

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

seam of the Skellyton Colliery, Larkhall, occupied by the respondents, and as such was a 'workman' within the meaning of the Workmen's Compensation Act 1897; (2) that on said date the deceased drove a loaded hutch to the gate which fences off said seam from the shaft, and having unyoked the pony which drew the hutch, opened the gate without signalling for the cage to be brought to the gate; (3) that the cage at the time was not opposite the gate, but was down the shaft at the Kiltongue seam, twenty fathoms below the Virtue-well seam; (4) that the deceased, presumably through absent-mindedness, failed to notice (although there was sufficient light to enable him to do so) that the cage was not at the gate, and proceeded to push the hutch from behind till it fell down the shaft; (5) that the deceased was drawn after it, and was fatally injured by the fall; (6) that the respondent is the father of the deceased, and was partially dependent upon him, receiving from 7s. 6d. to 10s. per week out of the deceased's wages, which were at the rate of £1, 9s. 4d. per week. In these circumstances I found that the deceased had contravened rule No. 3 of the Additional Special Rules adopted in the colliery under the provisions of the Coal Mines Regulation Act 1887, but was not guilty of serious and wilful misconduct; that the accident arose out of and in the course of deceased's employment, and I awarded respondent £60 as compensation."

The following questions of law were stated—“(1) Do the circumstances above set forth amount to serious and wilful misconduct within the meaning of said Act? (2) Deceased having contravened said rule, does the assumption that said contravention was due to absent-mindedness on his part negative the respondent's plea of serious and wilful misconduct? (3) Said rule having been contravened by deceased, does this fact amount to serious and wilful misconduct in the absence of any proved excuse for said contravention? (4) Would absence of mind alone constitute a valid excuse for the breach of said rule?”

The Workmen's Compensation Act 1897 enacts, 2 (c)—“If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.”

The Coal Mines Regulation Act 1887 provides (section 51) for the establishment of special rules in every mine, and enacts, section 51 (3)—“If any person who is bound to observe the special rules established for any mine acts in contravention or fails to comply with any of them he shall be guilty of an offence against this Act.”

Section 52 provides for the approval of such special rules by a Secretary of State.

By Rule 3 of the Additional Special Rules adopted by the United Mining Association of Scotland, approved under the provisions of section 52, and adopted in the Skellyton Colliery, it is provided—“The bottomer at a mid-working in a vertical shaft not provided with an appliance which constantly fences the shaft, being a mid-

working in use for the regular passage of workers or the drawing of minerals from the mine, shall not open the gate fencing the shaft until the cage is stopped at such mid-working, and he shall not signal the cage away until he has closed the gate, and shall not permit any other person to open the gate while he is on duty.”

In argument the following cases were cited:—For the Appellants—*Callaghan v. Maxwell*, January 23, 1900, 2 F. 420, 37 S.L.R. 313; *Davly v. Watson Limited*, June 19, 1900, 2 F. 1044, 37 S.L.R. 782; *O'Hara v. Cadzow Colliery Company*, February 6, 1903, 5 F. 439, 40 S.L.R. 355; *Condron v. Gavin Paul & Sons*, November 4, 1903, 6 F. 29, 41 S.L.R. 33. For the Respondents—*MacNicol v. Speirs, Gibb & Company*, February 24, 1899, 1 F. 604, 36 S.L.R. 428; *Lynch v. Baird & Company*, January 16, 1904, 41 S.L.R. 214.

This interlocutor was pronounced:—

“The Lords sustain the appeal: Answer the first question of law therein stated in the affirmative: Find it unnecessary to answer the other questions: Therefore recal the award of the arbitrator and remit to him to dismiss the claim and decern.”

Counsel for the Appellants—Salvesen, K.C.—R. S. Horne. Agents W. & J. Burness, W.S.

Counsel for the Respondent—G. Watt, K.C. — Moncrieff. Agents — Simpson & Marwick, W.S.

Saturday, July 2.

FIRST DIVISION.

[Lord Pearson. Ordinary.]

NORTH BRITISH RAILWAY COMPANY v. TURNERS LIMITED.

Railway—Property—Sale for Specified Purpose—Right to Adjacent Support.

Held that a grant of lands for a specified purpose, such as the construction of a canal or railway, whether voluntary or by force of statute, in the absence of evidence of contrary intention appearing *ex facie* of it, carries by implication the right to reasonable and necessary support for the undertaking contemplated from the adjacent lands of the grantor, and that the obligation to support once established affects the lands and renders liable in damages a subsequent owner thereof whose operations have withdrawn the support; and consequently that a railway company was entitled to decree in an action concluding for interdict and damages against the owner of an adjoining claypit whose workings had caused a subsidence of the line.

Railway—Minerals—Clay—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), secs. 70 and 71.

Held that common clay forming the sub-soil of a district was not a mine