

being raised in this case, viz., Who were the undertakers here in the sense of the Act? In my opinion the undertakers in this case were the Glasgow Police Commissioners. In carrying out the undertaking they had to employ tradesmen just as a railway company have to employ tradesmen to repair their stations, &c. But the railway company is in such cases the undertaker notwithstanding. I merely notice that in order to guard against it being said hereafter that I concurred in a judgment in which compensation under the Act was awarded against tradesmen employed by the real undertakers in the sense of the Act.

LORD TRAYNER—In dealing with this case the difficulty I have experienced is in discovering any question of law raised by it at all. What are termed the questions of law appear to me to be questions of fact. The first is—"Whether the building in question at the time of the accident exceeded 30 feet in height within the meaning of section 7 (1) of the Workmen's Compensation Act 1897?" Now, I quite understand that a question might arise as to the exact point from which the height of the building was to be measured, and this may admit of different views on the part of the judges dealing with that matter. But, nevertheless, the question whether a building is or is not 30 feet in height is a question of fact. If, however, any question of law has arisen on which we can give an opinion, I have no doubt that this building was 30 feet high within the meaning of the Act, as it has been found in fact that the height of the building above the foundation was 30 feet 5½ inches.

The second question is—"Whether the building was at the time of the accident being constructed by means of scaffolding in terms of section 7 (1) of the Workmen's Compensation Act 1897?" The Sheriff-Substitute has held that it was. This question I also think is one of fact, but as far as it may be held to raise a question of law I think that the Sheriff-Substitute's decision thereon is right.

I am not prepared to concur in the view that the Corporation of Glasgow were here the undertakers, but on that question no decision is called for.

LORD MONCREIFF—The point on which an opinion has been expressed by Lord Young as to who are the undertakers in the sense of the Act is not raised in the case before us, and on that matter I reserve my opinion.

Turning to the two questions put to us in the case, I think the first is not a question of law but purely a question of fact, which so far as I can judge was rightly decided. A question of law or construction of the statute may be involved in the second question, because it is found in this case that the scaffolding was not actually erected and in use on the day of the accident. Notwithstanding that, I am inclined to think that the building was at the time of the accident being constructed by means of scaffolding in the sense of the Act. The scaffolding was

regularly used from time to time by all the tradesmen engaged in the work during the construction of the building both prior and subsequently to the accident, and it was not removed from the building till six months after the accident.

The Court answered the questions in the affirmative, affirmed the award of the arbitrator, and decerned.

Counsel for the Appellants—G. Watt, K.C.—Cook. Agents—Cuthbert & Marchbank, S.S.C.

Counsel for the Claimant and Respondent—Salvesen, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Wednesday, March 13.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

STRAIN v. WILLIAM SLOAN & COMPANY.

Reparation—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) sec. 7 (2)—Factory—Wharf—Accident in Street "immediately Outside" Wharf—Machinery or Plant Used in Loading or Unloading from or to Wharf—Factory and Workshop Act 1895 (58 and 59 Vict. cap. 37), sec. 23.

In a stated case under the Workmen's Compensation Act 1897 the following facts were admitted—(1) The claimant, a quay labourer in the employment of the respondents, a firm of shipowners, at a wharf on the Clyde at Glasgow occupied by them, was assisting in removing iron girders from the street immediately outside the wharf shed to the side of a steamship belonging to the respondents which was being loaded; (2) the girders were lifted by means of a hand crane on to a truck, by which they were conveyed to the ship's side; (3) while removing the hand crane from one pile of girders to another, both of which lay in the street immediately outside the wharf shed, the claimant got jammed between the platform of the crane and one of the girders, and sustained injuries.

On these facts the Sheriff-Substitute dismissed the application, finding in law that in accordance with the decision in *Hall v. Snowden, Hubbard, & Company*, 1899, 2 Q.B. 136, the Factory and Workshop Act 1895 did not apply to the present case, in respect that the accident did not occur on the quay but on the street; and that no accident occurred on, in, or about a factory within the meaning of the Workmen's Compensation Act 1897.

The Court recalled the interlocutor of the arbitrator; found (1) that the wharf was a factory within the meaning of the Act of 1897, and (2) that the

fact that the accident happened in a public street "immediately outside the wharf shed" did not *per se* exclude the claim, and remitted to the arbitrator to proceed.

Observations on Hall v. Snowden, Hubbard, & Company, 1899, 2 Q.B. 136.

This was an appeal upon a stated case from the decision of the Sheriff-Substitute at Glasgow (BALFOUR) in an arbitration under the Workmen's Compensation Act 1897, between Charles Strain, quay labourer, Glasgow, claimant and appellant, and William Sloan & Company, shipowners, Glasgow, respondents, in which the claimant claimed compensation for injuries sustained by him.

The Sheriff-Substitute stated as follows:—"The following facts were admitted—*First.* That on 8th May 1900 the appellant, who is a quay labourer, was in the employment of the respondents at the wharf occupied by them in Clyde Place, Glasgow, and was assisting in the work of removing iron girders from the street immediately outside the wharf shed to the side of a steamship belonging to the respondents, which was being loaded. *Second.* That the girders were lifted by means of a hand crane on to a truck, by which truck they were conveyed to the ship's side. *Third.* That while removing the hand crane from one pile of girders to another pile, both of which lay in the street immediately outside the wharf shed, the appellant got jammed between the platform of the crane and one of the girders, and sustained injuries."

On these facts the Sheriff-Substitute found in law that in accordance with the decision in the case of *Hall v. Snowden, Hubbard, & Company, 1899, 2 Q.B. 136*, the Factory and Workshop Act 1895 did not apply to the present case, in respect that the accident did not occur on the quay but on the street; and that no accident occurred on, in, or about a factory within the meaning of the Workmen's Compensation Act 1897."

The Sheriff-Substitute accordingly dismissed the application.

The question of law for the opinion of the Court was—"Was the Sheriff right in deciding that the Workmen's Compensation Act 1897 did not apply to the employment at the time?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) enacts as follows, sec. 7 (1)—"This Act shall apply only to employment by the undertakers as hereinafter defined on, in, or about, *inter alia*, a factory. (2) In this Act . . . 'factory' has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895 . . . 'Undertakers' . . . in the case of a factory . . . means the occupier thereof within the meaning of the Factory and Workshop Acts 1878 to 1895."

The Factory and Workshop Act 1895 (58 and 59 Vict. cap. 37) enacts as follows,

Section 23 (1)—"The following provisions, namely (i) section 82 of the principal Act, (ii) The provisions of the Factory Acts with respect to accidents, (iii) Section 68 of the principal Act with respect to the powers of inspectors, (iv) Sections 8 to 12 of the Act of 1891 with respect to special rules for dangerous employments, and (v) The provisions of this Act with respect to the power to make orders as to dangerous machines, shall have effect as if (a) every dock, wharf, quay, and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto all machinery and plant used in that process . . . were included in the word 'factory,' and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself his agents or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupiers of the said premises; and for the purpose of the enforcement of those sections the persons having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using such machinery, shall be deemed to be the occupier of a factory."

Argued for the claimant and appellant—(1) The Sheriff-Substitute had held that because the accident had occurred in the street "immediately outside" the wharf, the Workmen's Compensation Act did not apply. The Act, however, did apply in direct terms, because the accident occurred "about" a factory. The wharf occupied by the defenders was *per se*, apart from any question about machinery, a factory within the meaning of the Act—*Jackson v. A. Rodger & Company, July 4, 1899, 1 F. 1053; Bruce v. Fraser, March 8, 1900, 2 F. 717*, opinion of Lord President (Balfour), 721. No doubt the decision in *Jackson v. A. Rodger & Company, supra*, had been to some extent explained away by the second case of the same name—*Jackson v. A. Rodger & Company, January 30, 1900, 2 F. 533*; but this latter decision, and the English case of *Flowers v. Chambers, 1899, 2 Q.B. 142*, on which it proceeded, had been practically overruled in *Stuart v. Nixon & Bruce, 1901, A.C. 79*. The case of *Stuart* decided that in terms of section 23 of the Factory Act of 1895 machinery on board a ship loading or unloading from or to a wharf, on which no machinery was proved or averred to have been erected, was a factory within the meaning of the Act. This struck at the decision in the second case of *Jackson*, in which it was held that the word "wharf," as used in section 23 of the Act of 1895 meant a wharf on which machinery was erected. The decision in the first case of *Jackson* might therefore be considered a sound one. If the Court were, however, of opinion that it was necessary for the appellant to show, in order to constitute the wharf a factory, that there was machinery upon it, he asked for a proof to enable him to do so. (2) Whether the wharf was a factory or not, the crane, which was machinery being

used in the process of loading from a wharf, was itself a factory within the meaning of the Act. The removing of the girders from the street where they lay was part of the process of loading—*Stuart v. Nixon & Bruce*, 1901, A. C. 79, opinion of Lord Chancellor (Halsbury), 89.

Argued for the respondents—(1) The place at which the accident occurred was not “about” a factory—*Haddock v. Humphrey*, 1900, 1 Q.B. 609. A wharf or quay was not *per se* a factory. Some limitation required to be put on the word “wharf,” for the Act did not apply to all wharfs—*Hall v. Snowden, Hubbard & Company*, 1899, 2 Q.B. 136. This limitation was that there must either be machinery on the wharf, which could be inspected in terms of the Factory Acts, or it must be a wharf to which some of the provisions of the Factory Acts are applied by the Act of 1895. In the case of *Hall* no machinery was used on the wharf, and the only provision of the Factory Acts which could apply to it was section 18 of the Act of 1895 as to notices of accidents. It was held that that section could not be made applicable in that particular case, because it is only when accidents occur in the factory that they require to be notified, and the accident there occurred outside the wharf, with the result that the Workmen’s Compensation Act 1897 did not apply—the reason being, not that the place where the accident occurred was too far away from the wharf to be “about” it within the meaning of the Act, for the judges indicated an opinion that it was not, but because the accident having occurred not on the wharf but only “about” it the wharf itself was not a factory, and therefore the accident did not take place “about” a factory. The facts in that case were practically the same as in the present, which was ruled by it. It was for the claimant to prove that there was machinery on the wharf, or that some of the provisions of the Factory Acts applied to it—*Jackson v. Rodger*, January 30, 1900, 2 F. 533; *Hall, cit.* The second case of *Jackson, cit.* had never been overruled. (2) The hand crane used in the present case was not a factory within the meaning of the Act. It was being used for the purpose of lifting girders in the street outside the wharf on to a truck. That was not part of the process of loading or unloading from or to a wharf in terms of section 23 of the Factory Act of 1895. The process of loading or unloading was limited to loading or unloading from the wharf to the ship or from the ship to the wharf—*Laing v. Young & Leslie*, November 2, 1900, 38 S.L.R. 29; *Merrill v. Wilson, Sons, & Company, Limited*, 1901, 1 Q.B. 35, opinion of A. L. Smith, M.R., 41.

LORD JUSTICE-CLERK—Having considered this appeal, I think it advisable that the case should be further dealt with in the way of inquiry as to facts. There is no doubt that if we take it upon the admissions and statements made at the bar, the case might be disposed of at once, but then I think, this being a Stated Case, it is

necessary that whatever decision is given should be on the facts as stated in the case. It does not appear to me that we are in a satisfactory position on these facts to dispose of the matter. The Sheriff-Substitute has held, on the authority of *Hall v. Snowden, Hubbard, & Company*, that as the accident did not occur on the quay but on the street, no accident occurred on or about a factory within the meaning of the Workmen’s Compensation Act 1897. I am not satisfied that that is a sound finding in law. I think the case of *Hall* which he founds upon was not a satisfactory decision, and I am not inclined to give weight to it. In any case, I do not think that what was decided in that case excludes the operation here of this statute in the view that if there is a place in which an accident happens which would be followed by inquiry by the Factory Inspector, then it is a place to which the statute of 1897 applies, and that that statute provides that there may be compensation where the accident happens “about” a factory as well as “on or in” it. I therefore think that the case must go back to the Sheriff-Substitute. [*His Lordship then read the interlocutor which he proposed the Court should pronounce.*]

LORD YOUNG—I have no objection to that course being taken, as your Lordship thinks we ought to have some further information on matters of fact than the case as stated by the Sheriff gives us. But my own opinion is, that the facts stated by the Sheriff are sufficient for the decision of the case—that is to say, for the decision of the question of law which he says he has decided, and which he says he has referred to us for decision at the request of the party against whom his judgment is expressed. The accident here occurred on the street immediately outside the wharf shed, and he finds that there is no liability in respect only that the accident did not occur on the quay but on the street. Now, if we are of opinion—and I am certainly of opinion—that the quay part of the wharf is a factory within the meaning of the Act, then the only question is, whether this case falls within the Act, the accident having occurred not on the quay, not in or on the wharf itself, but on the street immediately outside the wharf shed. There is no other ground stated or suggested for holding that the Workmen’s Compensation Act does not apply, except that, that the accident did not occur on the quay of the wharf, but on the street immediately outside. Differing from the Sheriff, I am of opinion that that is not *per se* a ground for refusing compensation. No other ground being suggested, my own opinion is that we might save the expense and delay of the case going back to the Sheriff, except for the purpose of determining the question of the amount of compensation. That would be a less tedious and a less expensive thing than sending it back with an indication that there is something else for the Sheriff to consider and inform us about. I think myself that there is nothing else.

LORD TRAYNER—The form of interlocutor which your Lordship has read expresses the view I take of the course that should now be followed. The case must go back to the Sheriff-Substitute because we cannot either pronounce findings in fact or fix compensation. The only jurisdiction we have is to decide points of law submitted to us by the Sheriff, and points of law which he has himself decided one way or the other. Now, this question has been put to us by the Sheriff, whether he was right in deciding as he has done. I think his decision is wrong. But I think we cannot at once proceed to find that the pursuer, the claimant, is entitled to compensation, leaving it to the Sheriff merely to ascertain the amount, and for this reason. We are of opinion that the wharf was a factory. To that opinion the Sheriff-Substitute must give effect. But then it is plain from the statement of facts before us that the accident did not happen on or in the wharf; and the only way therefore in which the appellant can bring himself within the statute is by showing that the accident happened "about the wharf." The Sheriff-Substitute states that the accident happened "immediately outside" the wharf. I do not know what that exactly means. It may mean 5 feet, it may mean 50 feet, it may mean 150 feet, according to what the Sheriff's own view of what "immediately outside" is. The case must go back to the Sheriff in order to have that matter of fact inquired into and determined, but with the direction from your Lordships that the mere fact on which he proceeded, that this happened on the street, however near the wharf, would not of itself be enough to set aside the appellant's claim. Your Lordships by interlocutor will direct him that that is not so, but it remains for him to ascertain and state what was the relative position of the site of the accident to the wharf, and on that he will determine, and if necessary we will determine, whether the accident happened "about" a factory.

LORD MONCREIFF—I am also of opinion that this wharf is a factory in the sense of the Workmen's Compensation Act of 1897. As I read the case the Sheriff's judgment amounts to this, that following the case of *Hall v. Snowden, Hubbard, & Co.* he is of opinion that the wharf is not a factory in the sense of the Act. Now, in the Workmen's Compensation Act the word "factory" is said to include "any dock, wharf, quay, warehouse, machinery, or plant to which any of the Factory Acts is applied by the Factory and Workshop Act of 1895." The 23rd section of the Factory Act of 1895 applies a variety of provisions to every dock, wharf, quay, and warehouse, amongst which are provisions in regard to accidents. Now, it was conceded in regard to this wharf that if an accident occurred upon it the provisions of the Factory Acts would be called into operation, and would apply. But then the respondent's argument is, that unless the accident in question—that is, the accident in respect of which this claim is made

under the Workmen's Compensation Act of 1897—occurred "on" the wharf, the wharf could not be held to be a factory in the sense of the Workmen's Compensation Act of 1897.

My opinion upon that is, that we must first ascertain whether the wharf is a factory. Well, we find on looking at the Act of 1895 a variety of provisions, some of which may not apply to a wharf, but some of which undoubtedly do apply in certain circumstances. Thus, this wharf is made subject to these conditions, and therefore satisfies the words of the Act of 1897 as being a wharf to which the provisions of the Factory Acts are applied by the Act of 1895. That being so, with all deference to the judgment in the case of *Hall*, I am of opinion that the wharf is a factory within the meaning of the Act of 1897.

But that does not end the question, because the accident did not occur actually "in" or "on" the wharf or quay. It is said to have occurred "about" the wharf, and I certainly should have gathered from the statement of facts in this case that it occurred so close to the wharf as necessarily to be "about" it in the sense of the statute, and in accordance with various decisions on that section. But for two considerations I should have been prepared to decide the case now, and I cannot doubt that when it is remitted to the Sheriff there can be only one course he can take, namely, to decide in favour of the present appellant. But in the first place the case must go back to the Sheriff in order that he may settle the amount of compensation. The other point—and that has weighed a good deal with me—is this, that we are not here dealing with an ordinary process, where we are at liberty to proceed on admissions made at the bar, but we are dealing with a special case, and I should be sorry to introduce a loose practice as to admissions on matters of fact. As the case has to go back to the Sheriff to fix the compensation, I do not think there will be any additional expense or inconvenience in asking him to decide the question of fact as to which we have not information in the case—that is to say, how close to the wharf this accident occurred. I have no doubt that it will turn out that it happened just at the gate or entrance to the quay, and if so there can be no doubt on the decisions that it was sufficiently near this "factory" to enable the appellant to recover compensation.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the arbitrator: Find (1) that the wharf referred to in the stated case occupied by the respondents is a factory within the meaning of the Workmen's Compensation Act 1897; and (2) that the fact that the accident in question happened on a public street 'immediately outside the wharf shed' does not *per se* exclude the claim of the appellant: and with these findings remit to the arbitrator to proceed with the application as accords."

Counsel for the Claimant and Appellant—Salvesen, K.C.—J. D. Robertson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—C. K. Mackenzie, K.C.—Spens. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, March 14.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

BAIRD v. S. HIGGINBOTHAM & COMPANY, LIMITED.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (4)—Action to Recover Damages Independently of Act—Motion After Action Dismissed to Find Pursuer Entitled to Compensation under Act.

By section 1 sub-section (4) of the Workmen's Compensation Act 1897 it is enacted "If within the time hereinafter in this Act limited for taking proceedings an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which in its judgment have been caused by the plaintiff bringing the action, instead of proceeding under this Act."

An action brought at common law and under the Employers Liability Act 1880 was dismissed as irrelevant by the Sheriff-Substitute in June 1900, and on appeal his interlocutor was affirmed by the Second Division on 29th November 1900. This action was raised within two months from the occurrence of the accident. On 14th February 1901 one of the pursuers craved the Court to find that she would have been entitled to compensation under the Workmen's Compensation Act 1897, and to assess such compensation. *Held* that her application was too late.

In February 1900 Mary Stewart or Baird, widow of James Baird, bricklayer, Glasgow, and the four children of James Baird, who were all major, raised an action in the Sheriff Court at Glasgow, at common law and under the Employers Liability Act 1880, in which they craved decree against S. Higginbotham & Company, Limited, and Hugh Baird, contractor, Glasgow, jointly and severally or severally, for certain sums as damages for the death of the said James Baird. In this action the pursuers averred that James Baird, who

was in the employment of the defender Hugh Baird, had been sent by the latter to the works of S. Higginbotham & Company, Limited to repair a furnace, and while so employed on 2nd January 1900 had been fatally injured by the collapse of one of the chimneys of the furnace, and that his injuries were due to the fault of the defenders.

Both defenders pleaded, *inter alia*—(1) The action is irrelevant.

On 16th June 1900 the Sheriff-Substitute (GUTHRIE) sustained the defenders' first plea-in-law, and dismissed the action.

The pursuers appealed to the Court of Session, but on 29th November 1900 the Second Division of the Court dismissed the appeal and affirmed the interlocutor appealed against.

On 14th February 1901 the pursuer Mrs Baird presented a note to the Lord Justice-Clerk, in which she asked his Lordship to move the Court to find that she would have been entitled to compensation from the defenders S. Higginbotham & Company, Limited, under the provisions of the Workmen's Compensation Act 1897, and to assess such compensation under such conditions as to expenses as were provided by the said Act.

In the note Mrs Baird averred that she was the only dependent of the said James Baird, who was wholly dependent upon his earnings at the time of his death, that the action was still pending in the Division, that she was desirous of having her right to compensation under the Workmen's Compensation Act 1897 settled, and that the proceedings in the said action were brought within the time limited by the said Act for taking proceedings. She made reference to section 1 sub-section (4) of the Workmen's Compensation Act 1897.

That sub-section enacts as follows:—"If within the time hereinafter in this Act limited for taking proceedings an action is brought to recover damages, independently of this Act, for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed, but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which in its judgment have been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceeding under this sub-section when the Court assesses the compensation it shall give a certificate of the compensation it has awarded, and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act."

The note appeared in the Single Bills on 19th February 1901, and was sent to the Summar Roll. It was heard therein on 14th March.

Argued for the pursuer Mrs Baird—The provisions of the Act must be construed in