

to the Lord Ordinary to allow the parties a proof of their averments.

Counsel for the Pursuer and Reclaimer—Jameson, K.C.—Hunter. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders and Respondents—Guthrie, K.C.—Macrobert. Agents—Macpherson & Mackay, S.S.C.

Saturday, July 2.

## SECOND DIVISION.

[Lord Low, Ordinary.]

### M'CAIG v. GLASGOW UNIVERSITY COURT.

*Process—Proof or Jury Trial—Reduction of Deed—Discretion of Lord Ordinary to Fix Mode of Trial.*

A sister signed a deed homologating the will of her deceased brother, as the only person interested in his estate, and conveying to third parties her whole right and interest in his estate, with the exception of an annual payment of £300. Thereafter she raised an action for the reduction of the deed on the ground that she signed it under essential error, in the belief that she had no interest in her brother's estate apart from the provision of £300 per annum, and not being aware that he had not by his will disposed of his whole estate, that she had a claim to the undisposed portion as his next-of-kin, and that his will was of questionable validity on account of vagueness and uncertainty. She further averred that the essential error was induced by the lawyer who prepared the deed.

The pursuer proposed issues for the trial of the case, but the defenders contended that the case was not suitable for jury trial, and should be tried by proof without a jury.

The Lord Ordinary (Low) allowed issues, on the ground that although he was at first disposed to think that the case should be tried without a jury because the circumstances were peculiar, and the case was not of the class appropriated to jury trial, yet it was a case of a kind usually sent to a jury if the pursuer desired it, and he did not think the presiding Judge should have any difficulty in directing the jury on points of law that might arise.

The defenders having reclaimed, held that the Court should not interfere with the Lord Ordinary's decision in the exercise of his discretion as to whether the case should be tried by a jury or by proof without a jury except on very strong grounds, and that no such grounds had been disclosed.

*Error—Error in essentialibus—Reduction of Gratuitous Unilateral Deed—Issue—Form of Issue.*

In an action for the reduction of a gratuitous unilateral deed, held that

essential error alone was a good ground for reducing the deed, and that the pursuer was entitled to the issue—“Whether in granting the deed she was under essential error as to its import and effect “without the addition of the words “induced by misrepresentation,” as contended for by the defender.

In January 1904 Miss Catherine M'Caig, Oban, raised against the University Court of the University of Glasgow, incorporated under the Universities (Scotland) Act 1889, as such University Court, and also as representing the University of Glasgow as the trustees acting under the testamentary settlement dated 20th January 1900, and relative codicil dated 18th February 1902, of the now deceased John Stewart M'Caig of Muckairn, Soroba, and Oban, Argyllshire, and also against Donald Macgregor, solicitor, Oban, judicial factor *ad interim* on the estate of the said John Stewart M'Caig, appointed by the Lords of Council and Session on 6th August 1902 for any interest he may have in the premises, an action of reduction of a deed of corroboration and assignation dated 27th January 1903 granted by the pursuer in favour of the University Court of the University of Glasgow.

The facts leading up to the action were as follows:—The said John Stewart M'Caig died unmarried on 29th June 1902. His sole next-of-kin at the date of his death were his sister, the pursuer, and his brother Duncan M'Caig, banker in Oban, who died intestate and without issue on 22nd July 1902.

John Stewart M'Caig at the date of his death was possessed of extensive and valuable heritable property in the vicinity of Oban, with a yearly rental of between £2000 and £3000, and he was also possessed of moveable estate believed to have been of the value of about £10,000. He left a holograph testamentary settlement dated 20th January 1900, and a codicil relative thereto, also holograph, dated 18th February 1902. By the said testamentary settlement the said John Stewart M'Caig nominated and appointed the Court of Session or Supreme Court of Scotland as his trustees and executors, who should manage and administer the trust by the appointment of a judicial factor from time to time as the circumstances of the management and administration might require, and the purposes and intention of the testator were declared in the following language:—“The purpose of the trust is to pay all my legal debts and deathbed expenses; these debts are to be paid from the accumulations of the yearly income of the trust after the expenses of the management is paid. I also wish that Donald Macgregor, solicitor, Oban, be continued by the trustees as local factor over all my estate, both moveable and real, at a legal remuneration for his work. The purpose of the trust is that my heritable property be not sold but let to tenants, and the clear revenue or income be used for the purpose of erecting monuments and statues for myself, brothers, and sisters on the

tower or circular building called the Stuart M'Caig Tower, situated on the Battery Hill above Oban, the making of these statues to be given to Scotch sculptors from time to time as the necessary funds may accumulate for that purpose; also that artistic towers be built on the hillock at the end of Aird's Park, in the parish of Muckairn and on other prominent points on the Muckairn estate, and on other prominent places on the various estates; such in particular on the Meolreoy of Balagown lying north-east of Kilachonish Farm-house; my wish and desire is to encourage young and rising artists, and for that purpose prizes be given for the best plans of the proposed statues, towers, &c., before building them; I wish and desire that the local factor during his term of office consult my surviving brother and sisters during their lifetime, to consult them in the management of the estate. I give full power to the trustees to sell the property of the Gas Works, which is not to include Battery Hill and Tower that goes with the unsaleable estate, or otherwise called the Muckairn, Soroba, Inverlonen, and Kilmore properties. My real purpose and intention is that this trust is to be perpetual for all time coming, and that is the reason for appointing the Court of Session as trustees, with the Auditor of the said Court of Session to audit the accounts yearly at the legal fees. And should the Court of Session decline the acceptance of the trust, then and in that case, which I hope and trust will not happen, I appoint the College of Glasgow to be the trustees to carry out the foresaid purposes and real written intentions of this will of mine, and failing the College of Glasgow accepting the trust, I nominate and appoint in their order as follows, the first, the College of Edinburgh; second in order, the College of Aberdeen; third, the College of St Andrews; failing them, the trust to be handed over to the Court of Chancery in London as trustees." By the said codicil dated 18th February 1902 the testator provided as follows—"I, John Stuart M'Caig of Muckairn, Soroba, and Oban, Argyllshire, Scotland, in reference to my will of the twentieth January One thousand nine hundred years, made and signed at Oban, holograph, do hereby make a codicil to said last will to the effect of more fully describing and explaining my real wishes and meaning in regard to the said will of 20th January 1900, to prevent the possibility of vagueness in construing the said will I do hereby mean by the College of Glasgow the University of Glasgow, and by the College of Edinburgh I mean the University of Edinburgh, and by the College of Aberdeen I mean the University of Aberdeen, and by the College of St Andrews I mean the University of St Andrews. I also wish and direct that the said Donald Macgregor be appointed factor over my whole estate, moveable and heritable, as long as he lives and is fit and proper to manage the estate. Further, in order to avoid the possibility of vagueness of any kind, I have to describe and explain that I particularly want the trustees to

erect on the top of the wall of the tower I built in Oban, statues in large figures of all my five brothers and of myself, namely, Duncan, John, Dugald, Donald, Peter, and of my father Malcolm, and of my mother Margaret, and of my sisters Jean, Catherine, Margaret, and Ann, and that these statues be modelled after photographs, and where these may not be available, that the statues may have a family likeness to my own photograph or any other member of my foresaid family, and that these statues will cost not less than one thousand pounds sterling, and that money to come out of the accumulated clear revenue. Should any vagueness of any kind crop up as to the trustees or the purposes of the trust to render it void from uncertainty judicially, in that case I name and appoint the Town Council of Oban Burgh and the chairman of the Parish Council of Kilmore and Kilbride, Oban, as trustees to manage the estate under the factorship of the foresaid Donald Macgregor, solicitor, Oban. Moreover, I wish and direct that the sum of three hundred pounds per year be paid to such of my brothers and sisters as may survive me as long as they live." The Court of Session did not accept the office of trustees under the said testamentary writings, and after the death of the said Duncan M'Caig on 22nd July 1902, and in August 1902 the said Donald Macgregor caused a petition to be presented to the Court of Session in the name of the present pursuer craving, *inter alia*, for his appointment as judicial factor on the estate of the said John Stuart M'Caig, and on 6th August 1902 he was appointed judicial factor *ad interim*. Answers to the said petition were lodged for the Burgh of Oban and the University of Glasgow, and on 15th January 1903 a minute was lodged in the process by the defenders the said University Court of the University of Glasgow, and by the University of Glasgow, in which the latter intimated their acceptance of the office of trustees under the said settlements, and the minutes craved for recall of the appointment of the said Donald Macgregor as judicial factor. No further interlocutor was pronounced in the said petition. The University Court of the University of Glasgow is incorporated under the Universities (Scotland) Act 1889, and is by said Act vested in all the property, heritable and moveable, belonging to the said University, with power to administer and manage the whole revenue and property thereof.

On 27th January 1903 the pursuer signed the deed now sought to be reduced. This deed was prepared in the office of the defender Donald Macgregor. It proceeded on the narrative that the pursuer was the only person who had any interest in or was entitled to any part of the estate of John Stuart M'Caig that might not be required for the purposes expressed in his deed of settlement and codicil or that might not be carried thereby, that the University of Glasgow had agreed to accept the same, and that she was desirous that the wish and intention of John Stuart M'Caig

should be carried out, and that the trust should last in all time coming. For that purpose she assented to acquiesce in, homologate, and ratify the settlement and codicil, and assigned and conveyed to the defenders the University Court of the University of Glasgow, for behoof of the University, all her right, title, and interest, present and future, original and accreting in and to the whole estate, heritable and moveable, real and personal, of the said John Stuart M'Caig, and in particular in and to that part of his means and estate, or such reversion therein, as might not be carried by the said testamentary writing. The deed further bore that the pursuer authorised the University Court, after the statues and two towers defined in the said writings had been erected, to apply the free revenue of the estate in creating, equipping, and endowing a chair to be called 'the John Stuart M'Caig Chair,' in the University of Glasgow, or otherwise for teaching sculpture, painting, music, or other fine art or kindred subjects; and if there should be any revenue available for that purpose that the same should be applied in teaching agriculture, including dairy and pastoral farming and gardening in such way as the said University Court should determine. The deed further contained, *inter alia*, clauses binding the pursuer to grant all deeds required for more fully vesting the University Court in the said estate, and empowering the University Court to sell that part of the estate treated by the said John Stuart M'Caig in the said testamentary writings as the Gasworks property, and to invest the free proceeds of the same in land or heritable property. The deed reserved to the pursuer during her lifetime the annual payment of £300 sterling provided by the testator to his brothers and sisters under the said codicil.

The pursuer averred—“(Cond. 5) On the death of the said John Stuart M'Caig, the defender Donald Macgregor, who had been his law-agent and factor, assumed entire charge of his affairs, and did not consult either the pursuer or her brother the said Duncan M'Caig, thereanent. . . . (Cond. 6) The pursuer on the death of the said John Stuart M'Caig made inquiries at the said Donald Macgregor concerning her brother's testamentary dispositions and her interest thereunder and in his estate. Mr Macgregor informed the pursuer that with the exception of the provision of £300 per annum mentioned in the said codicil she had absolutely no interest in or claim on the means and estate left by her said brother. The pursuer requested Mr Macgregor to show her the said testamentary writings, but he repeatedly refused her request, and at the date when the deed under reduction was signed by her she had not seen the said testamentary writings. The pursuer who, as was known to the said Donald Macgregor, had no independent advice on the subject, did not understand the true import and effect of said testamentary writings, and she expressed her desire to

Mr Macgregor that an opinion of counsel should be obtained as to the same. Mr Macgregor, however, did not obtain any such opinion, but put the pursuer off by assuring her that she had no claims whatever to the said estate with the exception of the yearly provision already mentioned. The pursuer was then over seventy years of age and infirm in health, and much affected and upset by the deaths of her two surviving brothers with whom she had resided, and she was by the said representations of Mr Macgregor, and in the absence of any advice or assistance, induced to believe and did believe that, apart from the provision in the said codicil, she had no interest whatever in the said John Stuart M'Caig's means and estate. (Cond. 7) The pursuer was in no way consulted by the said Donald Macgregor with regard to his intromissions with the means and estate of her said brother beyond being informed by him that he was in negotiation with the Glasgow University authorities as to their taking up the trust expressed by the said settlements. In or about the beginning of January 1903 the said Donald Macgregor called upon the pursuer, bringing with him an extended document which he represented to the pursuer required to be signed by her. The said Donald Macgregor did not explain to the pursuer the nature and effect of the said document, but stated that it required to be signed by her in connection with the carrying out of the provisions of the said John Stuart M'Caig's settlements. The pursuer relying upon that statement, and being at the time in weak health, and under the erroneous belief, induced by Mr Macgregor's representations referred to in the preceding article, that beyond the said provision of £300 per annum she had no interest whatever in her said brother's estate, signed the document, and it was taken away by Mr Macgregor. The said document was dated 7th January 1903. Subsequently, on or about 22nd January 1903, the said Donald Macgregor sent the defender a further document, which he explained to her required to be substituted for that signed on 7th January, and the pursuer, still relying on his representations as aforesaid, and under the said belief induced thereby, and in ignorance of the true effect of her brother's settlement and of the document in question, signed the said second document on 27th January 1903 and handed it to Mr Macgregor. Thereafter Mr Macgregor returned to the pursuer the document which she had signed on 7th January. (Cond. 8) Part of the heritable estate possessed by the said John Stuart M'Caig consisted of a *pro indiviso* half of certain property in John Square, Oban, the other *pro indiviso* half being owned by the pursuer's other brother the said Duncan M'Caig. On the death of the said Duncan M'Caig the pursuer became entitled as his heir-at-law to the *pro indiviso* half of this property which had belonged to him. In or about July or August 1903 the said Donald Macgregor called for the pursuer and re-

requested her to sign a document which purported to be a disposition by her in favour of the defenders the University Court of the University of Glasgow of all her right and interest in and to the said property in John Square, Oban. The said document bore that the said University Court had agreed to allow the pursuer the life interest use of the *pro indiviso* half of the said heritable property which had belonged to the said John Stuart M'Caig, and purported to reserve to the pursuer her life interest over the other *pro indiviso* half which had belonged to Duncan M'Caig, and to which she had succeeded as above mentioned. The pursuer, who had not instructed Mr Macgregor to prepare such a document, declined to sign it, as she had by that time begun to have doubts and misgivings as to the character and effect of the document which, as mentioned in the preceding article, had been signed by her on 27th January 1903, and also as to Mr Macgregor's representation and assurance to her that she had no interest in the property and estate of the said John Stuart M'Caig. Mr Macgregor left the said extended disposition with the pursuer, and it is herewith produced and referred to. (Cond. 9) Shortly after this the pursuer consulted a law-agent on the subject, and she was then for the first time made aware that the said testamentary writings of the said John Stuart M'Caig were of doubtful validity, and even assuming that the testator was of sound disposing mind at the date of their execution, that they did not dispose of his whole estate. In particular, she learned that the said writings did not make any provision for the disposal of the testator's moveable estate, and of the property therein described as the Gasworks property; and that so far as regards his heritable estate the trust purposes, or some of them, were invalid on the ground of vagueness and uncertainty, and further, that after fulfilment of the said trust purposes, so far as valid and sufficiently distinct to be operative, the settlement and codicils did not contain any ultimate provision for disposal of the heritable estate. The pursuer then further learned the terms of the deed signed by her on 27th January 1903. (Cond. 10) By the said will of the deceased John Stuart M'Caig the testator expressed the wish that the said Donald Macgregor should be continued by his trustees as local factor over all his estate, both moveable and real, at a legal remuneration for his work. The said Donald Macgregor had thus personally an indirect interest in obtaining from the pursuer, as the sole next-of-kin of her deceased brothers, the deed under reduction, which not only corroborates the said testamentary writings but also assigns to the defenders, as trustees, the whole of the deceased's estate which was not carried thereby, thus ensuring to the said Donald Macgregor a permanent appointment as factor on the whole of the said estates, heritable and moveable. It is believed and averred that the said Donald Macgregor stipulated with

the defenders the University Court before obtaining from the pursuer the said deed of corroboration and assignation that he should be retained as such factor. In preparing the said deed therefore and obtaining the pursuer's signature thereto in the manner before described the said Donald Macgregor, as was well known to the defenders, was not in a position in which he could give the pursuer independent advice as to her rights, and he did not act in her interest or on her behalf, but he acted on behalf of and under instructions from the defenders the University Court of the University of Glasgow, or the said University, or in his own interest as an individual, or both. At all events he did not act on the instructions or on behalf of the pursuer, who, as already mentioned, was never consulted with regard to the matter, and who never gave any instructions or directions as to the administration of her brother's affairs. The pursuer signed the said deed of corroboration and assignation not knowing its true meaning and effect, and in ignorance of the effect of her said brother's settlement and her rights in regard to her brother's estates, and in reliance on the representation of the said Donald Macgregor, and under the erroneous belief that she had no personal interest in the said John Stuart M'Caig's estate other than her interest in the said provision of £300 per annum. The said representation made by Mr Macgregor to the pursuer as aforesaid was false, and was made for the purpose of inducing, and did induce the pursuer to sign the said deed, and thus without any consideration to deprive herself of her whole rights and interests in the said John Stuart M'Caig's estate. Had the pursuer been aware of the doubtful validity of the said testamentary writings and of their being ineffectual to dispose of a great part of his estate, and of her rights as heir-at-law and next-of-kin of her said brothers, and of the true effect of the deed under reduction, she would never have consented to sign the same. (Cond. 11) The pursuer signed the said deed now sought to be reduced under essential error. At the time when she signed it she believed erroneously that she had no rights in the estate of her brother the said John Stuart M'Caig apart from the foresaid provision of £300 per annum. She was not aware that the said John Stuart M'Caig had not by his will disposed of the whole of his estate, and that she had a claim to the undisposed portion thereof as one of his next-of-kin, and as the next-of-kin and heir of his brother the said Duncan M'Caig. She was further unaware that the will of the said John Stuart M'Caig was of questionable validity on the ground of vagueness and uncertainty. She signed the said deed in ignorance of her said rights, and in ignorance of the fact that she was thereby parting with substantial rights and claims in and to the estate of the said John Stuart M'Caig. Had she been aware of the existence of said rights and claims she would not have signed the said deed.

(Cond. 12) The said deed of corroboration and assignation was delivered by the said Donald Macgregor to the defenders the University Court of the University of Glasgow, who have been called upon by the pursuer to return the same to her cancelled, but they refuse to do so, and the present action has become necessary. It is the intention of the pursuer, on the said deed being reduced, to take proceedings to have her rights in the estate of the said John Stuart M'Caig judicially determined."

The pursuer pleaded—“(1) The said deed of corroboration and assignation having been signed by the pursuer under essential error, induced by the misrepresentations and concealment of the said Donald Macgregor as acting for the other defenders, or in his own interest as an individual, the same should be reduced. (2) The pursuer having executed the said deed under essential error as to the substance and effect thereof, is entitled to have the same reduced. (3) The pursuer having executed the said deed under essential error as to her rights in the estate of her brother the said John Stuart M'Caig, and as to the effect of said deed in regard to these rights, is entitled to have said deed reduced. (4) The said deed ought to be reduced in respect it was executed by the pursuer *sine causa*, without independent legal advice, and in ignorance of and without adequate information in regard to her rights in the estate of her brother the said John Stuart M'Caig.”

The defenders the University Court of the University of Glasgow lodged defences, and pleaded, *inter alia*—“(2) The pursuer's statements are irrelevant. (3) The defenders having been induced to accept office as trustees in respect of pursuer having agreed to grant the deed in question, the pursuer is barred from insisting on the present action. (4) The pursuer's statements, so far as material, being unfounded in fact, these defenders should be assoilzied.”

The following issues were proposed by the pursuer—“(1) Whether the pursuer in granting the deed dated 27th January 1903, of which No. 8 of process is an official extract, was under essential error as to the substance and effect of the said deed? (2) Whether the pursuer was induced to grant the said deed by misrepresentation or concealment on the part of Donald Macgregor, solicitor, Oban? (3) Whether the said deed was granted by the pursuer gratuitously without independent legal advice and without adequate information in regard to her rights in the estate of her brother John Stuart M'Caig?”

On 7th June the Lord Ordinary (Low) approved of the following issues to be the issues for the trial of the cause—“(1) Whether the pursuer in granting the deed dated 27th January 1903, of which No. 8 of process is an official extract, was under essential error as to the import and effect of the said deed? (2) Whether in granting the said deed the pursuer was under essential error as to its import and effect, induced by Donald Macgregor, solicitor, Oban?”

*Note.*— . . . “The next question is how the case ought to be tried. The pursuer desires to go before a jury, while the defenders contend that the case is not suitable for trial by jury. I was at first disposed to think that the case would be better tried without a jury, because the circumstances are peculiar, and the case is not of the class which is appropriated to jury trial. At the same time, it is a case of a kind which is usually sent to a jury if the pursuer desires it, and I do not think that the presiding judge should have any difficulty in directing the jury in regard to any points of law which may arise upon the issues submitted to them. I have therefore come to the conclusion that I should not be justified in refusing issues.

“The first issue proposed by the pursuer is whether the pursuer in granting the deed under reduction ‘was under essential error as to the substance and effect of the deed.’ The defenders argued upon the authority of the decision of the House of Lords in *Stewart v. Kennedy* March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469, that essential error alone was not a ground for reducing a deed. I do not think that that is the import of the judgment in the House of Lords. What was sought to be reduced in that case was a contract, and what was laid down was that a contract could not be reduced on the ground of essential error on the part of one of the parties, unless that error was induced by the other party, or some one acting for him. The same rule would probably apply in the case of onerous unilateral obligations, but I think that it does not do so in the case of a purely gratuitous grant.

“I think that the case of *M'Laurin v. Stafford*, December 17, 1875, 3 R. 265, 13 S.L.R. 174, is an authority for that view. It was said for the defenders that that case had never been followed. It may be that a similar case has never come up for decision, but I know of no reason why the authority of the judgment (which was the unanimous judgment of Seven Judges) should be doubted. No doubt the deed in question in this case is not of the same kind as in the case of *M'Laurin*, but they have this vital element in common that in both cases the deed was granted gratuitously.

“In form the first issue proposed by the pursuer is that which was adjusted by the Court in *M'Laurin's* case, and I think that it ought to be approved. I would, however, suggest that the word ‘import’ should be used instead of the word ‘substance.’

“The second issue proposed by the pursuer is—Whether the pursuer was induced to grant the said deed by misrepresentation or concealment on the part of Donald Macgregor, Solicitor, Oban.

“I know of no authority for such an issue, and I do not think that it can be granted. It is not any or every misrepresentation or concealment which will justify the reduction of even a gratuitous deed. It might be proved that the pursuer was fully aware of the import and effect of the

deed, but was misled in regard to some unimportant details. That would not, I think, entitle her to have the deed reduced, but such a case would be covered by the issue proposed. It seems to me, however, that the record furnishes material for an issue, and that the pursuer is therefore entitled to an issue, to meet the possibility of her being found, when the facts are ascertained, to be barred from obtaining rescission on the ground of essential error alone, apart from misrepresentation as an inducing cause.

"I therefore propose to allow an issue in the form approved by the House of Lords in the case of *Stewart v. Kennedy*, namely, whether in granting the said deed the pursuer was under essential error as to its import and effect induced by Donald Macgregor, Solicitor, Oban.

"The pursuer proposes a third issue to the following effect:—'Whether the said deed was granted by the pursuer gratuitously without independent advice, and without adequate information in regard to her rights in the estate of her brother John Stuart M'Caig.'

"That appears to me to be practically a repetition of the issue of essential error with the exception of the part which refers to the absence of independent legal advice, and the fact that the pursuer had no independent legal advice, although it may be very important upon the question of essential error, is not, in my judgment, in itself a ground of reduction. I shall therefore refuse the third issue proposed."

The defenders reclaimed, and argued—(1) This was a typical case for trial by proof before a judge and not by a jury. It imported a serious charge against a professional man and involved intricate questions of law. The first impression of the Lord Ordinary was to send it to a jury, and this was the correct procedure—*Weir v. Grace* December 13, 1898, 25 R. 739, 35 S.L.R. 566. (2) In any event, the first issue should not be allowed. Essential error alone was not a sufficient ground for reducing a deed. *M'Laurin v. Stafford*, *supra*, was not applicable.

Counsel for the pursuer and respondent was not called on.

LORD JUSTICE-CLERK—I do not think it necessary to call for any further argument. This case seems to be very similar to that of *M'Laurin*, 3 R. 265. The action is brought to reduce a deed which is said to have been signed under essential error as to its import. The deed was entirely gratuitous, and I think the pursuer is entitled to the two issues in the form allowed by the Lord Ordinary. As regards the mode of trial, I am of opinion that the Court should not interfere with the judgment of the Lord Ordinary in such a case except on very strong grounds indeed. I think there are no such grounds here, and that the case should be tried by jury as the Lord Ordinary has decided.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—Cullen. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders and Reclaimers—The Lord Advocate (Dickson, K.C.)—Younger. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, June 7.

## SECOND DIVISION.

[Sheriff-Substitute at Hamilton.]

### UNITED COLLIERIES, LIMITED

v. M'GHIE.

*Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 2 (c)—Serious and Wilful Misconduct—Accident Due to Absent-Mindedness—Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), secs. 51 and 52—Contravention of Special Rules.*

A miner engaged in driving a loaded hutch in a seam of a colliery, opened the gate which led to the shaft without signalling for the cage to be brought to the gate. He then pushed the hutch forward, with the result that it fell down the shaft, dragging him after it, whereby he sustained fatal injuries. In an arbitration under the Workmen's Compensation Act the Sheriff found that the workman had acted as he did "presumably from absent-mindedness," and that in opening the gate without signalling for the cage he had contravened Rule 3 of the Additional Special Rules adopted in the mine under the provisions of the Coal Mines Regulation Act 1887. Held that the miner's conduct amounted to serious and wilful misconduct within the meaning of section 2 (c) of the Workmen's Compensation Act.

This was a case stated for appeal by the Sheriff-Substitute at Hamilton, acting as arbitrator under the Workmen's Compensation Act 1897, in an arbitration at the instance of John M'Ghie, miner, Bells-hill, respondent, against the United Collieries, Limited, appellants.

The case set forth the facts as follows— "This claim is made by the respondent in consequence of the death of his son James M'Ghie, who resided at Millheugh Bridge, Larkhall, upon whom, as is alleged, he was totally dependent, and whose death took place upon 11th June 1903 from injuries received upon 10th June while in the course of his employment by falling down the shaft from the Virtuewell seam to the Kiltongue seam in Skellyton Colliery, Larkhall, belonging to the appellants. The case was heard before me upon the 23rd December 1903, when the following facts were admitted or proved—(1) That on 10th June 1903 the deceased James M'Ghie was a driver and bottomer in the Virtuewell