

descending cage at a wrong level, and in seeking his way back to his proper road took a wrong turning, and proceeded along the road to which that wrong turning gave him access, for a considerable distance, till he met his death by scalding from the exhaust of a steam pump which apparently he passed. The Sheriff has stated all that is proved regarding the deceased's proceedings after he entered the wrong turning. And on the statement of these facts it would appear to me that the questions to which he had to address himself were, whether the deceased having started in a wrong direction became bewildered and blundered on, expecting that he would somehow get round to his destination, or whether out of foolhardiness and idle curiosity, having entered on a part of the mine which was unfamiliar to him, he wandered on to satisfy that idle curiosity. Now, these questions are purely questions of fact.

The Sheriff states that, on the facts which he found proved, he determined that the deceased's representatives had failed to prove that the deceased met his death by accident arising out of and in the course of his employment.

I think that the Sheriff has correctly stated the position. It is for the injured workman or his representatives to prove that injury or death occurred by accident arising out of and in the course of his employment. There is, therefore, an *onus* on them which they must discharge. But the question whether they have discharged it is in this case, whatever it may be in some, a pure question of fact. If the Sheriff has come to an erroneous conclusion on the questions of fact which I have said he had to consider, I cannot see how he could in this case be led into such opinion on any erroneous view of the law.

He may have given more weight to the *onus* upon the present appellant than this Court would have given. But he was entitled in law to give to it some weight, and the matter of less or more is not a question of law. He may have been satisfied that the deceased went on out of idle curiosity. We might be satisfied that he wandered on in innocent bewilderment. But if we differed from the Sheriff the difference would arise on fact, and neither on law, nor on law applied to the facts. The case does not fall under the category of *Jackson v. General Steam Fishing Company, Limited* (1909 S.C. (H.L.) 63, [1909] A.C. 523), where it appears to have been thought possible to hold that the question which the Sheriff had to decide was one of mixed fact and law.

I must, however, advert to the question put. The Sheriff asks, "Was the arbitrator right in holding, on the facts found by him, that the accident" to the deceased did not arise out of and in the course of his employment? If this question means, Has the Sheriff rightly interpreted the statute in holding that the facts which he found proved fulfil the statutory conditions? then a question of mixed fact and law, and therefore a question of law which justifies

appeal on case stated, has arisen. But if the question is intended to mean this, and not merely Has the Sheriff come to a sound conclusion on the evidence? I think that the Court is entitled to learn from the four walls of the case wherein the Sheriff conceived he was interpreting the statute, what were the opposite views between which he had to make up his mind, and wherein was his difficulty. From the present case as stated I cannot see that the Sheriff was concerned with any question of statutory interpretation but with a mere question of fact.

So far, therefore, I should have been prepared to hold that there was no question competently before us in this stated case, and therefore to refuse the appeal. But it has been recognised that the Court may competently entertain a case such as the present and answer the question in the negative, if we are satisfied that the Sheriff went either against evidence or without evidence, assimilating the stating of a case in such circumstances to the granting of a rule in jury court practice. If this is within the purview of the statute, I agree that cases do occur in which it is very salutary that the power be exercised, and that, as your Lordship proposes, this may be treated as one of them.

LORD M'LAREN was absent.

The Court answered the question of law in the negative.

Counsel for the Appellants—Constable, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Clyde, K.C.—M'Laren. Agents—Cumming & Duff, S.S.C.

Thursday, February 10

SECOND DIVISION.

[Sheriff Court at Glasgow

M'VICAR v. JOHN ROBERTSON & SON.

*Sheriff—Process—Jury Trial in Sheriff Court—Interlocutor Applying Verdict—Findings in Fact by Sheriff—Competency—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), secs. 31 and 32, and First Sched. (146).*

In a jury trial in the Sheriff Court the Sheriff proposed certain questions of fact to the jury, and subsequently issued an interlocutor applying the verdict. This interlocutor contained certain findings in fact on the answers of the jury and admissions of the parties, and it continued—"Upon these facts finds in law that in respect the answers returned by the jury to the questions proposed to them do not support the case laid on record . . . the verdict is for the defenders. . . ." In an appeal by the pursuer the Court, while refusing the appeal, recalled the findings in fact of the Sheriff as incompetent.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—section 31—“In any action raised in the Sheriff Court by an employee against his employer, concluding for damages under the Employers' Liability Act 1880, or alternatively under that Act or at common law, in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds fifty pounds, either party may, so soon as proof has been allowed or within six days thereafter, require that the cause shall be tried before a jury. . . . The verdict of the jury shall be applied in an interlocutor by the Sheriff, which shall be the final judgment in the cause. . . .”

Section 32—“Where jury trial has been ordered, the Sheriff shall, after hearing parties, if he shall think that necessary or desirable, issue an interlocutor setting forth the question or questions of fact to be at the trial proposed to the jury, and fixing a time and place for the trial, being not sooner than fourteen days from the date of the interlocutor.”

First schedule, section 146—“Any party in the cause may . . . move the Sheriff to apply the verdict . . . As soon as practicable the Sheriff shall issue an interlocutor applying the verdict, and grant decree accordingly. . . .”

Hugh M'Vicar, grainweigher, Suffolk Street, Glasgow, brought an action of damages for personal injuries in the Sheriff Court at Glasgow, against his employers John Robertson & Son, grainweighers and stevedores, Princes Dock, Glasgow.

On pursuer's motion the Sheriff-Substitute (FYFE) appointed the cause to be tried by jury.

On 14th July 1909 the Sheriff-Substitute appointed seventeen questions to be proposed to the jury. At the trial the jury returned a verdict in which they answered the questions proposed to them.

On 25th November 1909 the Sheriff-Substitute pronounced this interlocutor—“Having heard parties' procurators upon defenders' motion to apply the verdict of the jury, finds that the facts as admitted by the parties or found by the jury are . . . [Here followed a number of findings in fact] . . . Upon these facts finds in law that in respect the answers returned by the jury to the questions proposed to them do not support the case laid on record under the Employers' Liability Act 1880, the verdict is for the defenders: Applies the verdict accordingly, reserving to the pursuer any rights competent to him under section 1 (4) of the Workmen's Compensation Act 1906: Therefore dismisses the action: Finds the defenders entitled to expenses,” &c.

On 2nd December 1909 the pursuer appealed to the Second Division of the Court of Session on the ground that the verdict was contrary to evidence.

At the discussion counsel for the defenders drew the attention of the Court to the fact that the Sheriff-Substitute's interlocutor applying the verdict contained findings in fact, and argued that this was incompetent, on the ground that under the Act the facts

of the case as found by the jury exhausted the cause, and the Sheriff had no power to apply the verdict on facts found by himself.

On 10th February 1910 the Court in refusing the appeal pronounced the following interlocutor:—

“Recal the findings in fact in the . . . interlocutor from the words ‘finds that the facts as admitted by the parties’ down to and including the words ‘upon these facts,’ in respect that such findings are incompetent: *Quoad ultra* refuse the appeal, and adhere to the said interlocutor: Find and determine in terms of section 1, sub-section 4, of the Workmen's Compensation Act 1906, that the injury to the pursuer is one for which the defenders would have been liable to pay compensation under the provisions of the said Act, and remit to the Sheriff to determine the amount due to the pursuer under and in terms of the said Act, and decern: Find the defenders entitled to additional expenses,” &c.

Counsel for Pursuer and Appellant—Anderson, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Defenders and Respondents—Watt, K.C.—Lippe. Agents—Balfour & Manson, S.S.C.

Thursday, February 10.

#### FIRST DIVISION.

[Sheriff Court at Hamilton.]

#### ANDERSON v. DARGAVIL COAL COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (15) and (16)—Review—Proof of Recovery—Question of Fact or Law.*

A brusher in a mine, who had sustained an injury to his knee, was paid compensation down to 9th April 1909, when his employers stopped payment on the ground that he had recovered. On 13th May 1909 the workman was examined by a medical referee, who reported that, with the exception of a certain thinning of the muscular tissue of the knee joint (due to the prolonged use of an elastic bandage), the effect of the injury had passed off; that with the above exception the condition of the knee was now normal; and that in his opinion the workman should keep the knee unbandaged, continue doing light work for a month, and then resume his original work. The workman accordingly removed the bandage and resumed his light work. On 4th June 1909 the cartilage of the knee again became loose, requiring the knee to be bandaged, in consequence of which the workman was off work for a day.