weekly earnings of the respondent during the twelve months previous to the accident were 3*4s.* 7*d.*"

The Sheriff-Substitute held, that on a sound construction of sub-section 3 of section 7 (quoted *supra*), and having regard to the circumstances above detailed, the accident occurred when the ship in question was being finished in a dock "near the yard." He awarded compensation at the rate of 17*s.* 3*d.* a week.

He stated the following question of law—"Whether the Prince's Dock *quoad* the completion of the s.s. 'Ismore' by the appellants is a dock 'near the yard' in terms of section 7, sub-section 3, of the Workmen's Compensation Act 1897?"

Argued for the appellants—The Act applied only to workmen who were in or about a *locus*; "near" must therefore be construed as equal to "in close proximity." Otherwise there would be no limit, and a dock on one side of Scotland might be considered near a yard on the other. The cases allow a distance of 1½ miles; that should not be extended—*Lowth v. Ibbotson* [1899], 1 Q.B. 1003; *Aberdeen Steam Trawling Company, Limited v. Peters*, March 16, 1899, 1 F. 786; *Whitton v. Bell & Sime*, June 17, 1899, 36 S.L.R. 754; *Jackson v. Rodger & Company*, July 4, 1899, 36 S.L.R. 851. The case disclosed a question of law, mingled, doubtless, with fact, viz., what was the legal construction of the word "near?"

Counsel for the respondent was not called upon.

LORD ADAM—This is a case stated under the Workmen's Compensation Act 1897. The facts as stated by the Sheriff are:—[His Lordship then referred to the facts as already narrated]. Upon these facts the Sheriff has found that compensation is due, and the question which he calls "of law" is—[his Lordship quoted the question]. That question arises in this way: Section 7 of the Act says that the Act is to apply only to employment by the undertakers "on, in, or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers . . . on, in, or about any building which exceeds 30 feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof." Then that is qualified by sub-section 3 to this effect: "A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard." These are the sections of the Act under which this claim was brought, and in construing them the Sheriff has held that the Prince's Dock, which is two miles from the respondent's shipbuilding yard, is, in terms of the Act, near the yard, and therefore that the respondent is entitled to compensation. Mr Wilson asked us, as I understood, to give a legal construction of the word "near." How any Court could do so I do not understand. The question whether the yard is near is a question of circumstances in every case, and to ask us, as was suggested, to lay down the law that any dock over a mile and a half distant is not near the yard in the sense of the Act, is, in my opinion, perfectly preposterous. I agree entirely with what was said by Lord Justice Smith in the case of *Louth* (L.R. [1899], 1 Q.B. 1003) that the question whether one place is near another is entirely a question of circumstances, entirely a question of fact, and entirely a question for the tribunal which determines the claim. I think, therefore, that this claim should be refused. At the same time I have no hesitation in saying that I should have come to the same conclusion as the Sheriff-Substitute upon the facts stated. The 7th section no doubt bears that compensation is to be limited to workmen "on, in, or about" the railway or factory, and Mr Wilson says that that is the overriding clause, and that in every case, to be entitled to the benefits of the Act, the workman must be injured in close proximity to the factory. In my humble opinion the 3rd sub-section has been introduced to modify that, for the reason that from the nature of shipbuilding it is necessary for the completion of the ship that it should be, as it was in this case, removed to a dock for completion. In these circumstances, the Act says that if the dock is

"near"—and I think it is impossible to define in the abstract what "near" is—the liability of the undertaker will still continue. Looking at the provisions of the Act, I think the Act contemplated the ship being taken from the yard to a dock for completion. Now, we all know that docks are not always in close proximity to, or within half a mile or a mile and a half of shipbuilding yards in the Clyde or elsewhere. Accordingly, the intention of the Act was, that where there are docks near places where there are shipbuilding yards, and when in the course of construction of a ship it is necessary to remove it from the yard to the dock, the liability of the undertaker should continue.

These remarks are of course *obiter*, because I think there is no question of law before us, but I see no reason why I should not express my opinion upon the matter.

LORD M'LAREN—I agree in the result, but I am not sure that I should express myself so strongly as Lord Adam has done regarding the difficulty of answering questions put to us which involve matters of fact. I have in previous cases observed, and I continue to be of opinion, that where a question of the construction of the statute arises, we may assist the sheriffs by giving our views of the construction of the statute, even although we might not be able to give a decision which would cover the whole subject-matter in dispute because there are questions of fact also involved. Now, in a previous case, where a carter in driving home from his master's work toppled his cart over an embankment, we held that at the time when he met with the personal injury he was not in or about a factory. In other words, we were of opinion that the situation and the distance were such as to be altogether outwith any possible construction of the words "in or about." I see that in a cognate decision in the English Court of Appeal—*Louth* against *Ibbotson*—Lord Justice Smith, expressing the opinion of the Court, while pointing out that propinquity to the factory is a question of fact, says that he quite agrees with the County Court judge that the distance in question was too great to satisfy the words of the Act. Now, in the present case, I hold that, as a matter of construction, the expression "near a shipbuilding yard" must receive a wider meaning than the expression "in or about a factory," because if the words had meant the same thing, sub-section 3 would have been altogether unnecessary. The introduction of that sub-section was to cover a case where a ship could not, on a fair construction, be held to be in or about a shipbuilding yard, which is the factory, but where, nevertheless, having regard to the custom in the shipbuilding trade, and the necessity of a ship being taken to a dock, which would not always be in or about the yard, it was considered desirable to suppose an extension of the employment of the factory to a dock that in a reasonable sense might be regarded as in proximity to the yard. Now, I think that in this case the Sheriff

has come to a sound conclusion, and considering that the two places are in the same river, the Clyde, and that docks and shipbuilding yards are places of very considerable extent, I hold that two miles is quite within the order of magnitude that the Act contemplates when it says that the one place must be near the other. Although I should not be prepared to affirm all that has been said as to the mode of disposing of the case, I do not dissent from the view that the case may be satisfactorily disposed of by dismissing the appeal.

LORD KINNEAR—I am of the same opinion. I quite agree with what I understand to be the view of Lord M'Laren, that a question which is put to us in terms of fact may really involve a question of law if the true question in dispute be whether the specific case falls within the true construction of words describing conditions of fact on which the statute gives compensation. I should be slow, and I think the Court has hitherto been unwilling, to throw out a case merely because the question put to us, as we read it, looks like a mere question of fact, if upon a fair consideration of all the findings of the Sheriff or arbiter it appears that there is really a question of law or of legal construction involved. But then the question must always be whether that is the result of the Sheriff or arbiter's findings. Now, in this case the Sheriff finds that the respondent was employed as a shipwright by the appellants, who are shipbuilders, and was working on board a ship that they were in the course of building called the "Ismore"; that he was injured while working at this ship by an accident arising out of and in the course of his employment, and that admittedly if this accident had happened in the appellants' shipbuilding yard they would have been liable. But then he says that before the accident happened the ship had been launched from the shipbuilding yard, and had been taken to the Prince's Dock for the purpose of having its internal fittings adjusted and finished, and otherwise for its total completion as a ship, and it was while that part of the work was going on in the Prince's Dock that the accident happened. Now, the 3rd sub-section of the 7th section of the Act undoubtedly extends the ordinary construction of the word "factory" in the previous parts of that section for the purpose of covering the case of a workman who may be injured in the course of his work upon a vessel being constructed by his employers, although that vessel has been removed from their shipbuilding yard into a dock, river, or tidal water, provided such dock, river, or tidal water is near the yard. If the Prince's Dock is in a reasonable sense near the shipbuilding yard of Barclay, Curle, & Co., nobody disputes that they are still liable, although the accident happened when the ship was in the dock and not in their own yard. Then upon that statement the Sheriff finds in fact that the accident occurred when the ship was being finished in a dock near the yard. Now, I quite agree with

your Lordship in the chair that the question whether a dock is near the yard is a question of fact, and that in any particular case it is a question for the Sheriff or arbiter, and not for this Court, and that we cannot interfere with the decision of the Sheriff upon that question of fact, unless it be shown that there is some rule of law, or some sound doctrine of legal construction, which would have prevented him arriving at his conclusion of fact if he had paid attention to it; and therefore the only question seems to me to be whether there is any rule of law or any legal construction of this statute which should compel us to hold that Prince's Dock is not near the shipbuilding yard of Messrs Barclay, Curle, & Company, and I must say I have heard of none, and can imagine none. Mr Wilson says that the rule of law is that nothing is near which is not within a mile and a half of the shipbuilding yard. I must say I should adopt your Lordship's language in describing that proposition, and, at all events, have no hesitation in rejecting it. I come therefore to the conclusion that this is a case upon which we should not interfere with the Sheriff; but I agree with your Lordship that there is no reason why we should not take the course which was taken by Lord Justice Smith in the case cited [1899] 1 Q.B. 1013, and say, firstly, that the Sheriff has decided the question of fact, and, secondly, that we entirely agree with him.

The LORD PRESIDENT was absent.

The Court dismissed the appeal.

Counsel for the Appellants—D. F. Asher, Q.C.—J. Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Salvesen, Q.C.—R. M. Smith. Agent—William Balfour, S.S.C.

*Tuesday, November 14.*

## SECOND DIVISION.

[Lord Kincairney, Ordinary.]

### CALEDONIAN RAILWAY COMPANY v. JAMIESON.

*Property—Title to Land—Identification of Lands Excepted from Conveyance—Plan not Made Part of Disposition.*

A railway company acquired land for the purpose of constructing a line, but obtained no disposition and made up no title thereto. Their authors then disposed the land intersected by the line, and granted a disposition "excepting always . . . the parts and portions . . . sold to" the railway company, ". . . and now occupied by said branch line." In an action for interdict against the owner of the land from encroaching on a part of the land which the railway company averred was included in the portion