Tuesday, January 30.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

JACKSON *v.* A. RODGER & COMPANY.

(*Ante*, July 4, 1899, 36 S.L.R. 851).

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7 (2)—*Factory—Dock—Shipbuilding Yard.*

In a case stated under the Workmen's Compensation Act 1897 the Sheriff-Substitute found the following facts established by the proof:—A firm of shipbuilders, whose shipbuilding yard was situated at Port-Glasgow, contracted to build a vessel and engines. After the vessel had been built at Port-Glasgow and launched there, she was sent from Port-Glasgow to the Cessnock Dock, Glasgow, about twenty miles away, to have her engines erected and fitted there by a firm of engineers with whom the shipbuilders had contracted for the supply of the engines. While the vessel was lying in the Cessnock Dock and work was being done upon her, a workman in the employment of the firm of engineers was injured while working at the undertaking. There was, however, no finding that the dock was one to which any provision of the Factory Acts was applied by the Factory and Workshops Act 1895, sec. 23, or that any mechanical power was used within the precincts in aid of the work which was being performed.

Held that the Cessnock Dock could not, in the absence of those findings, be regarded either (1) as a dock which was a factory, or (2) as a shipbuilding yard which was a factory, within the meaning of section 7 (2) of the Workmen's Compensation Act 1897, and accordingly that the employment was not one to which the Act applied.

This was a sequel to the case reported 4th July 1897, 36 S.L.R. 851, in which John Jackson, engineer, Glasgow, appealed from the decision of the Sheriff-Substitute at Greenock (BEGG) in an arbitration under the Workmen's Compensation Act 1897, in which Jackson claimed compensation from A. Rodger & Company, shipbuilders, Port-Glasgow, for injuries sustained by him in the course of his employment as an engine-fitter whilst at work on 8th November 1898 on board a steamship in course of construction, then lying in the Cessnock or Prince's Dock, Glasgow Harbour.

The case having been remitted back to the Sheriff-Substitute, he on 7th July 1899 pronounced the following interlocutor:—"In respect of the judgment of the Second Division of the Court of Session, dated 4th July 1899, in the stated case on appeal between the parties, Recals the interlocutor of the Sheriff-Substitute dated 24th April 1899 dismissing the petition, and on the motion of both parties remits the cause to the Sheriff Court of Lanarkshire at Glasgow in terms of section 4 of the Act of Sederunt dated 3rd June 1898."

After proof had been led before the Sheriff-Substitute at Glasgow (FYFE) he found Jackson entitled to compensation.

On 8th August 1899 the Sheriff-Substitute stated a case on appeal at the instance of A. Rodger & Company for the opinion of the Court. The statement in the case was as follows:—"(1) That the appellants are shipbuilders at Port-Glasgow, but they do not themselves construct engines either at their own yard or elsewhere, although they undertake contracts for the delivery of a vessel with engines and other accessories complete. (2) That on 13th January 1898 appellants contracted with Russell, Huskie, & Company of Leith to build and deliver to them a vessel and engines conform to contract produced and forming No. 4 of this process. (3) That appellants then contracted with Hall, Brown, Buttery, & Company, engineers, of Govan, to build the engines and boilers and fit them on board the vessel conform to contract produced, and forming No. 5 of this process. (4) That the hull of the vessel was built at Port-Glasgow by appellants, launched there, and named the 'Craigneuk.' (5) That the vessel was then taken to Glasgow, about twenty miles from the appellants' shipbuilding yard, and was there placed at the disposal of the engineer contractors in Prince's Dock of the Glasgow Harbour, which is a public dock, the dock dues being paid by the said Hall, Brown, Buttery, & Company. The receipts for the dock dues form Nos. 15 and 16 of process. (6) That the shipbuilding part of the work was not completed when the vessel left Port-Glasgow, and could not be finally completed till the engines had been fitted. (7) That whilst the vessel lay in Glasgow Harbour work was being done upon her both by the shipbuilders' men and the engineers' men. (8) That respondent is an engine-fitter, and in that capacity he was employed after the vessel came to Glasgow by Hall, Brown, Buttery, & Company to work on board the vessel in Glasgow Harbour. (9) That on 8th November 1898, whilst respondent was at work on board the said vessel there, a piece of timber fell upon his head, in consequence of which he has lost the sight of his right eye, his other eye has been impaired, and he has been incapacitated for following his occupation. (10) That respondent's average weekly wage prior to the accident was 36s., and that since the accident he has not been able to earn anything.

"I interpreted the interlocutor of the Court of Session of 4th July 1899 as deciding, and I accordingly held in law—(1) That the place where this workman was injured, viz., the inside of the hull of the vessel lying in a public dock in Glasgow Harbour, was, for the purposes of this arbitration, a shipbuilding yard; (2) That a shipbuilding yard is a factory within the meaning of the Workmen's Compensation Act; and (3) That the appellants were the occupiers of that factory. I also held in law that the

appellants being the 'occupiers' of a factory were, in terms of the Act, the 'undertakers,' and as such liable in compensation to the respondent.

"I therefore found the appellants liable to respondent in compensation, awarded him 18s. per week, commencing at 22nd November 1898, and till further orders of Court, under deduction as craved, and found respondent entitled to expenses."

The questions of law for the opinion of the Court are—"1. Whether the Sheriff-Substitute correctly interpreted the interlocutor of the Court of Session of 4th July 1899 as deciding that the place where respondent was at work when injured was a factory in the sense of the Workmen's Compensation Act, and that the appellants were the occupiers of that factory? If the Sheriff-Substitute's interpretation of said interlocutor was correct—2. Whether the appellants, as occupiers of the factory, were the undertakers in the sense of the Act and so liable in compensation to respondent? If the Sheriff-Substitute's interpretation of said interlocutor was not correct—3. Whether the hull of the vessel, within which the respondent was working at the time of the accident, was at that time a factory within the meaning of section 7 of the Workmen's Compensation Act 1897? And if so—4. Whether the appellants were the occupiers of the factory, and the undertakers under the Act? 5. Whether the relation between the appellants and the said Hall, Brown, Buttery, & Company was such as is contemplated in section 4 of the Workmen's Compensation Act 1897, as rendering the appellants liable to the respondent?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) enacts as follows:—Section 7—(1) "This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a . . . factory . . . (2) In this Act . . . 'factory' has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895 . . . 'Undertakers' . . . in the case of a factory . . . means the occupier thereof within the meaning of the Factory and Workshop Acts 1878 to 1895 . . . (3) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard."

The Factory and Workshop Act 1895 (58 and 59 Vict. cap. 37) enacts as follows:—Section 23—(1) "The following provisions, namely—(i) Section 82 of the principal Act; (ii) The provision of the Factory Acts with respect to accidents; (iii) Section 68 of the principal Act with respect to the powers of inspectors; (iv) Sections 8 to 12 of the Act of 1891 with respect to special rules for dangerous employments; and (v) the provisions of this Act with respect to the power to make orders as to dangerous machines, shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process, and (*b*) any premises in which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building, or any structural work in connection with a building, were included in the word 'factory,' and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or his workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupiers of the said premises; and for the purpose of the enforcement of these sections the persons having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using such machinery, shall be deemed to be the occupier of a factory."

The Factory and Workshop Act 1878 (41 and 42 Vict. cap. 16) enacts as follows:—Section 93—"The expression 'non-textile factory' in this Act means . . . (2) Also any premises or place named in part 2 of the said schedule (*i.e.*, the fourth schedule) wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." Fourth Schedule.—"List of factories and workshops . . . (24) 'Shipbuilding yard'—that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired."

Argued for appellants—The prior case of *Jackson* v. *A. Rodger & Company* did not apply. It was a decision on relevancy, and therefore could not be held to be conclusive now that the facts of the case had been ascertained at the proof. The place at which the accident occurred was not a shipbuilding yard within the meaning of the Acts. The mere fact that a ship is being repaired in some place temporarily does not constitute that place a shipbuilding yard. It must be a place where the shipbuilding trade is carried on. There was no provision for a temporary factory in the Factory Acts. Besides, there was no mechanical power used in aid of the manufacturing process, and thus it was not a shipbuilding yard which was a factory in terms of sec. 93 of the Factory Act of 1878, and Schedule 4, Part 2 (24). Neither was the place of the accident a dock to which the Act of 1897 applied. In order that the Act should apply the dock must be one to which some provision of the Factory Act was applied by the Factory and Workshop Act of 1895—*Hall* v. *Snowden, Hubbard, & Company* [1899], 2 Q.B. 136. There was no finding of the Sheriff-Substitute that Cessnock Dock was such a dock. Even if it was held that it was, the mere fact that the unfinished vessel was lying inside it did not bring it within the scope of the Act. A vessel lying in a dock was not part of the dock — *Aberdeen Steam Trawling and Fishing Company* v. *Peters*, March 16, 1899, 1 F. 786; *Flowers* v.

Chambers [1899], 2 Q.B. 142; *Hennessey* v. *M'Cabe* [1900], 1 Q.B. 491. Even if the Court should hold that the respondent was employed at the time of the accident in a factory within the meaning of the Act, the appellants were not liable, as they were not the occupiers of the dock at the time of the accident, and thus were not liable under sections 4 and 7 of the Act. Hall, Brown, Buttery, & Company were the occupiers of the hull in the dock at the time of the accident, and the injured man was in their employment. The third finding in law was contrary to the facts stated in article 5.

Argued for respondents—The previous case of *Jackson* v. *A. Rodger & Company* ruled the present. It had there been decided that the place where Jackson had been injured was a factory. No new circumstances had emerged in addition to those which had been stated to be admitted in the last appeal, and the Court, if it now decided against him, would be overturning its own judgment. The cases of *Peters, supra*, and *Flowers, supra*, had both been founded on by the present appellant in the last appeal, and were therefore before this Court when it pronounced its decision. Neither of these decisions touched this case. All that they decided was that the Act did not apply to an accident occurring on board a ship completed and registered lying in a dock. Such ships were regulated by the Merchant Shipping Act. But the place of the present accident was not a completed ship to which the Merchant Shipping Act applied; it was only a ship under construction. The dock was occupied by A. Rodger & Company. The vessel was in the dock. They were the owners of the vessel, and therefore, *prima facie*, were its occupiers. In terms of the findings of fact the vessel at the time was in the occupation of the appellants, and there were men aboard her at their work. The defenders being therefore for the time occupiers of the dock, and thus undertakers in terms of the Act, Jackson was employed in their factory when the accident occurred, and they were liable to him in compensation.

At advising—

LORD JUSTICE-CLERK—It is important in this case that the facts found by the Sheriff which have a bearing on the question of law to be decided should be defined. They are, I think, these—(1) That the appellants built and launched the ship in question at Port-Glasgow; (2) that the ship was removed from their yard and its neighbourhood and taken to Glasgow, and there placed in Prince's Dock, where it had been arranged that the sub-contractors for the engines were to put them into the ship; (3) that the respondent was a servant of these sub-contractors, and was injured while on board the ship and engaged in their work. These are the facts in the case, and on these facts the Sheriff has given a judgment in favour of the respondent. Upon these facts the questions of law are not satisfactorily stated, but the case may, I think, be decided by ascertaining whether any factory existed at the place at the time of the accident in the sense of the Workmen's Compensation Act and the relative Factory and Workshop Acts. To do so it is necessary to consider the definitions in the Act of 1878, sec. 93. In the definition of non-textile factories the second head is that which must apply, and the first thing to be ascertained is whether this place can fall within it. For this it is necessary to turn to Part 2 of the Fourth Schedule to which the sub-section refers, and in that schedule the 24th head is—"Shipbuilding yards—that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired." Therefore if the premises in this case, upon the facts found by the Sheriff, corresponded with the requirements of the second head of the non-textile factory definition in sec. 93, there would be ground for holding that the Workmen's Compensation Act applied to the case. The words of that second head are—"Also any premises or places named in Part 2 of the said Fourth Schedule, wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there."

Now, in considering the ten findings of the Sheriff, I find no statement that it was proved that steam, water, or other mechanical power was used in any manufacturing process which was being carried on in connection with this vessel when in Prince's Dock. There may have been, but it has not been found to have been proved. That being so, I fear it must be held that there is not in the facts found any basis for the legal decision that there was a factory of the nature of a shipbuilding yard in the sense of the Factory Act of 1878, within which the respondent was employed at the time he met with his accident. Therefore the legal grounds for the respondent's contention must fail.

LORD YOUNG—I concur.

LORD TRAYNER—This case was sent back to the Sheriff-Substitute to be amended, but the amendment he has made does not yet make the stated case satisfactory. The questions of law which alone we are called on to consider are those questions of law which the Sheriff-Substitute has decided. We have no power to determine any other. In the case as now presented to us there are five questions put, but on some of them the Sheriff-Substitute has pronounced no decision. I should regret to occasion more expense or delay by sending the case back again to the Sheriff-Substitute, and I think this can be dispensed with, as the case may be decided on a consideration of what the Sheriff-Substitute states in the body of the case he decided in point of law.

The Sheriff-Substitute appears to some extent to have misapprehended what was done by us when the case was first before us on 4th July 1899. The question then raised and decided was only a question of relevancy, and we held that there were statements made by the petitioner which

called for inquiry, and might, if proved, entitle him to compensation. The original petition contained a statement (of which no notice whatever is now taken) which might be read as meaning that mechanical power was being used at the dock or wharf where the "Craigneuk" was lying for the purpose of putting her machinery, boilers, &c., on board, although it was explained that no such mechanical power was being employed "at the time" the petitioner received his injury. If such mechanical power was being used from the dock or wharf to put the "Craigneuk's" machinery on board, the dock would have come within the meaning of factory as used in the Factory Acts. But a dock *per se* is not a factory. Neither is a ship's hull *per se* a shipbuilding yard. I can find nothing in our former decision which could lead to the opinion that we thought so. A dock comes within the statutory definition of factory where any machinery on it worked by steam, water, or other mechanical power is used in connection with the loading or unloading of any ship, or where it is a dock to which any of the provisions of the Factory Acts is applied by the Act of 1895. The Sheriff-Substitute has not adverted to any of these conditions as existing here, and therefore I presume they did not exist. On this ground it cannot then be affirmed that the dock in question was for the purposes of this case a factory.

But the "Craigneuk" was in the dock in question for the purpose of being finished. It might therefore have been held that the dock was *pro hac vice* a shipbuilding yard, because the Act of 1878 defines a shipbuilding yard as "any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired." That Act, however, also provides (sec. 93) that the definition shall only apply where "within the close or curtilage or precincts" of the premises, steam, water, or other mechanical power is used in aid of the work which is being performed. This necessary condition is again wanting in the present case. It was argued that a dock could not in any case be regarded as "premises" within the meaning of the Act of 1878. I am not prepared to adopt that view. The word "premises" has a very wide application, and indeed the section of the Act I have just referred to provides that premises shall not be excluded from the definition of a factory because "such premises . . . are in the open air." Besides, in remedial statutes such as the Factory Acts a liberal interpretation must be given. There does not appear to me to be any good reason for excluding a dock or a shipbuilding yard from the operation of the Acts if the other statutory conditions are present,

Taking this view of the case, I think the judgment of the Sheriff-Substitute must be recalled. If the injury complained of by the respondent was not received in, on, or about a factory, the appellants as undertakers are not liable, and on the facts before us I cannot hold that the place where the injury was received was a factory within the meaning of the Workmen's Compensation Act.

LORD MONCREIFF—This case first came before us solely on relevancy, and our judgment was confined to that matter. The Sheriff-Substitute held that the (then) appellant's petition was irrelevant, and accordingly dismissed it. All that we could and did decide at that time was that the appellant had stated a case for inquiry, and that it might appear after proof that the Cessnock Dock, in which the vessel lay when the accident occurred, was a place to which the Workmen's Compensation Act 1897 applies, as being either a "factory" within the meaning of the Factory and Workshops Acts, or a dock to which those Acts applied.

It was stated in the first case that it was admitted that at the time of the accident no steam or mechanical power was being used. But I understood (perhaps erroneously) that although no steam or mechanical power was being used at the time of the accident, the petitioner was prepared to prove that it had been used at an earlier stage in putting the engines on board by means of a steam crane, or in testing the machinery when put in place. But be this as it may, the case was remitted, and it now returns to us after proof with findings in fact and law by the Sheriff. Amongst those findings there is no finding to the effect that any steam or mechanical power was used while the vessel lay in Cessnock Dock in connection with the construction of the vessel or the fitting of the engines, although it is stated that while there work was being done upon the vessel both by the shipbuilder's men and by the engineer's men,

Now, I should have been prepared to hold that Cessnock Dock—not the ship's hull—was a shipbuilding yard, and therefore a "factory," and that the appellants were the occupiers of it, but for one thing. Under the Factory and Workshops Act 1878, sec. 93, taken in connection with Schedule 4, Part 2 (24), a shipbuilding yard is not a "factory" in the sense of the statute unless steam, water, or other mechanical power is used in aid of the manufacturing process carried on there. Here that is not found.

Another view put forward is that Cessnock Dock is a dock to which some of the provisions of the Factory Acts apply, and to which therefore the Workmen's Compensation Act applies. In some circumcumstances undoubtedly it might be. But then the question arises, whether when this accident occurred the workman who was injured could be said to be employed in or about a dock in the sense of the statute. On the facts found I am inclined to think that he was not, and that the English case of *Flowers* v. *Chambers*, L.R. [1899], 2 Q.B. 142, is in point. The workman when injured was engaged on board the vessel, and not apparently in connection with the dock or any apparatus or work on the quay.

On both points, therefore, the respondent's case fails, and I am prepared to find that in relation to the facts found Cess-

nock Dock was not a place to which the Workmen's Compensation Act 1897 applies. Unfortunately not one of the questions is appropriate.

The Court pronounced this interlocutor:—

"In answer to the questions of law therein stated, Find that the Cessnock or Prince's Dock was not a place to which the Workmen's Compensation Act 1897 applies: Therefore recal the award of the arbitrator: Remit to the Sheriff-Substitute to dismiss the application."

Counsel for the Pursuer — Younger — Chree. Agent—Harry H. Macbean, W.S.

Counsel for Defender — W. Campbell, Q.C.—J. Wilson. Agents—Morton, Nelson, & Macdonald, W.S.

Wednesday, January 31.

SECOND DIVISION.

[Lord Stormonth-Darling, [Ordinary.

BUCHANAN *v.* RIDDELL.

Custom—Averment of Custom — Discount — Whether Term Added to Lease by Custom of District — Lease — Outgoing — Taking over Stock at Valuation.

A lease provided that as the tenant at his entry took over the regular sheep stock and others at a valuation of arbiters and an oversman, the proprietor or incoming tenant should be bound at the termination of the lease to take over certain sheep stock and others according to the valuation of arbiters and an oversman. At the tenant's entry he had entered into a minute of reference with the proprietor regarding the valuation of the stock and others, which provided that the tenant should be allowed six months' credit or alternatively 2½ per cent. discount on the amount of the valuation. At the tenant's waygoing a minute of reference was also entered into, which nominated arbiters and an oversman for the purpose of the valuation, but contained no provision as to credit or discount. It was agreed that the property in the stock should not be held as delivered until the price was paid. The landlord made prompt payment of the sum fixed by the oversman as the amount of the valuation, less 2½ per cent. discount, which he claimed should be allowed to him in accordance with the custom of the district. *Held* that in these circumstances proof of the alleged custom was not admissible.

This was an action at the instance of Angus Buchanan, sometime farmer, Drimnatorran, Strontian, now farmer at Kilvaree, near Connel, in the county of Argyle, against Sir Rodney Stuart Riddell of Ardnamurchan and Sunart. The pursuer concluded for payment of £183, 7s., being a balance still unpaid of the sum which was found by arbiters and an oversman to be the value of the stock and others handed over by the pursuer to the defender upon quitting possession of the farm of Drimnatorran, which was the property of the defender.

In defence the defender claimed that he was entitled to retain the sum sued for as discount in respect that by custom binding upon the parties he was entitled either to six months' credit or discount at the rate of 2½ per cent.

By lease, dated 7th and 23rd May 1889, entered into between the defender and the pursuer, the defender let to the pursuer the farms and grazings of Drimnatorran and Ariundle, on the estate of Suinart in the county of Argyle, for the space of fifteen years from and after the term of Whitsunday 1887, with a break in favour of both parties at the end of the fifth and tenth years respectively. The pursuer entered into the farms, and continued therein down to the second break at Whitsunday 1897, of which he took advantage.

By the lease it was stipulated, *inter alia*, as follows:—"Further, as the said tenant at his entry took over the regular sheep stock and crop on the said farms at a valuation of arbiters and oversman, it is hereby provided and declared that the proprietor or incoming tenant shall, at the termination hereof, whether at the natural expiry or at either of the breaks, be bound to take over not exceeding 4000 of said stock of sheep if the tenant takes advantage of the first break, and the average stock of sheep of the previous three years [altered by minute appended to the lease to "the average stock of sheep of the previous five years"] if the tenant takes advantage of the second break or at the end of the lease, and also at the termination of the lease, at whatever term that may be, the crop, horses, farm implements, sheep dipping-machine, and utensils, and pay for the same according to the valuation of arbiters, one to be appointed by the tenant and another by the proprietor or incoming tenant, and an oversman mutually chosen in case said arbiters shall differ in opinion." The lease contained no provision as to six months credit or discount being allowed.

When the pursuer entered into possession of the farms he took over the sheep stock and others at valuation. With reference to this valuation the parties entered into a contract of submission dated 24th June 1887, which contained, *inter alia*, the following clause:— "With power also to the said arbiters and oversman respectively to decern against the said second party for payment of such sum as they or he may determine to be due and resting owing by him to the said Sir Rodney Stuart Riddell as the value of said sheep stock, crop, threshing-mill, and moveables, payable said sum immediately on delivery of the said stock, &c., or in the option of the said second party six months after delivery of said stock, &c., and in the event of the said second party making