

in "the repair" of the ship, and that being so I think no distinction can be drawn between this case and that of *Raine v. Jobson*, and that it is governed by that decision.

LORD ADAM—I concur.

LORD M'LAREN—Comparing the case of *Raine v. Jobson*, [1901] A.C. 404, with the more recent authority cited (*The Houlder Line, Ltd. v. Griffin*, April 14, 1905, 21 T.L.R. 436), but which has not yet appeared in the official reports, it is quite plain that the Supreme Court of Appeal has kept clearly in view the distinction between the case where the dock is hired by the ship-owner for the purposes of repairing a ship and the case where a ship is being repaired while lying in the water-space of the dock and surrounded by the structure of a dock which is under the administration of a company or public body.

In the present case the dock was at the exclusive disposal of the shipowners, by whom it had been hired, and the repairs were being executed by workmen employed by them. One of these was a ship's carpenter who had been employed on the vessel during the previous voyage, but who at the time when he met with the accident was not engaged as a seaman but as a workman employed to execute repairs.

The fact that the particular operation on which he was engaged, viz., turning the ship's cable end for end, was such work as a ship's carpenter might be required to do at sea under his contract as a seaman cannot be held to exclude him from the benefit of the Act unless the mere fact of his being a seaman is sufficient to debar him, even although he may happen to be employed at the time as a landsman under a contract of a different description.

LORD KINNEAR—I agree with your Lordships that it is quite clear that the dock in this case was constructively a factory.

It is not disputed that the deceased was employed in this factory, but it is said that the operation in which he was actually engaged was not work concerned with the business of the factory. The Sheriff states, however, that as matter of fact he was employed in the work of repair, which is the very business of this so-called factory, for the work of the factory is the repair of the ship.

If so, the only point is that the deceased was doing work which he might have been required to do while at sea and in an emergency; but the mere fact that he might on some other occasion have to do elsewhere in a different capacity—that of a seaman—the work which he was doing when the accident happened to him in the capacity of a workman employed by the undertakers cannot be held to exclude him from the provisions of the Act.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—The Solicitor-General (Salvesen, K.C.)—R. S. Horne. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Respondent—Watt, K.C.—Wark. Agents—M. J. Brown, Son, & Co., S.S.C.

Tuesday, June 6.

SECOND DIVISION.

[Lord Low, Ordinary.]

PLAYFAIR v. KELSO RAGGED INDUSTRIAL SCHOOL.

Succession—Legacy—Legacy to Charitable Institution Existing for Object Specified in Constitution—Alteration of Constitution before Legacy Payable—Identity of Legatee—Whether Legacy Lapsed.

A testator who died in 1888 directed his trustees in a certain event which did not occur until 1903 to pay a share of the residue of his estate to a certain institution, the objects of which, as described in its constitution, were, *inter alia*, "to rescue destitute and morally deserted children." The constitution of the institution at the date of the testator's death made provision for a daily allowance of food to the children, and for their elementary education in a school. The school was closed in 1889 after the introduction of free education, and in 1891 the constitution of the institution was altered. In the new constitution certain changes were made in the appointment of directors, and it was provided that the object of the institution should be the provision of clothing and food for destitute or poor children attending the board schools. When the testator's residue became divisible his heirs *in mobilibus* maintained that the bequest in question had fallen into intestacy by reason of the institution named having ceased to exist or having materially changed in scope and character. *Held* (*aff.* judgment of Lord Low) that the institution which the testator intended to benefit had not ceased to exist by reason of the changed methods of carrying out its objects and the change in the mode of appointing the directors.

This was an action of multiplepointing at the instance of the testamentary trustees of Thomas Johnston, grocer and wine merchant, Kelso, who died on 26th March 1888.

By his trust-disposition and settlement Mr Johnston directed his trustees to pay the income of the residue of his estate to Eliza M'Dougal, his housekeeper, and at her death to divide the residue among certain institutions and individual beneficiaries. The liferentrix died in 1903.

One of the testator's residuary bequests which vested and became payable on the death of the liferentrix was as follows:—"Two-eighth parts thereof to the Kelso

Ragged Industrial School to be paid upon the discharge of the treasurer or secretary thereof for the time being for the purposes of the said school."

Kelso Ragged Industrial School was founded in 1857. In terms of a constitution and rules framed in 1889 the object of the institution was "to rescue destitute and morally deserted children from idleness and evil temptations, and to fit them for the duties of life by imparting to them a good common and Christian education, and by training them to habits of order and industry." Provision was made in the constitution for steps to be taken for management "at a general meeting duly called to appoint directors and office-bearers, and to sanction or alter any article of the constitution."

The constitution contained rules which prescribed the methods in which its object was to be attained. These provided, in particular, with regard to "*Objects of the Day School*."—The children shall receive an allowance of food daily. They shall be daily trained to the worship of God by praise and prayer and instructed from the Holy Scriptures. The branches of ordinary education shall be reading, writing, arithmetic, geography, and vocal music, and to the girls also sewing and knitting. So soon as the means are adequate the boys shall be taught some industrial employment, as shoemaking, tailoring, or carpentry; the girls shall also be taught washing and cooking of plain food." . . .

In 1889 on the introduction of free education the school of the institution was closed and the school building was sold.

In 1891, after due consideration, alterations and amendments on the constitution were approved of and adopted at a meeting called in terms of the existing regulations.

The new constitution provided—"Whereas in consequence of the alterations occasioned by the operation of the Education Acts and the provision of free education it is expedient that the constitution of the Kelso Ragged Industrial School and the rules relating thereto should in some respects be varied and amended. . . . 1. In addition to the objects of the charity mentioned in the said constitution they shall be, first, to provide destitute or poor children with clothing so as to enable them to attend for educational purposes the board schools or other places of education in decency and comfort, and next when in the opinion of the directors the funds of the charity shall be sufficient for the purpose, to provide such children with food, and also with books required for their education."

Some alterations were made with regard to the management of the institution and appointment of directors, which are sufficiently disclosed in the averments of the heirs *in mobilibus* of the testator, *infra*

In 1903, when the testator's residuary bequests became payable, the present action was raised as stated, the fund *in medio* being the share of residue bequeathed to the Kelso Ragged Industrial School, by which and by Mrs Agnes Johnston or

Playfair and another, the heirs *in mobilibus* of the testator, claims were lodged.

The claimants, the Kelso Ragged Industrial School, averred—" (Cond. 3) For many years prior to the death of the said Thomas Johnston, who died on 26th March 1888, the objects of the Kelso Ragged Industrial School included the provision to the children who were the objects of the charity, not only of education but also of food and clothing during their attendance at school. When free education was provided by the Legislature the said Industrial School discontinued the provision of education, sold the school buildings, and added the price obtained for them to its general funds. The said industrial school has since employed its funds primarily in clothing, and secondarily, in supplying with books children of the same class as those formerly educated by it during their attendance at school. On 28th January 1891 the said industrial school, in view of the circumstances herein mentioned, and in accordance with the constitution of 1859, adopted certain alterations and amendments on the constitution and rules of 1859. The constitution of 1859 has never been abrogated, and subject to the said alterations and amendments is still in force. These claimants claim to be ranked and preferred to the whole fund *in medio*, or alternatively, that the whole fund *in medio* should be handed over to the claimants, or to such persons as the Court may appoint, subject to a scheme for its administration approved by the Court."

The heirs *in mobilibus* of the testator averred, with reference to the original and amended constitutions of the Kelso Ragged Industrial School—"The latter differs entirely from the former both as regards the administering body and the objects of the charity. The governing body, instead of being periodically elected by subscribers, has now become permanent and self-elective. The prime object of the charity as defined by the original constitution has now disappeared, and what were mere incidents in the scheme originally provided for have now become the sole objects of the charity. Prior to the school being closed and disposed of in 1889, it was conducted as a regular school, with a teacher and a considerable attendance of children, who received a full and complete system of secular education, religious instruction, and moral and disciplinary training in accordance with the objects of the charity as defined in its constitution. The school was maintained at considerable expenditure by means of public donations and subscriptions. Since the close of the school in 1889 there have been no public subscriptions and donations. The funds then realised have simply been held and the interest thereof applied for the other objects stated in the amended constitution. The charity as now administered is a quite inappropriate object for the class of bequest that would have been appropriate to the original charity." These claimants accordingly maintained "that in these circumstances the object of the testator's bequest of two-eighths of the residue

of the estate to the Kelso Ragged Industrial School has failed. The constitution and administration of the charity contemplated by the testator have entirely changed, and there is no object whatever corresponding to the bequest. Alternatively, and on the assumption that the charity as now administered is to be regarded as the successor of the previous one, the claimants maintain that its constitution, scope, and objects have been so materially altered that it can no longer be regarded as the institution which the testator intended to benefit. In either case the result is that the two-eighths share destined to the Kelso Ragged Industrial School becomes intestate succession of Thomas Johnston and falls to be divided equally among the claimants."

On 13th January 1905 the Lord Ordinary (Low) repelled the claim for Mrs Playfair and another and sustained that for the Ragged Industrial School.

Opinion.—"There is no dispute what the object was which the truster had in view, because there was, at the date when the trust-disposition and settlement was executed, and at the date of the truster's death, an association in Kelso which carried on work there of a charitable and educational character under the name of the Kelso Ragged Industrial School. It is not disputed that that was the association which the truster had in view, and that if the bequest had vested at the date of his death the association to which I have referred would have been entitled to the legacy. But the legacy did not vest till the death of the liferentrix—an event which occurred in 1903—and the heirs *in mobilibus* of the truster claim that the legacy has fallen into intestate succession upon the averment that at the latter date the Kelso Ragged Industrial School, which was the object of the truster's bounty, had ceased to exist. If that association had actually ceased to exist, if it had been discontinued and wound up, I should have thought that the claim of the next-of-kin was well founded, because it seems to me that this was a bequest to a special institution, and that it was no more capable of being used as a general charitable bequest than if it had been a bequest to an individual, so that the question comes to be whether the institution named by the truster is still in existence. Well, there is no doubt that in one sense it is in existence. An association calling itself the Kelso Ragged Industrial School still exists, and it is the same institution which existed when the trust-disposition and settlement was executed, and it has existed from its institution in 1857 down to the present day without any break or interval whatever. But then the claimants say though there is an institution which carries on a certain work at Kelso under the same name, the objects and the character of its work have so changed that it is not, and cannot be said to be, the Industrial School which the truster intended to favour. That, I think, is the sole question in the case, and it is one which requires a little consideration. The association, as I have said, was first instituted in 1857, and

its constitution was framed in 1859. Under that constitution the object of the association is stated to be 'to rescue destitute and morally deserted children from idleness and evil temptations.' That is the object of the association. And then the manner in which that object is proposed to be attained is stated to be, 'by imparting to them a good common and Christian education, and by training them to habits of order and industry.' Very naturally, and indeed inevitably, in 1859, when that constitution was framed, the main method of carrying out the object of the association was by providing a school in which education could be supplied, and accordingly we find that the greater part of the original constitution and of the rules appended to it deal with this school and with nothing else. But there is specially reserved in the constitution powers to the members of the association in general meeting to alter any article of the constitution. Now, shortly after the truster's death a political event occurred which very much changed the position of the association, because free elementary education was given to this country, and the directors of the association at once recognised that that made it necessary for them to consider what would be the best means of carrying out the main purpose of the association, namely, 'the rescue of destitute and morally deserted children from idleness and evil temptations.' It was no longer necessary, and therefore was most inexpedient, to spend money in giving them an education which the State was providing, and so a general meeting of the association was called, and they amended the constitution of the association, as they were entitled to do, in order to meet the changed circumstances. The alteration which they made was this—that instead of providing the school which the State now provided, they determined to expend the means at their disposal in providing clothing to enable children of the character referred to in the deed of constitution to attend the board school or other place of education in decency and comfort, and then, if there should be sufficient funds over, to provide them with food and also with books required for their education. It seems to me that that was a diversion of the funds of the institution entirely in accordance with the original purposes of the trust, and although it was not carrying on its main purpose precisely in the way contemplated or which was appropriate at the time of the original institution, it was as nearly as possible on the same lines, because, although it was no longer necessary to provide education, what was done was to enable the children to profit from the education supplied by the State by giving them clothing to enable them to attend school in decency, by supplying them with books, and if necessary, giving them food. I therefore think that in a very plain sense the object of the testator's bounty is still in existence, and that the Kelso Ragged Industrial School is still carrying on the work. I shall therefore repel the claim of Mr Constable's

clients and sustain the claim of the Kelso Ragged Industrial School."

The claimants, Mrs Playfair and another, reclaimed, and argued—A bequest to a charity which had ceased to exist was lapsed if the object of the gift could no longer be effected, just as in the case of an individual who had died—*Marsh v. Attorney-General*, 1861, 30 L.J. Ch. 233; *Clark v. Taylor*, 1853, 1 Drewry Ch. Rep. 642. The object which the testator desired to benefit could not be effected by the claimants, the Ragged Industrial School, as that object required a fully equipped school. The amended constitution supplied a suitable scheme for the application of the price obtained for school buildings, but it involved a departure from the objects for which the original constitution was framed and a consequent loss of the identity of the legatee specified by the testator. The bequest was not to charitable purposes of a specified nature but to a specified institution. The share of residue in question had fallen into intestacy—*Young's Trustees v. Deacons of the Eight Incorporated Trades of Perth*, June 9, 1893, 20 R. 778, 30 S.L.R. 704; *in re White's Trustee*, 1886, 33 Ch. D 449.

Argued for the respondents, Kelso Ragged Industrial School—There had been no departure from the fundamental object of the institution, which was rescue, though the method by which that object was attained was altered. The original constitution had not been repealed; it contained power to alter any article thereof, and that power had been competently and constitutionally exercised—*Free Church of Scotland v. Lord Overtoun and Others*, August 1, 1904, 41 S.L.R. 742. The change in the means of attaining the object of the institution was rendered necessary by circumstances—*Ferguson Bequest Fund v. Commissioners on Educational Endowments*, March 15, 1887, 14 R. 627, 24 S.L.R. 441. The identity of the institution was preserved, and the object of the bequest would still be effected—*Marsh v. Attorney-General*, *cit. sup.*

LORD KYLLACHY—I am quite satisfied with the Lord Ordinary's judgment. He puts the decision, I think, upon the right ground when he says that this is not a bequest generally for charitable purposes, but a bequest to a particular institution, the only question really being whether since the date of the will this institution has lost its identity by reason of certain changes which have occurred. I agree with the Lord Ordinary that the question falls to be answered in the negative. The constitution is the same and the objects are the same. The only changes arise (1) with respect to the persons charged with the management, and (2) with respect to the ways and methods by which the funds are applied in carrying out the objects of the institution. I think the interlocutor is right, and should be adhered to.

LORD KINCAIRNEY—I agree, and have nothing to add.

LORD STORMONTH DARLING—I agree with your Lordships and with the Lord Ordinary.

LORD JUSTICE-CLERK—I am of the same opinion.

The Court adhered.

Agents for the Pursuers and Real Raisers—A. S. Douglas, W.S.

Counsel for the Claimants and Reclaimers, Mrs Playfair and Another—Wilson, K.C.—Constable. Agents—J. & J. Turnbull, W.S.

Counsel for the Claimants and Respondents, Kelso Ragged Industrial School—Chree—Hamilton. Agents—W. & J. Burgess, W.S.

Tuesday, June 6.

SECOND DIVISION.

THE COYLTON COAL COMPANY v. DAVIDSON.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 7—"On or in or about" a Mine—Accident on Railway Premises a Quarter of a Mile from Pit.

A carter in the employment of a coal company at one of the pits went with his cart along a private road belonging to the company to the point at which it joined a public road, a distance of 259 yards from the pit, crossed the public road 22 yards in width, passed through a gate into a railway company's premises, and at a point 123 yards from the gate proceeded to load on to his cart from a railway waggon a quantity of timber. While engaged in this work he was accidentally injured. Held that the accident did not happen "on or in or about" a mine within the meaning of section 7 of the Workmen's Compensation Act 1897.

Opinion (per Lord Stormonth Darling) that had the question still been open there would have been much force in the argument that section 7 referred not to the locality of the accident but to the kind of employment which was to give a right to compensation.

Section 1 of the Workmen's Compensation Act 1897 provides—" (1) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman his employers shall, subject as hereinafter mentioned, be liable to pay compensation." . . . Section 7—" This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a railway, factory, mine, quarry, or engineering work." . . .

In an arbitration under the Workmen's Compensation Act 1897 Mrs Jane Brown or Davidson claimed compensation from the Coylton Coal Company, and James Morton as the only known partner thereof, in respect of the death of her husband William