

not reported. The name was, I think, *Aberdeen District Council v. Milne*, and the year 1901.

"I have thought it desirable to refer to some of the cases in which a similar question has been mooted, and which seemed to me valuable as illustrating the present case. But, as I have said, each statute must be interpreted by its own terms. In the case of *Fulton* we have what almost amounts to a direct precedent, and even without the help of that case I should have come to a clear conclusion that I have no jurisdiction to entertain this appeal."

The petitioners and the respondent Goodwillie appealed to the Court of Session.

Counsel for the appellants argued that an appeal to the Sheriff was competent, and referred to *Leitch v. Scottish Legal Burial Society*, October 21, 1870, 9 Macph. 40, especially Lord Cowan at p. 42, 8 S.L.R. 8.

Counsel for the respondents were not called upon.

LORD PRESIDENT—I do not see any difficulty in this case, and I think the judgment of the Sheriff is right. It is impossible to read the provisions of the Burial Grounds (Scotland) Act 1855 without seeing that the only appeal allowed is an appeal to the Lord Ordinary under certain limited conditions, and that there is no appeal from the Sheriff-Substitute to the Sheriff. The Sheriff and the Sheriff-Substitute here are not acting in their ordinary capacity, and are both equally available as a court of first instance.

LORD M'LAREN—I concur.

LORD KINNEAR—I entirely agree with your Lordship. I think the Sheriff has refused the appeal on perfectly right grounds; and that he has stated correctly the distinction between Acts of Parliament conferring an exclusive jurisdiction on the Sheriff, to be exercised either by the Sheriff-Depute or the Sheriff-Substitute, and those which give a new jurisdiction to the Sheriff Court to be explicated according to the ordinary course of procedure.

LORD PEARSON was absent.

The Court dismissed the appeal.

Counsel for the Reverend Richard Goodwillie (Respondent and Appellant), and for the Parish Council of Strichen (Petitioners and Appellants)—Chree. Agents—Henry & Scott, W.S.

Counsel for John Sleight and Others (Respondents) — Hunter, K.C. — Macmillan. Agents—Alex. Morison & Company, W.S.

Wednesday, May 27.

FIRST DIVISION.

[Sheriff Court at Airdrie.]

GEORGE v. THE GLASGOW COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 1 (2) (c)—Serious and Wilful Misconduct—Coal Mines Regulation Act 1887 (50 and 51 Vict. c. 58), sec. 51—Contravention of Special Rule.

By the additional special rules in force in a coal mine, under the provisions of the Coal Mines Regulation Act 1887, it was provided (Rule 3)—"The bottomer at a mid-working in a vertical shaft not provided with an appliance which constantly fences the shaft, being a mid-working in use for the regular passage of workers or the drawing of minerals from the mine, shall not open the gate fencing the shaft until the cage is stopped at such mid-working."

A bottomer employed at a mid-working, requiring the cage, called down the shaft to the bottomer at the foot, who signalled to the engineman to raise the cage. By the system of signalling in use in the pit, the engineman on receiving a signal to raise the cage, though in use to stop at the mid-working, was entitled, unless stopped by a further signal, to raise the cage to the pit-head, and on this occasion did so. The bottomer at the mid-working, without ascertaining whether the cage had stopped or not, opened the gate fencing the shaft, pushed his hutch forward into the shaft, and fell with it to the bottom, receiving injuries.

In a stated case under the Workmen's Compensation Act 1906, held that there was evidence upon which the arbiter in a claim for compensation could find that the workman's injuries were due to his serious and wilful misconduct.

Opinion per curiam that the workman's breach of the additional special rule was serious and wilful misconduct in the sense of the Act.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (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, unless the injury results in death or serious and permanent disablement, be disallowed."

John George, bottomer, Shieldmuir, Wishaw, claimed compensation under the Workmen's Compensation Act 1906 from the Glasgow Coal Company, Limited, Kenmuirhill Colliery, Carmyle, in respect of injuries sustained by him while employed in one of the defenders' pits.

The matter was referred to the arbitration of the Sheriff-Substitute at Airdrie.

(GLEGG), who assoilzied the defenders, and at the request of the pursuer stated a case.

The facts proved, as stated by the Sheriff-Substitute, were—"1. John George, aged 21, was a bottomer in the employment of the Glasgow Coal Company for some time prior to the 22nd August 1907, his average weekly earnings being 39s.

"2. George's working-place was at the ell coal seam bottom, which is a mid-working, and is situated 40 feet above the main coal bottom.

"3. His duties were to take off empty hutches from the cage, and to put on full hutches.

"4. There is no light at the ell coal except that supplied by miners' lamps.

"5. Where the ell coal opens from the shaft there is no gate or fence which protects the opening automatically when the cage is not opposite the opening, but there is a gate which is opened and shut by the bottomer as required.

"6. According to the customary working of the cage it stopped at the ell coal without a special signal when ascending empty from the main coal bottom, the engineman usually being able to tell from the pull on his engine when the cage was empty.

"7. It was re-started on its ascent from the ell coal by a signal given from there.

"8. The bottomer at the ell coal could also obtain the cage by signalling by bell when the cage was passing or had passed the ell coal, when it was stopped and sent back to the ell coal.

"9. If the bottomer at the ell coal required a cage, and it was not obtainable at the time in the way last mentioned, he called down the shaft to the main coal bottomer, who signalled to the engineman to raise the cage, when it would be stopped at the ell coal, either with or without a farther signal as above described.

"10. The engineman, however, on receiving a signal from the main coal bottomer to raise the cage, was entitled, unless stopped by a farther signal, to raise the cage to the pit-head, and sometimes he did so, without stopping at the ell coal.

"11. The cage in question was one of a pair which worked together, and there was no opening in the shaft on the opposite side corresponding to the ell coal opening.

"12. On the occasion in question George called to the bottomer at the main coal to send up the cage, and the latter did so, George hearing the signal given for raising; the time required to raise the cage from the main to the ell coal was a little over two seconds.

"13. George expected that the cage would stop at the ell coal level, without any farther signal being given, and acting on this assumption, he without ascertaining whether it had stopped, opened the gate, went some three yards along the level behind a full hutch and pushed the hutch forward to the shaft.

"14. The cage had passed the ell coal level without stopping, and George pushed the hutch into the shaft and fell with it to the bottom.

"15. He sustained a severe scalp wound

and had his right tibia and fibula fractured.

"18. The fractures of the leg have united well, there is no shortening of the limb, and with the lapse of time sufficient for the wasted muscles to recover, it will be as efficient for all purposes of his work as before.

"19. At present George is still suffering from the effects of the injury to his leg to such an extent as to be totally incapacitated for work.

"20. The ell coal level is a working to which Rule No. 3 of the Additional Special Rules under the Coal Mines Regulations Acts 1887 to 1896 applies.

"21. George previously opened the gate fencing the shaft when the cage had not stopped, and he had been warned about this a day or two prior to the accident."

The Sheriff-Substitute further stated—"On these facts I found that George had not been seriously and permanently disabled in consequence of his accident, and that his injuries were attributable to his serious and wilful misconduct. I therefore assoilzied the defenders from the conclusions of the action, and found them entitled to expenses."

The question of law was—"Is the applicant in view of the above findings barred from recovering compensation for his injury in respect that it is attributable to his serious and wilful misconduct?"

Argued for appellant—There was no evidence upon which the Sheriff could find serious and wilful misconduct. *Esto* that the appellant had not in fact obeyed the additional special rule, his failure to do so was not wilful. The system of signalling in the mine was defective, and in this the respondents were in breach of the Coal Mines Regulation Act 1887, section 49, rule 25, which provided that in every working shaft proper means of communicating distinct and definite signals be provided. The workman could not be made to suffer for the respondents' fault. He was entitled to assume that the cage would be worked as it had usually been worked, and consequently that it had been stopped at the mid-working. *Esto* that he had been negligent, and even grossly negligent, that was very different from wilful misconduct. The case was clearly distinguishable from that of *The United Collieries, Limited v. M'Ghie*, June 7, 1904, 6 F. 808, 41 S.L.R. 705, for in that case the workman had omitted to signal for the cage to be sent up. Further, the appellant's own conduct excluded the idea of wilfulness, for it could not be supposed that he had of intention pushed his hutch into the empty shaft. Neither negligence nor even gross negligence would bar the appellant's claim so long as wilful misconduct was absent—*Johnson v. Marshall, Sons, & Co., Limited* [1906], A.C. 409; *Bist v. London and South Western Railway Co.* [1907], A.C. 200. Admitting, however, that negligence might in certain circumstances be so gross as to amount to serious and wilful misconduct, there was no such negligence here. The case fell within the ex-

ception figured by Lord M'Laren in *Dobson v. The United Collieries, Limited*, December 16, 1905, 8 F. 241, at p. 247, 43 S.L.R. 260.

Counsel for the respondents was not called on.

LORD M'LAREN—In deciding this case it is quite proper to refer to the variation in the law made by the Act of 1906, which provides that the objection of serious and wilful misconduct does not apply where death results from the accident, but still continues to apply in the case of lesser injuries. But whilst this provision limits the scope of this objection, it does not alter the nature of serious and wilful misconduct as it has been decided under the Act of 1897. There have been many cases in England dealing with this question, and the last was the case of *Bist v. The London and South-Western Railway Company*, [1907] A.C. 209. In that case the noble and learned Judges were agreed in stating that the question which they had to consider on appeal was whether the facts amounted to evidence that raised the question of serious and wilful misconduct for the decision of the County Court Judge who had heard the case. They do not give their own opinions as to whether the facts amounted to serious and wilful misconduct, but they think that the breach of a rule made by a railway company, and intended for the protection of their servants from injury, was *prima facie* a serious and wilful act, and that it was for the person who had broken the rule to displace the presumption. That is, I think, also the principle of the decision of this Court in the case of *Dobson v. United Collieries, Limited*, 8 F. 241, and in that case the Lord President said the infraction of a colliery rule, intended for the protection of life and property, was *prima facie* serious and wilful misconduct unless it was explained. Other judges gave their opinions to the same effect.

Now, the present case is the case of a breach of a colliery rule, and the rule referred to is the third supplementary rule, which provides—I do not read the whole of it—that the bottomer shall not open the gate until the cage is stopped at the mid-working. In this case I do not think it is necessary to comment upon all the findings with reference to the practice existing in this mine regarding signalling for sending the cage up or down. But it results from all these findings that means existed by which the injured man, John George, who was a bottomer in the mid-working, could communicate with the engineman and desire that the cage should be stopped at the mid-working. On the occasion in question he wished the cage sent up because he had some loaded hutches which were to be sent to the surface. He did communicate in a manner which is not said to be inconsistent with the rules. I think he called down the shaft, and his communication was heard by the bottomer and signalled to the engineman, and the cage was sent up. Now, it results also from the Sheriff's findings that the engineman might,

without any breach of duty, on getting such a message, either stop the cage at the place from which he believed the signal had come, or he might draw it to the top, leaving it to the man at the mid-working, if he pleased, to ring a bell which would have the effect of stopping the cage at the right place or of sending it back if it had passed.

Under these conditions it is quite plain that when a signal had been given by the person in charge of the gate at the mid-working to send up the cage, it is not a matter of absolute certainty that the cage will stop there. I have no doubt that in nine cases out of ten it will. But then rules are just made for the purpose of guarding against exceptional occurrences or mistakes. And this rule, if observed, was certainly a very effective way of preventing such an accident as occurred, because it provides that the bottomer shall not open the gate until the cage is there. Of course, if he had complied with the rule, it is conceivable that in a certain case the cage might start again without waiting for the hutches, and if an accident occurred the man at the gate of course would not be responsible. But that was not the case here. The case was that the cage had passed him and that he opened the gate without ascertaining whether the cage was standing there. Then, just assuming that the cage was there, he went back and pushed the loaded hutches over into the shaft, and being drawn over with them fell and received the injuries from which he is suffering.

In these circumstances, if we apply the criterion of the decision in the highest Court and consider whether there was evidence upon which the Sheriff as arbitrator could find that the accident was due to serious and wilful misconduct, I must say that in my opinion there was such evidence. It is not necessary that we should say how we would have decided the case. Indeed, we could not give a personal opinion upon it without having the evidence before us, because in a question of misconduct, and above all whether that misconduct is of such quality and degree as to fulfil the condition of being regarded as serious and wilful, it is impossible to proceed upon a dry statement of facts such as we have before us. We should need to know what George said when he was examined on the subject and what sort of excuse he attempted to make for his action before we could pronounce that he was excusable. I certainly do not feel that we have materials to decide that matter, and it is not at all necessary that we should, because we are only judges of law and not judges of questions of fact. The materials before us are sufficient to satisfy me that there was a breach of the rule which, if unexplained in a manner consistent with innocence, would entitle the arbitrator to come to the conclusion which he has reached, and therefore my opinion is that this appeal should be dismissed.

LORD KINNEAR—I am of the same opinion.

The Sheriff has found that the injuries of which this man complains were attributable to his serious and wilful misconduct. That is a finding in fact, and we have no jurisdiction to review the Sheriff's judgment upon a mere question of fact. But it has been held, and I do not myself doubt, that the question whether the facts found by the Sheriff will support his decision as to the liability of the employer for compensation is within the jurisdiction of the Court of Appeal. But then, I think, considering the statement that the Sheriff has given us here, there is no fault in point of law in his decision.

I concede that in order to bring the case within the statutory disability it is not enough to show that a workman has been negligent or that he has done something thoughtlessly that he ought not to have done. It is necessary to show that the misconduct was wilful, which implies, in my opinion, that the thing was done, not by mere inadvertence, but with intention to do it. Now in this case the special rules of the mine laid upon the bottomer at the mid-working the duty of keeping the gate which fenced the working from the shaft closed until the cage had been brought to the level of the working, so that it might be safely entered from the working. It is plain upon the Sheriff's statement that this man deliberately broke that rule, because he opened the gate without ascertaining that the cage had stopped.

Now as to the element of wilfulness in that, I do not see that there can be any doubt upon the statement that what the man did was wilful. It is not suggested that the gate fell open by accident. He opened it on purpose without performing the duty of ascertaining in the first place that the cage was stopped. I agree with the Sheriff that that justified a finding that there was a deliberate breach of the duty laid upon the man by the special rules of the mine. I think it was misconduct and serious misconduct, because it was a breach of a rule intended for the safety of life and limb. The seriousness is obvious enough from the accident which followed, because he opened the gate and drove a hutch into the shaft, so that the hutch and he following it fell down the shaft instead of entering the cage. The consequences to himself unfortunately are serious, and they might have been serious to others in the shaft below. But to the question whether it was or was not a wilful act in the sense of the statute the answer is plain. It was, because it was a deliberate breach of a rule which he knew and which he ought to have observed.

LORD MACKENZIE—I agree with your Lordships. I think that the facts found, and especially the facts contained in the 13th paragraph of the case, were amply sufficient to justify the learned Sheriff-Substitute in reaching the conclusions that he did.

At the close of the advising—

LORD M'LAREN—I may add that, if it is

necessary that we should consider whether the Sheriff's finding is correct, I should agree with what Lord Kinnear has said. I think that the act of the man George was serious and wilful misconduct; but I think it is sufficient for me to say that there were materials from which the arbitrator could draw that conclusion.

The LORD PRESIDENT and LORD PEARSON were absent.

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

Counsel for Pursuer (Appellant)—Scott Dickson, K.C.—Moncrieff. Agents—Simpton & Marwick, W.S.

Counsel for Defenders (Respondents)—Hunter, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Friday, May 29.

FIRST DIVISION.

BORLAND AND OTHERS, PETITIONERS.

*Charitable and Educational Trusts —
Bursary — Alteration of Scheme —
Extension — Nobile Officium.*

A testator left a sum to trustees to found a bursary for young men, being natives of Dunbar, attending college with a view to becoming ministers of the Church of Scotland or missionaries. The trustees, on the narrative that although full publicity had been given to the bursary for a number of years no applications for it had ever been received, petitioned the Court for approval of a scheme under which the bursary might, failing candidates born in Dunbar, be conferred on applicants born within the Presbytery of Dunbar, who should in other respects fulfil the conditions of the bequest, and, failing such applicants, to any applicant of whom they might approve without condition as to nativity so long as he was otherwise qualified.

The Court granted the petition.

James Simson, accountant, Edinburgh, died leaving a trust disposition and settlement, dated 2nd November 1869, which contained the following bequest:—"To the minister and kirk session of the Parish Church of Dunbar the sum of Five hundred and sixty pounds sterling, which shall be laid out by them on heritable security at interest, and the annual rent or interest thereof applied as a bursary, to be called the 'Simson Bursary,' to be granted by said minister and kirk session to any deserving young man, being a native of Dunbar, attending college in the prospect of becoming a minister of the Established Church of Scotland or as a missionary going abroad, said bursary to be continued to each recipient for a period not exceeding