

LORD ADAM was absent.

The Court dismissed the appeal.

Counsel for the Appellants—Clyde, K.C.
—Morton. Agent—W. A. Hyslop, W.S.

Counsel for the Respondents—Ure, K.C.—
A. S. D. Thomson. Agents—Simpson &
Marwick, W.S.

Thursday, February 5.

SECOND DIVISION.

CLARK BURSARY FUND (MILE-END) TRUSTEES, PETITIONERS.

*Educational Trust—Extension of Scheme—
University Scholarships and Bursaries
—Trust for Bursaries to Male Students
—Admission of Female Students to the
Benefits of the Trust.*

Authority granted to the trustees of
a trust for providing bursaries and
scholarships for men in the University
of Glasgow to extend the benefit of the
trust to female students.

A petition was presented by Lord Inverclyde and others, the trustees of the Clark Bursary Fund (Mile-end), for extension of the scheme under which they administered certain bursaries and scholarships under a trust-disposition and deed of settlement dated 30th June 1866, and a subsequent deed of direction, by the late Mr John Clark junior, Mile-end, Glasgow. By the deeds referred to the petitioners were directed to award out of the fund administered by them, which amounted to upwards of £36,000, certain bursaries or scholarships to male students in the University of Glasgow. Under the benefactor's scheme of administration the petitioners offered for competition at intervals, *inter alia*, a scholarship in modern languages. Female students were first admitted to the University of Glasgow at a date subsequent to the granting of the deeds referred to, and a female student was the only candidate for the Modern Languages Scholarship in Session 1902-1903. The petitioners stated as follows:—"Since the trust came into operation the university regulations have been so amended that women students can now attend most of the classes of the university, and can proceed to graduation in the Faculties of Arts, Medicine, and Science in the same manner as men. . . . The petitioners are of opinion that the utility of the trust under their administration would be greatly increased if the bursaries and scholarships provided as aforesaid were opened to the competition of female students instead of being restricted as in practice they have hitherto been to competition among men only. It has accordingly been resolved to seek the Court's authority to permit women to take part in future competitions for said bursaries and scholarships." The petitioners accordingly prayed the Court to

authorise the petitioners and their successors in the management of the said trust estate to extend the benefit thereof to female students in the University of Glasgow on the same terms as men by admitting them to competition for the bursaries and scholarships in the petitioners' appointment, and on their being found qualified by appointing them thereto.

On 25th November 1902 the Court remitted to Mr Charles Young, W.S., "to inquire and report as to the whole circumstances and the proposed extension of the benefits of the scheme." Mr Young reported in favour of the extension proposed by the petitioners.

On 5th February 1903, on the calling of petition in single Bills with Mr Young's report, the Court granted the prayer of the petition.

Counsel for the Petitioners—M'Clure—
Skinner. Agents—Webster, Will, & Com-
pany, S.S.C.

Friday, February 6.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

REID v. THE ANCHOR LINE.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 7, (1), (2)—Factory and Workshop Act 1895 (58 and 59 Vict. cap. 37), sec. 23, (1)—Factory—Dock—Ship in Dock—Machinery on Board Ship Used for Unloading.

A workman was employed as a docker by a shipowner for the unloading of a cargo from a ship belonging to the shipowner in Glasgow Harbour. The cargo was being discharged by means of the ship's steam winch, derrick, and fall, and was wheeled ashore by labourers in the employment of the shipowner over gangways laid between ship and quay. The workman was killed by slipping on the ship's fixed ladder while ascending from the hold. *Held* that at the time of the accident he was employed in a factory within the meaning of the Workmen's Compensation Act 1897, and that the shipowner was liable to pay compensation in terms of the Act.

Stuart v. Nixon & Bruce, [1901], A.C. 79, and *Raine v. Jobson & Company*, [1901], A.C. 404, *followed*.

Aberdeen Steam Trawling Company v. Peters, March 16, 1899, 1 F. 786, 36 S.L.R. 573; *Jackson v. Rodger & Company*, January 30, 1900, 2 F. 533, 37 S.L.R. 390; *Healy v. Macgregor & Ferguson*, February 20, 1900, 2 F. 634, 37 S.L.R. 454; *Bruce v. Henry & Company*, March 8, 1900, 2 F. 717, 37 S.L.R. 511; *Low v. Abernethy*, March 8, 1900, 2 F. 722, 37 S.L.R. 506; and *Living v. Young & Leslie*, November 2, 1900, 3 F. 31, 38 S.L.R. 29, *overruled*.

This was a stated case on appeal from the decision of Sheriff-Substitute STRACHAN in an arbitration under the Workmen's Compensation Act 1897 in the Sheriff Court at Glasgow, between (1) Catherine M'Cafferty or Reid, widow of Alexander Reid, docker, Glasgow; (2) Helen Reid; and (3) the said Catherine M'Cafferty or Reid as tutor-in-law for her pupil children—Mary Reid, William Reid, Jessie Reid, and Catherine Reid—claimants and appellants, and The Anchor Line (Henderson Brothers, Limited), steamship owners and agents, Glasgow, respondents, in which the Sheriff was asked to find that the respondents were liable to the appellants in £300 as compensation in terms of the Workmen's Compensation Act 1897, in certain proportions.

The Sheriff-Substitute stated as follows:—"The case was heard before me on 8th August 1902, when I found the following facts to be established:—(1) That the appellant Mrs Catherine M'Cafferty or Reid was the widow and the other appellants were children of the deceased Alexander Reid, docker, and that they were totally dependent on the earnings of the deceased. (2) That the deceased was on 14th March 1902 in the respondents' employment as a docker, and was assisting to unload a cargo on board the respondents' s.s. 'Astoria' at Glasgow Harbour. (3) That about 2 p.m. on said date he left the hold of the vessel along with the other workmen for the purpose of going home to dinner, and while ascending the fixed ship's ladder between the orlop deck and the 'tween deck his foot slipped off a rung, with the result that he fell back into the hold, a distance of about fifteen feet, and was killed. (4) That the respondents, besides being the owners of said vessel on which the accident occurred, were the undertakers for the whole workings of the vessel, including the process of loading and discharging. (5) That the ship's cargo was being discharged by means of the ship's steam winch, derrick, and fall, and the cargo was wheeled ashore by respondents' labourers over quay planks or gangways laid between ship and quay. I held that the deceased Alexander Reid was not at the time the accident happened employed on or in or about a factory within the meaning of the Workmen's Compensation Act 1897. I therefore dismissed the application, and found no expenses due to or by either party."

The question of law for the opinion of the Court was—"Whether the deceased was at the time when the accident happened employed on or in or about a factory within the meaning of the Workmen's Compensation Act 1897, and whether his dependents are entitled to recover compensation under the foresaid arbitration in respect of his death?"

Argued for the claimant and appellant—This case fell within the Workmen's Compensation Act 1897 on two alternative grounds—(1) Under section 7 of that Act, adopting the meaning in the Factory Act 1895, section 23 (1), every dock, wharf, quay, &c., was *per se* a factory. In the present

case the ship was in a dock, and the workman had therefore met his death within a factory—*Raine v. Jobson & Co.* [1901], A.C. 404, approving *Merrill v. Wilson* [1901], 1 K.B. 35; *Bartell v. W. Gray & Co.* [1902], 1 K.B. 225. (2) Under the above-mentioned sections of the Acts of 1897 and 1895 all machinery and plant, so far as related to the process of loading or unloading from or to a dock, wharf, or quay, constituted a factory. In the present case Reid was assisting in the first step of the process of unloading or getting the cargo from the ship to the quay. The ladder was part of the plant. The workman Reid was therefore employed on or in or about a factory—*Stuart v. Nixon & Bruce* [1901], 79, 82, opinion of Halsbury L.C. 89. No doubt the decisions in the Scottish Courts founded on by the other side were against the view submitted. But all these cases were decided prior to the two decisions in the House of Lords *cit. supra*. The Scottish Courts might be said to have followed and been led astray by the decision in the early case of *Flowers v. Chambers* [1899], 2 Q.B. 142. But that decision had been overruled expressly by the House of Lords in the case of *Raine v. Jobson & Co., supra*, and although there was no appeal to the House of Lords in Scots cases under the Act, the Court ought to follow the decisions of the highest Court of the realm on an Act common to both countries.

Argued for the respondents—Neither a dock, wharf, or quay nor the machinery used for loading or unloading on board a ship in a dock or at a quay was *per se* a factory under the Workmen's Compensation Act 1897. In order to constitute a factory under the Act, the dock, wharf, or quay must be one to which some of the provisions of the Factory Acts applied. These Acts only applied where there was on the dock, wharf, or quay some machinery employed for loading and unloading, and worked with steam, water, or other mechanical power in connection therewith. And in order that machinery or plant for loading or unloading might constitute a dock, it must be fixed gearing on the quay. Where the ship's own machinery was being used for loading or unloading there was no factory. These propositions were supported by no fewer than six Scotch decisions, viz.—*Aberdeen Steam Trawling Co. v. Peters*, March 16, 1899, 1 F. 786, 36 S.L.R. 573; *Jackson v. Rodger & Co.*, January 30, 1900, 2 F. 533, 37 S.L.R. 390; *Healy v. Macgregor & Ferguson*, February 20, 1900, 2 F. 634, 37 S.L.R. 454; *Bruce v. Henry & Co.*, March 8, 1900, 2 F. 717, 37 S.L.R. 511; *Low v. Abernethy*, March 8, 1900, 2 F. 722, 37 S.L.R. 506; *Laing v. Young & Leslie*, November 2, 1900, 3 F. 31, 38 S.L.R. 29. It was not correct to say that the Scottish Courts had followed the decision in the case of *Flowers v. Chambers, supra*. The case of *Aberdeen Steam Trawling Co. v. Peters, supra*, was decided before the case of *Flowers*. There were also three other English decisions to the effect that where the process of loading was being carried on with the ship's machinery the Act did not apply, viz.—*Durrie v. Warran*,

& Co., 1899, 15 T.L.R. 365; *Hennessey v. M'Cabe* [1900], 1 Q.B. 491; *Spencer v. Livett, Frank, & Son* [1900], 1 Q.B. 498. It was argued that all this mass of authority was nullified by the House of Lords' decisions in *Stuart v. Nixon & Bruce, supra*, and *Raine v. Jobson & Co., supra*. As regards the case of *Stuart*, that case was appealed to the House of Lords in order that it might be determined whether the Act applied to "casual" labourers. Seven Judges heard the case, and in the opinions of six of them there was no reference to the present question. The only reference to it was a single sentence in the opinion of the Lord Chancellor. The present question as to whether machinery on board a ship could constitute a factory under the Act was not raised in that case, and an *obiter dictum* of one Judge, who had heard no argument on the point, was not enough to overturn a long series of decisions. Then as regards the case of *Raine*, it had no application. In that case the ship under repair was in a dry dock, and it was conceded in that case that the work was going on inside premises which constituted a factory. In such circumstances the Court would not be disposed to pronounce a decision which would overturn a whole series of their own decisions. The decisions of the Court in cases under the Act were final, and should be treated as laying down the law once and for all.

At advising—

LORD JUSTICE-CLERK—In this case the inclination of my own opinion would be towards holding that the judgment of the Sheriff-Substitute in this case was right. Indeed, it is difficult to see how the Sheriff-Substitute could have held otherwise than he did, looking to the numerous decisions in the Court of Session which are in accordance with his view. But I have been unable to find any sound ground for distinguishing this case from that of *Raine v. Jobson & Co.*, decided in the House of Lords by a unanimous judgment of five learned law Lords. That being so, it is undesirable in the highest degree that there should be conflicting decisions on an Act of Parliament passed for the whole United Kingdom. And the House of Lords being the highest judicatory in the land I bow to its decision, and in respect of that decision, and of that only, am in favour of answering the question in this case in the affirmative, and remitting back to the Sheriff to proceed.

LORD YOUNG—I am of the same opinion, not on the grounds stated by your Lordship, but on this ground, that I think the view taken by the House of Lords in the two cases quoted was right.

LORD ADAM—The deceased Alexander Reid while in the respondents' employment on 14th March 1902, met with an accident. He was at the time assisting to unload the cargo of their s.s. "Astoria," which was lying in Glasgow Harbour. He had left the hold for the purpose of going to dinner,

and while ascending the ship's ladder his foot slipped and he fell back into the hold and was killed.

The cargo was being discharged by means of the ship's steam winch, derrick, and fall, and the cargo was wheeled ashore by the respondents' labourers over quay planks and gangways laid between the ship and quay. The Sheriff has held that the deceased Alexander Reid was not at the time employed on or in or about a factory within the meaning of the Workmen's Compensation Act, and the question which we have to decide is whether this judgment is right.

I think, if we are to follow the cases of *Peters*, 1 Fr. 786, *Bruce*, 2 Fr. 717, *Low*, 2 Fr. 722, and *Laing*, 3 Fr. 31, which have been decided in Scotland, that the Sheriff's judgment is certainly right, and I do not think that that was disputed.

But it was argued to us that certain cases decided in the Appeal Court in England, in which the same view of the construction of the Act had been taken there as had been taken here, had been appealed to the House of Lords and reversed, and that we should now give effect to the decisions of the House of Lords.

The first of these is the case of *Stuart v. Nixon & Bruce* [1901], A.C. 79. In that case the workman, who was killed, was in the employment of certain stevedores who were loading a vessel in a dock by means of a winch, derrick, and fall, which were all on board the ship. The fall got entangled, and in going to disentangle it a beam canted, and he fell into the hold and was killed. The House of Lords held, reversing the Court of Appeal, that he was at the time employed in or about a factory, and that his widow was entitled to compensation. It is difficult to distinguish that case from the present. In that case, as in this, the ship was lying in a dock, and the machinery which was being used was entirely within the ship. It can make no difference that in one case the cargo was being loaded and in the other unloaded.

In the case of *Raine v. Jobson* [1901], A.C. 404, certain ship repairers took a ship into a dry dock which they had hired for the purpose of cleaning and repairing the ship. One of their workmen engaged in clearing the ship was sent to the quay, and while crossing the gangway from the ship to the quay fell into the dock and was killed. It was held, reversing the Court of Appeal, that the dock was a factory and that his widow was entitled to compensation.

It appears to me that if we are to follow these two cases the decision in the present case cannot stand. Although there is no appeal in cases occurring in Scotland to the House of Lords, yet as these are decisions by the highest Court in the realm upon the construction of an Act common to both countries, I think we ought to follow them, and that the decision in the present case ought to be reversed and the case remitted to the Sheriff.

LORD TRAYNER and LORD MONCREIFF were absent.

The Court answered the question of law in the affirmative; therefore recalled the dismissal of the claim by the arbiter, and remitted to him to proceed.

Counsel for the Claimants and Appellants—A. S. D. Thomson—Munro. Agents—Patrick & James, S.S.C.

Counsel for the Respondents—Urð, K.C.—Younger. Agents—Webster, Will, & Company, S.S.C.

Friday, February 6.

SECOND DIVISION.

[Sheriff-Substitute
at Hamilton.

O'HARA v. THE CADZOW COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1, sub-sec. (2); (c)—Serious and Wilful Misconduct—Coal Mines Regulation Act 1887 (50 and 51 Vict. c. 58)—Additional Special Rule 9—Failure to Set Sprags.

Rule 9 of the Additional Special Rules framed in pursuance of the Coal Mines Regulation Act 1887 provides—"Where holing is being done sprags or holing props shall be set as soon as there is room, and the distance between such sprags or holing props shall not exceed six feet, or such less distance as shall be ordered by the owner, agent, or manager."

A workman was killed by a fall of head coal while engaged with four other men in holing coal in a pit; three of the other men had holed a considerable portion before they were joined by the workman who was killed and the fifth man. The two latter men had holed about three feet when the accident happened. The total space holed by the five men was over twenty feet. No sprags had been set by any of the men although there was ample room for the setting of sprags. In an appeal under the Workmen's Compensation Act 1897, held (*disc.* Lord Young) that the workman who was killed was in breach of rule 9, that his injury was therefore attributable to his own serious and wilful misconduct, in the sense of sec. 1, sub-sec. 2 (c) of the Act, and that consequently his representatives were not entitled to compensation under the Act.

This was a case stated on appeal from a determination of the Sheriff-Substitute (DAVIDSON) at Hamilton, in an arbitration under the Workmen's Compensation Act 1897, between Mrs Catherine O'Brien or O'Hara, 6 Burnside Lane, Hamilton, widow of James O'Hara, miner, claimant and respondent, and the Cadzow Coal Company, Limited, appellants, in which the claimant claimed compensation for herself and her five pupil children in respect of the death

of her husband, which was caused by a fall of head coal from the roof of one of the appellants' pits.

The following facts were stated as admitted or proved:—"That O'Hara was holing coal with four other men on 25th June 1902 in the appellants' pit, in which additional special rule No. 9 was in force; that three of the men had holed a considerable portion before O'Hara and the remaining man began to hole coal; that at the time of the accident these two had holed only about three feet; that the total space holed where all five men were working was over twenty feet, and no sprags had been erected by anyone although there was ample room for the erection of sprags; that, apart from the consideration of the quantity holed by each man, there was no responsibility on any one of the five more than on the others in regard to propping; that O'Hara's average weekly wages were £1, 6s. 2½d."

The Sheriff-Substitute stated his finding to be as follows:—"I found that the respondent was entitled to compensation, and I awarded £204, 8s. 6d. to be allocated in the proportions of £68, 2s. 8d. to the respondent, and £136, 5s. 10d. to the said pupil children in equal portions."

The question of law for the opinion of the Court, as amended, was—"Was the deceased James O'Hara in breach of additional special rule No. 9 of the Coal Mines Regulation Act 1887; and if so, was his injury attributable to his serious and wilful misconduct?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, enacts—sub-section 2 (c)—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

The provisions of Rule 9 of the Additional Special Rules framed in pursuance of the Coal Mines Regulation Act 1887 are quoted in the rubric.

Argued for the appellants—Every miner was bound to put in a sprag as soon as there was room, and thereafter to put one in at spaces not exceeding six feet. The fact that all five men neglected the rule did not excuse O'Hara; all five men were in breach of the rule, and in particular O'Hara having holed a space sufficient to make room for a sprag was in breach of the rule in failing to put one in. Breach of a special rule framed for his own safety was serious and wilful misconduct on the part of a miner—*Dailly v. John Watson, Limited*, June 19, 1900, 2 F. 1044, 37 S.L.R. 782. O'Hara should have seen that the holing was spragged in accordance with the rule before he began to work. In the case of *M'Nicol v. Speirs, Gibb, & Company, cit. infra*, the facts were special; knowledge of the rule was to be assumed.

Argued for the respondent—It was not stated that O'Hara knew the rule, and knowledge was essential to fault—*M'Nicol v. Speirs, Gibb, & Company*, February 24, 1899, 1 F. 604, 36 S.L.R. 428. Assuming knowledge of the rule on the part of O'Hara, he was not guilty of serious and wilful