COURT OF SESSION.

Tuesday, November 27.

FIRST DIVISION.

[Sheriff Court at Glasgow.

COYNE *v.* GLASGOW STEAM COASTERS COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7 —"*On or in or about a Factory*"—*Ship—Ship Berthed in Dock—Workman Engaged in Cleaning and Repairing Engine Tubes.*

A fireman on board a steamship was engaged while the ship was berthed in a dock in cleaning and repairing the engines, boilers, tubes, &c., and while sponging the tubes fell and was injured. He claimed compensation under the Workmen's Compensation Act 1897. *Held* in a stated case that he was not entitled to the benefit of the Act, as he was not engaged at the time of the accident "on or in or about a factory," his work being ordinary seaman's work, and the ship not being in the dock for repairs, and consequently not constructively forming for that work a part of the dock. *Houlder Line, Limited* v. *Griffin*, [1905] A.C. 220, *followed; Raine* v. *Jobson & Co.*, [1901] A.C. 405, *distinguished.*

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule II, sec.* 14 (*c*)—*Process—Sheriff — Dismissal of Claim on Relevancy — Competency.*

A workman having brought an arbitration under the Workmen's Compensation Act 1897 to obtain compensation from his employers, the Sheriff dismissed the claim on the averments in the application, holding that on these averments the workman was not entitled to the benefit of the Act. Objection having been taken that this procedure was incompetent and that the Sheriff was bound to hear evidence, *held* in a stated case that under Schedule II, 14 (*c*), of the Workmen's Compensation Act 1897, it was in the discretion of the Sheriff to allow a proof or not.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), enacts—"Sec. 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 . . . to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895 . . ."

The Factory and Workshop Act 1895 (58 and 59 Vict. c. 37), sec. 23, provides that certain provisions of the Factory Acts "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 . . . 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 workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purposes of the enforcement of those sections the person 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 any such machinery, shall be deemed to be the occupier of a factory . . ."

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule II, sec. 14 (*c*), enacts—"In the application of this schedule to Scotland, . . . (*c*) any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act 1876 . . ., subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by Act of Sederunt to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the Sheriff with instruction as to the judgment to be pronounced."

The Sheriff Courts Act 1876 (39 and 40 Vict. cap. 70), sec. 52, enacts—"In every case of an application, whether by appeal or petition, made to the Sheriff under any Act of Parliament which provides, or according to any practice in the Sheriff Court which allows, that the same shall be disposed of in a summary manner in the Sheriff Court without record of the defence or evidence, and without the judgment being subject to review, but which does not more particularly provide in what form the same shall be heard, tried, and determined, the application may be by petition in one of the forms as nearly as may be contained in Schedule A annexed to this Act, and the Sheriff shall appoint the application to be served and the parties to be heard at a diet to be fixed by him, and shall at that diet, or at an adjourned diet, summarily dispose of the matter after proof led when necessary and hearing parties or their procurators thereon, and shall give his judgment in writing."

Thomas Coyne, fireman, 40 Oak Street, Glasgow, presented in the Sheriff Court at Glasgow a Claim for compensation under the Workmen's Compensation Act 1897 against the Glasgow Steam Coasters Company, Limited, Glasgow. The Sheriff-Substitute (DAVIDSON) dismissed the claim. An appeal by stated case was taken.

The case stated — "The appellant in his application made the following averments: — 1. The appellant, the said Thomas Coyne, is a fireman, and resides at 40 Oak Street, Anderston, Glas-

gow. The respondents, the said the Glasgow Steam Coasters Company, Limited, are steamship owners, who have their principal office at 142 St Vincent Street, Glasgow.

"2. On 25th October 1905, and for some weeks previously, the appellant was in the employment of the respondents. On 2nd October 1905 the appellant was engaged by the respondents to act as fireman on the steamship 'Carlston' belonging to the respondents, and was engaged to join said steamship at Greenock on the following day, and to proceed with same to a number of seaports.

"3. On 25th October the appellant was on said ship, which was then berthed in the basin of the Manchester Ship Canal in Pomona Dock, Manchester, and, as instructed, was engaged in repairing and cleaning the boilers, tubes, engines, and fittings of said ship. While he was standing on the end of a plank, which was placed on two iron bearers or supports which were fastened to the front of the boiler of the ship, and was engaged sponging the tubes, the sponging-rod which he was using broke, and the plank on which he was standing slipped, and he was thrown to the angle iron of the smoke-box, a distance of 4 feet or thereby, sustaining severe injuries. Two ribs of his right side were severely fractured. He was taken to the Manchester Royal Infirmary where his injuries were attended to, and he has been since said date under medical treatment. As the result of said accident he has been incapacitated for work.

"4. On the date of said accident the respondents had the occupation of Pomona Dock, which is a factory within the meaning of the Workmen's Compensation Act 1897, for the repairing and cleaning of their said ship. Their said ship while berthed in said dock was a factory, and the respondents had the occupation thereof. The work at which the appellant was engaged at the time of said accident was an undertaking within the meaning of said Act, and the respondents were the undertakers thereof.

"5. The appellant's wages while in the employment of the respondents were at the rate of 28s. per week.

"The case was heard before me on 9th March 1906, when I found that on the averments of the appellant he was not employed at the time of the accident condescended on in or about a factory within the meaning of the Workmen's Compensation Act 1897. I therefore dismissed the claim, and found the respondents entitled to expenses."

The question of law for the opinion of the Court was—"Whether the vessel, being in a discharging berth in a basin of the Manchester Ship Canal as stated, and the appellant being employed as set forth in his condescendence, the accident alleged to have happened is one to which the Workmen's Compensation Act applies?"

Argued for the appellant—The Sheriff had erred in dismissing this claim. (1) This was a case where he should have allowed the appellant a proof of his averments. These averments were not to be strictly construed, being under the Workmen's Compensation Act 1897, and were relevant to support a claim. But whether strictly relevant or not, the Sheriff was not entitled to dismiss the claim at that stage. Schedule II. section 14 (*c*), of the Act had been interpreted to mean that the Sheriff must exhaust the case before him—*Rankine* v. *Alloa Coal Company, Limited*, July 16, 1903, 5 F. 1164, Lord M'Laren at p. 1168, 41 S.L.R. 306. That he had not done here, and the case should be remitted back to him to take evidence. (2) But the Sheriff had also erred on the merits. The real question was—were there "undertakers" in the sense of the statute. That, rather than what the workman was actually doing, was the factor which determined whether a dock became constructively a "factory." Such constructive change had operated here, and the workman was entitled to compensation—Workmen's Compensation Act 1897, section 7; Factory and Workshop Act 1895, section 23; Factory and Workshop Act, 1901 (1 Edw. VII. cap. 22), section 104 (superseding section 23 of 1895 Act); *Merrill* v. *Wilson, Sons, & Company, Limited*, [1901] 1 Q.B. 35. The respondents were here in effect ship repairers working on their own vessel, and had hired and were using the dock for that purpose, and the workman was engaged in such repair, the cleaning being incidental to the repairing. Compensation was therefore due—*Raine* v. *Jobson & Co.*, [1901] A.C. 405. It did not matter whether or not the work actually being done could have been asked of the workman while at sea—*Cayzer, Irvine, & Company* v. *Dickson*, June 3, 1905, 7 F. 723, 42 S.L.R. 591. The case of *Houlder Line, Limited*, v. *Griffin*, [1905] A.C. 220, was distinguished by the fact that here it was not the ordinary work of the ship which was being done. The appellant was not performing his ordinary duties as a seaman at sea—*e.g.* the boiler fires were out. The whole circumstances of the use and occupation of the dock and the nature of the workman's employment fell to be considered in each case—*Smith* v. *the Standard Steam Fishiug Company, Limited*, [1906] 2 K.B. 275. Here on that footing the workman was entitled to the benefits of the Act.

Counsel for the respondents were not called upon.

LORD KYLLACHY—I cannot doubt that the Sheriff-Substitute was entirely within his right in disposing of this case upon relevancy. He was not bound to allow a proof if in his opinion no proof was necessary. I quite accept what has been said that it is not generally desirable to dispose of cases of this sort on mere relevancy, especially if the suggested irrelevancy depends, as it often does, on mere looseness of language or want of specification. We all know that both in the Sheriff Court and in this Court there is a disposition not to decide doubtful questions of relevancy, but unless the irrelevancy is clear to allow a proof before answer.

But if the irrelevancy is clear — if the pursuer's averments disclose no cause of action—that is a different matter; and what we have here to decide is whether the appellant's case is not on his own statement clearly outside the statute.

Now, it does appear to me that the case here is clearly irrelevant. It is conceded that the appellant has no case unless he is in a position to show that this ship (or rather the dock of which the ship had become a part) was for the time being turned into a factory, of which factory the shipowner was the occupant, and that the appellant was engaged when he met his accident on the work of the factory, work which was, as it happened, being performed for the shipowner by the appellant and the rest of the crew. And I am far from saying that a case of that kind might not be figured, as, for instance, where an accident happens in the course of loading or unloading a ship berthed in a dock for that purpose—or, to take an instance perhaps nearer the present, where a ship is put into a graving dock for repairs, and that dock is exclusively occupied by the repairing staff, whether employed by the shipowner or by an independent contractor.

But there is obviously no case of that sort disclosed here. In the first place, it is clear upon the appellant's statement that when he met with his accident he was simply doing his usual work as a member of the crew, viz., cleaning, and as he went along repairing where necessary the machinery of which he had charge. In other words he was simply doing the work of a seaman, work which might equally have had to be done when the ship was in a roadstead or even at sea. That is perhaps in itself sufficient. But, in the next place, what seems quite conclusive is this—it is the dock which under the Act is the factory. The ship comes in only when it becomes constructively part of the dock. Now, the repairs, &c., here in question involved no use of the dock at all. They had no connection with the dock or the ship's presence in the dock. The ship was not in the dock for repairs, but was simply moored to a berth for the purpose of loading her cargo. While, therefore, she may have (constructively) been part of the dock in so far as she used the dock and its appliances for loading or unloading, it seems hopeless to argue that she was also (constructively) part of the dock for purposes with which plainly her use of the dock had no connection.

In short, the present case it appears to me falls very clearly within the case of *Houlder*, [1901] App. Cas. 404, while the case of *Raine*, [1905] App. Cas. 220, has no application.

Lord Pearson—The larger question of procedure which Mr Morison argued before us would be very important if his proposition were well founded, because according to his view the Sheriff ought to have held an inquiry here even although he had formed a distinct opinion against the relevancy. That might in some cases avoid multiplicity of procedure, but it seems to me that in a great many more cases it would lead to confusion and expense. At all events it would be contrary to the system of procedure in our Courts to hold that any judge was bound, after deciding the preliminary pleas against the applicant, to go on to allow that applicant a proof upon the merits, and to decide in his favour upon the merits, which I suppose would be the result contemplated in this case. I do not think that any reason has been stated for regarding these cases as really allowing of any such special procedure as that. I do not see that the statute says so, and therefore in my view the matter must be dealt with as an ordinary question of relevancy.

What the Sheriff has held is, that on the averments of the applicant he was not employed at the time of the accident in or about a factory within the meaning of the statute. Now, on looking at the averments I entirely agree with the Sheriff and with what your Lordship has said. I am very far from being desirous of criticising at all rigidly the averments of a person in the position of the applicant. I think there might very well be a difficulty in the way of such a man getting justice if his claim were viewed in that spirit and held too strictly to the necessities of relevancy which are required in more formal cases. But one test he must at least consent to, that having had a very significant warning from the Sheriff that he considered the averments to be irrelevant, he ought to have come here with some indication of what changes he proposed to make in order to eke out the averments which the Sheriff was satisfied were irrelevant. We have heard no indication of anything of that sort, and I agree that the Sheriff has decided rightly in holding this claim to be irrelevant.

Lord Ardwall—With regard to the general question which was raised by the proposition submitted by Mr Morison, and which was to the effect that the statute contemplated that all cases should go to a proof before the Sheriff before a decision was pronounced in an arbitration such as this, I cannot agree that section 52 of the Sheriff Court (Scotland) Act 1876 imports anything of the kind. I see that it is provided in that section that "the Sheriff shall at once dispose of the matter after proof, if necessary, and after hearing parties or their procurators upon it." Now, these words "when necessary" surely entitle the Sheriff to consider the question whether the averments of which proof is desired are relevant to entitle the applicant to a proof. If the Sheriff is satisfied that they are not relevant it follows that he is satisfied that a proof is not "necessary," and accordingly I think that the Sheriff was quite within his rights in deciding this case without a proof upon the question of relevancy alone.

Coming to the relevancy of the averments here, the question is whether the Pomona

Dock is relevantly averred to be a factory or not. I think that it was incumbent upon the applicant to show that this dock was a factory for one of two reasons—either that it was then being occupied for the purpose of loading or unloading, and that the accident occurred in the course of loading or unloading the particular ship, or, otherwise, that it was being used for proper factory work, such as repairing the ship or the ship's machinery, and I mean repairing in the proper sense of the term, viz., executing such repairs as are not merely incidental to every voyage on which the ship is engaged, but such as might be let out to a proper contractor or engineer to perform. Now there is no suggestion of either of these requirements here. It is not said that the applicant was engaged in loading or unloading; and as to proper factory work, we are told, first, that he "was engaged in repairing and cleaning the boilers, tubes, engines, and fittings of said ship." That is the general averment. Coming to the particular averment as to what he was doing when the accident actually happened, we are told that he "was engaged sponging the tubes," and that while so engaged the sponging-rod he was using broke, and the plank on which he was standing slipped. Now, this sponging of boiler-tubes is just such work as a fireman, which the applicant was, is bound to do. It is just part of his ordinary work when the ship comes into a port and when there is time to let the fires out and allow the boilers and machinery to be thoroughly cleaned before going on to another seaport. The applicant was employed as a fireman on this steamship, and was engaged to join her at Greenock and to proceed with her to a number of seaports. The port she was in at the time was Manchester, and there the ordinary work of cleaning the boilers was engaged in, and in that ordinary work this fireman was employed, and there is no averment to show that he was not doing just such work as is the usual work of a fireman on board a vessel of this description. When counsel for the applicant was asked if he had anything more to aver on this subject he told us that he really was not in a position to do so. In that state of matters I do not think there is any option left to this Court but to hold that the Sheriff has done rightly in holding that this statement is irrelevant. The applicant has stated what his employment at the time of the accident was, and I do not think that that employment was such as to bring him within the provisions of the Workmen's Compensation Act.

The Court answered the question in the negative, dismissed the appeal and remitted to the Sheriff to proceed as might be just.

Counsel for the Appellant—Morison, K.C.—Munro. Agents—Sinclair, Swanson, & Manson, W.S.

Counsel for the Respondents — Scott Dickson, K.C.—Spens. Agents—J. & J. Ross, W.S.

Thursday, November 29.

SECOND DIVISION.

RITCHIE AND ANOTHER (BANKS' TRUSTEES) *v.* BANKS' TRUSTEES AND OTHERS.

Succession — Trust — Vesting — Gift on Expiry of Widow's Liferent to Children, and "if any Child shall die without a Vested Interest" "their Issue shall be Entitled" to said Gift—"Provision"—"Share"—Income.

A testator conveyed his whole estate to trustees and, *inter alia*, directed them to pay one-half of the income of the residue of his estate to his widow, and as regarded the remaining half "to divide the same among his children equally." He further directed—"And (*Lastly*) I direct my trustees at my death, or on the death of my wife in the event of her surviving me, or upon her entering into another marriage, to pay and make over to such of my children as have arrived at the age of twenty-one years, or as they respectively reach that age, the residue and remainder of the whole of my means and estate among them. . . . And it is hereby declared, in the case of provisions to children under these presents, that if any child shall die, either before or after me, leaving lawful issue, and without having acquired a vested interest in such provision, such issue shall be entitled to the share or shares, original and accruing, which their parent would have taken by survivance; and the share of any child dying without leaving lawful issue, shall be divided among the surviving children and the lawful issue of such children as may have died leaving such issue, in equal shares, *per stirpes*."

The testator was survived by his widow and five children, all of whom attained the age of 21, but subsequently one of them, W., predeceased the widow (who had not married again), leaving an only child, F. who had not attained majority.

Held in a special case (1) that the share of the residue destined to W. had not vested in him; (2) that vesting of the said share did not take place in F. on the death of her father, but was postponed until the death (or second marriage) of the widow, though not to the attainment of majority by F. (*Martin* v. *Holgate*, 1866, L.R., 1 H.L. 175 *distinguished*); (3) that the one-tenth part of the interest of the estate accruing after the death of W. was payable to his daughter F.

This was a special case presented for the opinion and judgment of the Court upon certain questions arising as to the construction of the trust disposition and settlement of Alexander Banks, engraver, Fountainhall Road, Edinburgh, who died on 27th May 1886.