

question must be treated as capital for the reasons your Lordship has stated. It was not any part of the intention of the directors, or of the shareholders who assented to the scheme proposed by the directors, to distribute the reserve fund as money available for the payment of dividend or bonus, and it was quite impossible that anything of the kind could have been done, both because the articles of the company as they stood would not have allowed it, and also because the money no longer existed so as to be divisible in that form. The money had been spent in acquiring a new theatre in Glasgow, and the whole purpose of the operations proposed by the directors and assented to by the company appears to me to have been simply this—to state the accounts so as to record in the most convenient form operations that had been already carried out, and to define the interests of the shareholders in the result. The good faith of the transaction between the company and the shareholders appears to me to have been that the shareholders on obtaining these dividend warrants were to apply for allotment of the new shares. It is quite true that any individual shareholder might, if he thought fit, have done otherwise and turned his dividend warrant into money. But, in the first place, that was not the true intent of the transaction as between the shareholders and the company, and, in the second place, it is apparent on the face of the circular-letter issued by the directors that they had throughout a well-justified confidence in the action of the directors, because it was for their "interest to take up the allotment." The trustees accordingly did take up the allotment, and I think nobody disputes that in doing so they were acting prudently in the administration of their trust. I quite agree that they were dealing with the capital of the trust estate, and that the new shares form part of the capital and no part of the income.

LORD PRESIDENT—LORD DUNDAS desires me to say that he concurs in this judgment.

The Court answered the first question in the case in the negative, and found that the second question was superseded.

Counsel for the First and Third Parties—D. Anderson. Agents—Lockhart Thomson & Stevenson, W.S.

Counsel for the Second Party—W. T. Watson. Agent—Robert Stewart, S.S.C.

Wednesday, July 18.

FIRST DIVISION.

[Sheriff Court at Dundee.

MITCHELL AND OTHERS v. WHITTON.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1, sub-sec. 2 (c)—"Serious and Wilful Misconduct"—Question of Fact or Law—Breach of a Statutory Regulation—Driving Cart without having Hold of Reins—General Turnpike Act (1 and 2 Will. IV, c. 43), sec. 97.

A farm servant in charge of a horse and cart was fatally injured through the horse suddenly bolting and the cart being upset. At the time of the accident the deceased, who was driving the cart along a public road, was not holding the reins, having tied them, within reach, to the upper left ring of the breeching. The Sheriff-Substitute "found in fact" that the deceased had not been guilty of serious and wilful misconduct and awarded compensation.

In an appeal held (1) that the question was one of fact and not subject to review, and (2) assuming review to be competent, that the deceased had not been guilty of serious and wilful misconduct in the sense of section 1, sub-section 2 (c), of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, sub-section 2 (c), enacts—"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 General Turnpike Act (1 and 2 Will. IV, cap. 43), section 97, incorporated in the Roads and Bridges (Scotland) Act (41 and 42 Vict. cap. 51), section 123, provides—"If the driver of any cart . . . on any turnpike road shall ride on the shafts, or in or on any other part of such carriage, without having and holding reins attached to each side of the bridle of each beast of draught drawing such cart, . . . such driver shall for every such offence forfeit and pay a sum not exceeding five pounds over and above the damages occasioned thereby."

In an arbitration under the Workmen's Compensation Acts 1897 and 1900, between James Whitton, farmer, Easter Jordanstone, Meigle, and Waterybutts, Barry, and Mrs Mary Lyall or Mitchell, Waterybutts, Barry, widow of the late William Mitchell, farm servant there, and others, claimants, the Sheriff-Substitute (CAMPBELL SMITH) awarded compensation, and at the request of Whitton stated a case for appeal.

The case stated—"That on 14th January 1907 the husband of the senior respondent, and the father of her children, when working as a farm servant in the employment of the appellant on the farm of Waterybutts, of which the appellant is tenant, and in charge of a horse and cart belonging to him, was so severely injured that he died in consequence of and within four hours after

the overturning of the said cart, which fell upon him near the entrance to a field which adjoins the road to Barry railway station; that the defence that his death was brought about or caused by his wilful or conscious default has not been proved in point of fact; that the causes of this fatal accident were complex and not capable of definite separation, and included (1) the leaving open of the gate of the field into which the steady horse that he was sitting behind on the head of the coup cart suddenly bolted; (2) that at the left-hand pillar of entry by this open gate a small mound of road scrapings had been piled up; (3) that the left wheel mounted this small mound as an inclined plane; and (4) that it knocked over or broke the left-hand pillar of the gate and climbed it so far as to capsize the cart and cause the fall of the deceased below the cart thus thrown off its balance and turned over on its right wheel. The deceased was not holding the ropes called 'reins' in his hand at the time, but had tied them within reach to the left upper and most accessible and convenient ring of the britch on leaving the steading, as the farmer's son who followed and accompanied him had also done, and for the defence it is maintained that the failure to hold the reins in his hand was in law wilful default on his part, and was in fact the truly sufficient cause of the death; but the Sheriff-Substitute . . . held in law that no working man is bound to foresee the unusual, much less the unprecedented, or to be wiser than his class; and found in fact that the death of the workman in this case was not attributable to any serious and wilful misconduct on his part. The Sheriff-Substitute therefore found the respondents entitled to compensation, and granted decree as craved, with five guineas of expenses."

The *question of law* was—"Was the accident to the deceased attributable to his own serious and wilful misconduct within the meaning of section 1, sub-section 2 (c), of the Workmen's Compensation Act 1897?"

Argued for appellant—The deceased in not having hold of the reins was in breach of a statutory regulation—Roads and Bridges (Scotland) Act 1878, section 123, incorporating, *inter alia*, section 97 of the General Turnpike Act (1 and 2 Will. IV, cap. 43)—and breach of a statutory regulation amounted to serious and wilful misconduct—*Dobson v. United Collieries, Limited*, December 16, 1905, 8 F. 241, 43 S.L.R. 260.

Counsel for respondents were not called on.

LORD PRESIDENT—I think this is a pure question of fact, and that the Sheriff-Substitute's statement of the circumstances discloses nothing that can give rise to a question of law. I therefore think it is not a case for review. In such cases there may be a question raised which is one of mixed fact and law and so capable of review, but I do not think the question here is of that nature. But even if I could have reviewed the decision I should have come to the

same conclusion, for I think there is nothing disclosed here which amounts to serious and wilful misconduct as that has been interpreted in various well-known decisions in the House of Lords. I think, therefore, the question must be answered in the negative.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court answered the question of law in the negative and dismissed the appeal.

Counsel for Appellant—Morison, K.C.—James Macdonald. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Respondents (Claimants)—Watt, K.C.—Macmillan. Agents—Gardiner & Macfie, S.S.C.

Saturday, July 20.

SECOND DIVISION.

COLLINS' TRUSTEES *v.* BORLAND & COMPANY, LIMITED, AND ANOTHER.

Company—Voluntary Winding-up—Future or Contingent Claims—Necessity of Lodging Affidavit and Claim with Liquidator—Distribution of Assets without Making Provision for such Claims—Companies Act 1886 (49 Vict. cap. 23), sec. 4.

The proprietors of paper mills were also tenants of lands and reservoirs under leases which in most cases excluded assignees, and in all cases imposed on the tenants obligations of maintenance and restoration. They disposed the mills, and assigned the leases to a limited company which undertook to relieve the vendors of all obligations under the leases, which were at the same time declared to be real burdens on the mill property. At a time when the leases had still some twelve years to run the company went into voluntary liquidation, being unable to carry on business except at a loss, but able to pay and more than pay all claims of creditors except possible future and contingent claims by the vendors in respect of the obligations in the leases.

Held (1) that the vendors were not bound to lodge with the liquidator an affidavit and claim as for breach by the company of its future obligations under the disposition and assignment, and (2) that they were entitled to prevent him from distributing among the shareholders any assets of the company which might remain after payment of ordinary creditors without making provision for the implement of these obligations as they from time to time might become prestatable.

Lord Elphinstone v. Monkland Iron and Coal Company, June 29, 1886, 13 R. (H.L.) 98, 23 S.L.R. 870, and section 4 of the Companies Act 1886, considered.