liable to the pursuer for the value of the goods stolen from his premises as aforesaid: Therefore decerns against the defenders for payment to the pursuer of the said sum of £300," &c.

The defenders appealed to the First Division, and argued, *inter alia*, that the loss which the pursuer averred he had sustained was not the natural consequence of the defenders' actings, and that damage caused by the criminal acts of a third party was too remote to render the defenders liable.

LORD PRESIDENT—[*After reviewing the evidence upon which the findings of the Sheriff were based, his Lordship proceeded as follows*]—I think the Sheriff's judgment should be adhered to.

The next question is somewhat curious, for the Railway Company say—"Suppose we did omit to do that, it is not a natural conclusion that a thief would have sufficient finesse to crawl through that hole to accomplish his purpose." Now, I suppose experience shows it is wonderful what thieves can do in the way of making use of a small aperture to obtain access to coveted goods, and this seems to be an instance of it. The hole itself apparently physically admits of the possibility of this man or somebody else having gone through the wall, and that being to a certain extent matter of experience in a particular though not laudable profession, the Sheriff was informed by detectives, who are in the way of examining into things of this kind, and he has come to this conclusion that the thing was practicable and in fact happened. Well, now, it seems to be perfectly plain that if the Railway Company under statutory powers desires to open up a man's premises, they are bound to fill up the aperture completely, and that one of the ordinary risks against which walls are expected to stand as a safeguard is theft. As the Sheriff pointed out, the man who was superintending the construction of this work mentioned that he considered it part of his duty to guard against thieves. I am not prepared to say that if the company have the misfortune to have a thief amongst their workmen, it is not likely he will cast his eye 10 feet up and see this hole and make such use of it as was congenial to his propensities, and accordingly on the second point I am against the defender.

LORD ADAM—[*After reviewing the evidence, and expressing his concurrence on that point with the conclusions of the Sheriff, his Lordship proceeded*]—The next question is, does it follow in law that the company are liable? It was said by Mr Balfour that it was difficult to connect the loss of the pursuer through the criminal action of a third person with the defenders' negligent act in leaving the wall in this state. I cannot take that view. Not only is it said that the attention of the Railway Company was drawn to the fact of the danger arising from a matter of this sort, but I think that, looking to the large number of the servants of the company engaged in this work, who had access to the spot all along, it was not at all unlikely that there might be some loose character among them. If that were so it would be very probable that this hole would be used in the way in which it has been used, and there is nothing to relieve the company from liability.

On the whole matter I should be loth to disturb the judgment of the Sheriff.

LORD M'LAREN and LORD KINNEAR concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defenders—J. B. Balfour, Q.C.—Nicolson. Agents—Hope, Todd, & Kirk, W.S.

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*Thursday, July* 6.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## MINISTERS OF ABERDEENSHIRE *v.* THE SHERIFF.

*Jurisdiction—Court of Session—Fixing of Fiars Prices—Process—Reduction—Defenders Called—Act of Sederunt, December* 21, 1723.

The parish ministers of a county raised an action to reduce, on the ground of illegality, the verdict of the jury and the decree of the Sheriff following thereon fixing the fiars prices for the year in terms of the Act of Sederunt of 21st December 1723. The defenders called were the sheriff of the county, the sheriff-clerk, the convener of the county, and the county clerk and treasurer.

*Held* (1) that the action was competent, and (2) that the Court had jurisdiction.

*Church—Stipend—Fixing of Fiars Prices—Procedure—Act of Sederunt, December* 21, 1723.

By Act of Sederunt dated December 21, 1723, which regulates the annual fixing of fiars prices in each county by the sheriff and a jury of fifteen men who "have knowledge and experience of the prices and trade of victual in those bounds," it is provided that the jury are to return their verdict on the evidence adduced before them or "their own proper knowledge concerning the fiars for the preceding crop of every kind of victual of the product of that sheriffdom." The Act also provided that if the sheriff or jury thought the evidence adduced was defective the sheriff should adjourn the jury till another day that sufficient evidence might be laid before them.

At a fiars court three witnesses spoke as to the price of oatmeal, and accord-

ing to their evidence the average price was 13s. 5½d. per boll. The jury fixed the fiars price thereof at 12s. 6d. per boll, and decree was granted by the Sheriff in accordance therewith.

In an action by the parish ministers of the county to reduce the decree, on the ground (1) that the verdict was contrary to the evidence led, (2) that the Sheriff called attention to the paucity of evidence, and yet did not adjourn the jury in order that sufficient evidence might be adduced, and (3) that the Sheriff had misdirected the jury by telling them that they were entitled to use their own observation and experience in fixing the fiars price of oatmeal, the fact being that none of the jury had any personal or proper knowledge on the subject—*held* that no relevant case had been stated for the interference of the Court.

By Act of Sederunt dated 21st December 1723 it is provided as follows:—"The said Lords do hereby appoint and require the sheriffs of Scotland and their deputes, yearly, betwixt the 4th and 20th of February, to summon before them a competent number of persons living within the sheriffdom, who have knowledge and experience of the prices and trade of victual in those bounds, and from them to chuse fifteen men, whereof not fewer than eight shall be heritors, to pass upon the inquest, and return their verdict on the evidence underwritten, or their own proper knowledge concerning the fiars for the preceding cropt, of every kind of victual, of the product of that sheriffdom: And the said sheriffs and their deputes shall, to the same time and place unto which the jury is called, also summon the properest witnesses, and adduce them and all other good evidence before the said jury, concerning the price at which the several lots of victual have been bought and sold, especially since the first of November immediately preceding until that day; and also concerning all other good grounds or arguments from whence it may rationally be concluded by men of skill and experience what ought to be established as the just fiar prices for the said cropt; and any persons then present may in open Court, and no otherwise, and observing due order and respect, offer information to the jury concerning the premises and concerning the evidence adduced or that might be adduced before them: And if it appear to the sheriff or his deputes, or to the jury, that the adducing of proper evidence has been any way disappointed, or that the evidence adduced is defective, the said sheriff or his deputes shall adjourn the jury till a certain and proper day, that sufficient evidence may then be laid before them. . . . And the said sheriff or his deputes shall, on or before the first day of March, pronounce and give forth sentence according to the said verdict, determining and fixing the fiars prices for the cropt preceding, of each kind of victual of the product of that sheriffdom."

On 10th June 1898 the Parish Ministers of Aberdeenshire raised an action against the Sheriff of the County, the Sheriff-Clerk, the Convener of the County, and the County Clerk and Treasurer, for the purpose of reducing and setting aside the verdict of the jury and decree of the Sheriff following, whereby the fiars price of oatmeal victual in the county of Aberdeen was struck for crop and year 1897.

The pursuers stated that their stipends were partly modified in oatmeal, and were partly payable according "to the highest fiars prices" of oatmeal of the county of Aberdeen, and averred — "(Cond. 3) The Fiars Court for the county of Aberdeen for crop and year 1897 was held at Aberdeen on or about the 11th day of March 1898, and was presided over by the defender Sheriff Crawford. Three witnesses attended at the Court and gave evidence as to the price of Aberdeenshire oatmeal, viz., John Lee, miller, Mill of Crimond, Crimond, who deponed to transactions to the amount of 2876 bolls at the price of £1941, 15s. 9d.; William Milne, miller, Mill of Feochel, Old Meldrum, who deponed to transactions in 1153½ bolls at the price of £779. 1s.; and Alex. Byres junr., Nethermill, Cruden, who deponed to transactions in 1428 bolls, 7 stones, 9 lbs. at the price of £957, 16s. 2d, The total amount of transactions thus deponed to was 5548 bolls, 2 stones, 9 lbs. at a total price of £3672, 12s. 11d., the aver age price per boll, according to the evidence, being thus 13s. 5½d. (Cond. 4) No other evidence was laid before the jury with regard to oatmeal. The Sheriff, in charging the jury, called their attention to the paucity of evidence as to oatmeal, and he stated with regard to what he considered the paucity of evidence, that they were entitled to use their own observation and experience in fixing the fiars price of oatmeal. It was the duty of the Sheriff, in respect he considered the evidence insufficient, to have adjourned the jury in order that sufficient evidence might be adduced. In failing to adjourn the jury the Sheriff acted illegally, and in breach of the terms of the said Act of Sederunt. Further, the Sheriff acted illegally and contrary to the provisions of the said Act of Sederunt, in directing the jury to use their own observation and experience in fixing the price. It was the duty of the Sheriff to inform the jury that their verdict must be returned upon the evidence or their own proper knowledge concerning the prices at which oatmeal of crop and year 1897 had been bought and sold in the market, and the direction to them to use their own observation and experience was erroneous in law, and was calculated to mislead, and did mislead, the jury as to their functions as after mentioned. (Cond. 5) The jury having retired, returned with their verdict, which, as regards oatmeal, fixed the fiars price thereof for the said crop and year at 12s. 6d. per boll. The said verdict is dated 11th March 1898, and so far as relates to oatmeal, is in the following terms:—'Aberdeen, 11th March 1898.—The haill persons of inquest before named and designed, by the mouth of the said William Ferguson, their

chosen chancellor, appretiate the victual underwritten (according to their own proper knowledge, and the evidence led before them) at the several prices set opposite to the different species of victual in the following schedule, the meal per 140 lbs. avoirdupois, and the grain according to the imperial quarter—1. Oatmeal per boll of 140 lbs. avoirdupois, 12s. 6d.—WM. FERGUSON, *C.*' On the verdict being returned, the Sheriff thereupon, by deliverance dated said 11th March 1898, interponed authority thereto, and ordained the price of victual to be rated accordingly. The said verdict, in so far as it relates to oatmeal, is inaccurate and false in respect it bears that the price of oatmeal was appretiated by the jury according to their own proper knowledge and the evidence led before them. In fixing the price of oatmeal the jury did not proceed upon the evidence which had been submitted to them, and upon their own proper knowledge as to the prices at which transactions in Aberdeenshire meal had taken place for crop 1897; nor upon either of those grounds. It is believed and averred that the actual method by which the jury arrived at their verdict was by taking the evidence led as to the price of oats, and having fixed the price of oats, they made a calculation as to how much meal could be produced by a quarter of oats, giving effect in their calculation to what they considered their experience entitled them to regard as the meal-producing qualities of oats of the crop in question. By this method they did not and could not arrive at the correct fiars price of oatmeal, or the price at which meal had been selling in the market. This method necessitated the proceeding upon uncertain and unreliable data, and was bound to show a less price than the selling price of oatmeal. None of the jury had any personal or proper knowledge whatever as to the prices at which Aberdeenshire oatmeal for crop 1897 had been sold and bought, and none of them had had personal dealings in oatmeal. It was their duty, therefore, to fix the price according to the evidence, or if they considered the evidence which had been led insufficient, to have called upon the Sheriff to adjourn the Court in order that sufficient evidence might be adduced. In arriving at their verdict in the manner averred, the jury acted under essential error induced by misdirection in law, and whether so induced or not their action was illegal, incompetent, and contrary to the provisions of the said Act of Sederunt, and to the immemorial custom of fiars courts throughout Scotland, and in particular in Aberdeenshire. The finding of the jury to the effect foresaid, and the sentence of the Sheriff following thereon, were therefore *ultra vires*, illegal, and contrary to the provisions of the said Act of Sederunt. They were also contrary to the previous practice of the Aberdeenshire Fiars Court, which as regards oatmeal had always given effect to the evidence adduced. (Cond. 6) On account of the said illegal and unwarrantable manner of fixing the fiars price of oatmeal, the pursuers have suffered serious loss and damage. Had the price been fixed according to the evidence, or according to the current market prices in the county, the value of the boll of oatmeal would have been at least 13s. 5½d., and the pursuers' stipends would thereby have been increased by sums ranging to as much as £20 each."

The Sheriff did not enter appearance. Preliminary defences were lodged by the remaining defenders in which they pleaded (1) that the action was incompetent in respect that none of the defenders called had any interest in the premises; (2) that the Court had no jurisdiction to interfere; and (3) that in any view the pursuers' averments did not disclose any illegality in the procedure justifying the intervention of the Court.

On 2nd February 1899 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the pursuers have stated no relevant case for the interference of the Court; therefore assoilzies the defenders from the conclusions of the action, and decerns."

*Note.*—"The pursuers in this case are the Parish Ministers of Aberdeenshire, and the parties called as defenders are the Sheriff, the Sheriff-Clerk, the Convener of the County, and the County-Clerk. The object of the action is to reduce and set aside the verdict of the jury and decree of the Sheriff following, whereby the fiars price for oatmeal victual in the county of Aberdeen was struck for crop and year 1897. The ground of reduction is that the price in question was struck by an illegal method,—that is to say, by a method contrary to the Act of Sederunt of 1723—an Act which, whether or not originally obligatory, has in Aberdeenshire, as in most other counties, become obligatory by usage.

"The special grounds of complaint are as averred—(1) that although the evidence adduced as to transactions in oatmeal victual was, in the Sheriff's opinion, defective, he yet failed to adjourn the Court as required by the Act of Sederunt; (2) that the Sheriff directed the jury that they were entitled to use their own observation and experience in fixing the price; and (3) that the jury acting on this direction disregarded the evidence adduced, and (proceeding by a method of their own) fixed the price of oatmeal victual at a figure lower than was warranted by the evidence, or by the true market price within the county.

"The Sheriff has not entered appearance, considering that it is not his duty to do so. But preliminary defences have been lodged by the Sheriff-Clerk and the other defenders, in which they plead—(1) that the action is incompetent in respect that none of the defenders called has any interest in the premises; (2) that this Court has no jurisdiction to interfere; and (3) that in any view the pursuers' averments do not disclose any illegality in the procedure justifying the Court's intervention.

"I am not, as at present advised, prepared to affirm either that the action is incompetent or that the Court has not jurisdiction. I agree that in strictness, and as matter of

principle, the Sheriff, although not *quoad hoc* acting judicially, is yet *functus* when he has signed his interlocutor, and that consequently he has no duty, and perhaps no proper interest, to defend. I am also disposed to agree that neither the Convener of the County nor the County-Clerk have, as such, any interest in the matter. But, on the other hand, I consider that the Sheriff-Clerk, as custodier of the documents called for, may be in a different position. And as regards the Sheriff, I cannot overlook that, rightly or wrongly, it has been recognised in practice for nearly two hundred years that actions of this sort may be competently raised against the Sheriff as principal or even as sole defender. It does not follow that he is bound to appear,—that is for himself. But the cases cited at the discussion, and of which I have made a note, seem conclusive as to the practice. I cannot therefore throw out the action as incompetent.

"Neither am I disposed to throw any doubt upon the jurisdiction of the Court to reduce on the ground of illegality the proceedings of fiars courts. It is true that originally the Sheriff was responsible only to the King's Exchequer, and collected in his own way for the Crown's use the information which is now embodied in the verdict of the jury. It is also true that in the latest cases on the subject, viz., those of *Mylne* v. *Horne*, 12 D. 883, and *Howden* v. *Haddington*, 13 D. 522, the matter was taken up and considered by the whole Court (acting, it would appear, rather administratively than judicially) upon a report by the Sheriff and a compearance by parties interested. But, on the other hand, there have been beyond doubt several cases in which actions of reduction of the verdicts of fiars courts have been sustained as competent. I refer particularly to the cases of *Lawers* v. *Earl of Haddington*, M. 7464, and *Knox* v. *Law*, M. 4420. I may refer also to *Home* v. *Swinton*, 7th February 1806, F.C., where a summary petition was refused on the ground that a reduction, and not a petition, was the proper proceeding.

"But the question remains whether any illegality was here committed, or is averred to have been committed, by the Sheriff or by the jury; and on this question I am not able to sustain the relevancy of the pursuers' case. I shall endeavour to state my reasons in a word.

"It is, in the first place, complained that the jury were told by the Sheriff that in fixing their prices for the various kinds of victual they were at liberty to use their own observation and experience. It does not seem to me that that was a wrong direction. The jury had of course before them the evidence adduced, and they had power to give to it such weight as they thought fit. It is not said that they were told they should or even might put it aside. The alleged direction, therefore (if it was a direction), came only, as I read the averment, to this—that the jury were not confined to the evidence, but might, if they chose, proceed partly or wholly on their own proper knowledge. Now that, as it seems to me, was simply putting in other words the direction of the Act of Sederunt.

"Again, it is said that the jury in fact disregarded the evidence, and employed, as I have already mentioned, a calculation of their own. But here again I think the answer is in effect the same. The jury, as I read the Act of Sederunt, were certainly bound to listen to the evidence adduced, and to have it before them; but, on the other hand, they were entitled to give it what weight they thought fit; and if they concluded to give it little weight, or no weight, they may have been quite wrong; but that matter was one for their judgment.

"Then lastly, it is said, or rather suggested, that the Sheriff was of opinion that the evidence was defective, and that being so he was bound to adjourn the Court. But how does this matter really stand? It is not, it will be observed, averred that the evidence was in fact defective. On the contrary, I infer that the pursuers thought and think that it was good and sufficient evidence; for they found on it as showing how unfair the verdict of the jury was. Their complaint, therefore, comes to turn not on the fact but on the Sheriff's opinion; and in that view it comes to depend on a very fine point indeed. For all that they in terms aver that the Sheriff in charging the jury directed their attention to the 'paucity' of the evidence, by which I suppose is meant the small number of witnesses examined. That is the whole averment, and from that the deduction is made that the Sheriff considered the evidence defective in the sense of the Act of Sederunt.

"Now, it seems to me that this will not do. I must assume—because it is so stated—that the Sheriff commented on the 'paucity' of the evidence,—whatever that means. But I must, I think, also assume that the Sheriff did not consider the evidence defective, or at least so defective as to call for the exercise of his power of adjournment. Defectiveness is necessarily a matter of degree; and I do not know any definition of the degree contemplated by the Act of Sederunt, except that the degree shall be such as in the Sheriff's view to require an adjournment.

"Altogether I do not see my way to entertain the action. It is, of course, possible that the jury erred in reaching a figure so substantially below the figure which was the result of the evidence,—evidence which, although coming only from three witnesses, represented undoubtedly transactions extending to over 5000 bolls. And if that was so, the pursuers have, of course, suffered grave injustice. But I have no right to make any assumption on that subject, still less to review or criticise the jury's conclusion. The Court can only, in my opinion, interfere upon the ground of illegality, and I do not consider that there is any averment of such ground here."

The pursuers reclaimed, and argued—The proceedings in the fiars courts were subject

to the review of the Court, and the latter was not trammeled by the statutory rules regarding civil jury trials, but were entitled to review on the merits — Connell on Teinds, 432, *et seq.* The procedure was similar to reductions of verdicts of idiotry and furiosity pronounced by a jury, which could be reduced if not warranted by the evidence — *Dewar* v. *Dewar*, February 25, 1809, F.C. In the present case the evidence showed that the price of oatmeal was 13s. 5½d. per boll, while the verdict of the jury fixed it at 12s. 6d. The verdict was therefore directly opposed to the evidence. The averments on record were that none of the jury had personal or proper knowledge of the price of oatmeal, and the Sheriff had misdirected them when he stated that they were entitled to use their own observations and experience in fixing the fiars prices of oatmeal. If the Sheriff thought there was a paucity of evidence his duty was to adjourn the case in terms of the Act of Sederunt till sufficient evidence could be laid before the jury. A proof should be allowed of these statements, and if they were shown to be true the verdict or decree following thereon should be reduced.

Counsel for the defenders were not called on.

Lord Justice-Clerk—I have no doubt that this proceeding, the fixing of fiars' prices, which takes place each year in each county of Scotland, is one in which if there is irregularity of a gross kind there may be interference by this Court to the effect of directing that the proceedings shall be conducted with regularity. That is what must happen if there be something outrageously wrong in the proceedings; as, for example, if the Sheriff or the jury refused to hear evidence at all.

So far, however, as I can see, there is no irregularity in the proceedings which are complained of in this action.

The Act of Sederunt of 21st December 1723 enacts that a jury is to be summoned of "a competent number of persons living within the sheriffdom, who have knowledge and experience of the prices and trade of victual in these bounds," who are to give a verdict "on the evidence underwritten or their own proper knowledge concerning the fiars for the preceding cropt of every kind of victual of the product of that sheriffdom." Now, this jury were summoned. No one of them was challenged as an incompetent person. We must take it that they were present as persons who had "proper knowledge" of the matters required. That, of course, is not what we are ordinarily accustomed to see in civil jury trials, where the jury are required to give their verdict on the evidence alone. Now, some members of this jury may possibly not have themselves individually had "proper knowledge," but others had, and could inform the rest at their consultation in the jury room. At all events, they were all present, heritors and others, as persons fit to be summoned for such a purpose. On the whole, I think that no case can be made for the pursuers on the constitution of the jury.

Then it is maintained that there was a deficiency of evidence (or in the words of the Act of Sederunt, that the "evidence was defective.") That is a matter to be judged of by the Sheriff and the jury. If it appears to the Sheriff or to the jury that there is no evidence as to some of the descriptions of victual or that there is no evidence sufficient to judge upon, then it is their duty to have the case adjourned—that is to say, it is to be adjourned if there is no evidence to be used along with their own personal knowledge. But in this case neither the Sheriff nor the jury thought that there was necessity for adjournment. The pursuers say in Cond. 4 that the Sheriff in charging the jury called their attention to the paucity of the evidence as to oatmeal, and he stated with regard to what he considered the paucity of evidence that they were entitled to use their own observation and experience in fixing the price of oatmeal. Now, if the Sheriff said that he was in my opinion entitled to say it. The evidence was that of three witnesses only, and it was quite a justifiable observation that there was a paucity of evidence. But that did not mean that if the jury thought that, taken with their own knowledge as to the prices of oatmeal, there was enough evidence to enable them to form a judgment, they were not entitled to do so. The fact that it was slight in quantity did not preclude them from taking it as sufficient along with their own knowledge. There are many cases in which the judge finds it his duty to say to the jury that the evidence on a point is certainly slender in quantity but sufficient if they believe it, only it will be their duty to exercise caution before giving it effect.

On the whole, I think that the grounds for attacking the judgment of the jury are very slender indeed, and I agree with the Lord Ordinary. I have referred to all the points dealt with by his Lordship. The real point in the argument before us was that the evidence was "defective" in the sense of the Act of Sederunt.

Lord Young—I am of the same opinion. I think the case is clear. It is clear on the pursuers' own statement that the proceedings were not irregular. There was no objection taken to the jury who were summoned. As to the conduct of the trial, the only thing suggested is that the Sheriff said that there was paucity in the evidence as to oatmeal. Now I think the pursuers' averments make it plain that there was no paucity in the sense that there was not evidence on which a judgment could be formed. On other matters there must have been more than three witnesses I suppose. Upon this matter of oatmeal there were only three. But see what is the pursuers' statement about them. They say that the first was John Lee, miller, Crimond, who deponed to actual transactions to the amount of 2876 bolls at the price of £1941, 15s. 9d.

Now these quantities are considerable, and the evidence was skilled. The next witness was, according to the condescendence, a miller at Old Meldrum, "who deponed to transactions in 1153½ bolls at £779, 1s.," while the third was a witness from Cruden, "who deponed to transactions in 1428 bolls, 7 stones, 9 lbs. at the price of £957, 16s. 2d." These are considerable transactions, and the condescendence, after setting forth the testimony of the third witness, goes on to make the thing more plain by saying that "the total amount of the transactions thus deponed to was 5548 bolls, 2 stones, 9 lbs. at a total price of £3672, 12s. 11d., the average price per boll according to the evidence being thus 13s. 5½d." And with that price the pursuers are satisfied.

Now, I think there is no paucity of evidence though the witnesses are few, and I doubt if the Sheriff used the word paucity as meaning that there was not sufficient evidence if believed. The jury seemed to have taken off 11½d. from the average price 13s. 5½d., but this was done in the exercise of the power and discretion which lay with them, and it is impossible to allow inquiry into the reasons why they did so.

No other case was stated to us, and I agree with your Lordship in thinking that the Lord Ordinary is right.

Lord Trayner—I think the Lord Ordinary is right.

Lord Moncreiff—I also think that the Lord Ordinary is right.

The Court adhered.

Counsel for Pursuers—Balfour, Q.C.—Moffat. Agents—Alex. Morison & Company, W.S.

Counsel for Defender the Sheriff-Clerk of Aberdeenshire—C. N. Johnstone. Agent—Thomas Carmichael, S.S.C.

Counsel for Defenders the Convener of the County of Aberdeen and the County Clerk and Treasurer—W. Brown. Agents Macpherson & Mackay, S.S.C.

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*Tuesday, July 4.*

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## SECOND DIVISION.

[Sheriff Court at Greenock.

## JACKSON *v.* A. RODGER & COMPANY.

*Reparation — Workmen's Compensation — Factory — Occupiers of Factory — Shipbuilding Yard.*

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, between fifteen and 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 having her engines put in, a workman in the employment of the firm of engineers was injured while working at the undertaking. *Held* that under the Workmen's Compensation Act 1897, section 7 (2), and the Factory and Workshop Act 1895, section 23 (1) the shipbuilders were 'occupiers' of the dock as a factory at the time when the accident occurred, and were therefore liable as the "undertakers" to the injured workman.

*Opinion per* Lord Justice-Clerk and Lord Trayner that the place where the accident occurred was not a dock, river, or tidal water "near" the shipbuilder's yard within the meaning of section 7 (3) of the Workmen's Compensation Act.

This was an appeal from the Sheriff-Court of Renfrew and Bute at Greenock upon a case stated in an arbitration under the Workmen's Compensation Act 1897, between John Jackson, engineer, Glasgow, and A. Rodger & Company, shipbuilders, Port-Glasgow,

The case stated for the opinion of the Court by the Sheriff-Substitute (Begg) was as follows:—[*After summarising the prayer of the petition*].—"The following are the appellant's averments raising the question of law submitted on appeal:—(1) 'The pursuer is an engineer or engine-fitter, and was employed by Hall, Brown, Buttery & Company, marine engineers and contractors, carrying on business at Helen Street, Govan, near Glasgow, at the time of and some time prior to the accident after mentioned. (2) On or about the 8th day of November 1898, while the pursuer was working at an undertaking of the defenders in Cessnock or Princes Dock, Glasgow, on s.s. "Craigneuk," a new vessel in course of construction, on which the engines and other mechanical appliances driven by steam were being erected and fitted, there fell upon the side of his head, in the region of the right temple, a carpenter's wedge or other piece of timber, which penetrated the right eye of the pursuer, causing severe injuries.' (It was admitted that this averment did not mean that, in the erection and fitting of the engines, &c., any machinery driven by steam, water, or other mechanical power, was used in the work on which he was engaged at the time of the accident.")

[*The Sheriff-Substitute then quoted the pursuer's averment as to the result of the injuries.*]

"Further, the appellant narrates and founds upon two agreements, produced by the respondents at the debate before me, viz.:—(1) agreement between the respondents of the one part and Messrs Russell, Huskie, & Company of Leith of the other part (thereinafter called the purchasers), dated 13th January 1898, whereby the respondents agree that they 'will build for the purchasers, of the best materials and