

the benefit of the company's creditors. The mortgagee has therefore the security of the real property, which is what is meant by a real security. The pursuers, however, maintain, on the authority of *Mant v. Leith*, 15 Beav. 524, that a railway mortgage is not within the power given to the trustees, even assuming it to be a real security. There is much weight in the considerations stated by the Master of the Rolls against the eligibility of such securities. But it cannot be held in Scotland that they are improper investments so as to infer personal liability against the trustees, who have selected them in the exercise of a power expressly conferred by the trust-deed, since they are investments which the Legislature has empowered all trustees to make unless they are expressly prohibited by the deed. It may be that the investment in question could not be supported by the subsequent enactment of the Trusts Amendment Act if it were not within the class of securities authorised by the trust itself. But the Act appears to me to suggest a sufficient answer to the argument founded on *Mant v. Leith*, that a railway mortgage is in its nature so improper an investment that trustees will not be justified in selecting it even if it be shown to fall within a general power conferred upon them by the trust. It is not suggested that if they were entitled to invest in railway mortgages at all, the defenders were negligent in their selection of the mortgage in question, or that the Girvan and Portpatrick Railway Company was not in good credit when the investment was made."

The pursuers reclaimed, and argued—This investment was not a legal one for the trustees to make under the conditions of the will. That authorised them to make investments on "real securities," and a mortgage over a railway company's property was not a real security, because (1) the security rested only on the success of a trading speculation, and not upon the security of real property transferred to the trustees; that had been held in England to be a bad security for trustees—*Whitely v. Leayroyd*, March 16, 1886, 32 L.R., C.D.196; and (2) because the security could not be affected by the ordinary diligences as applicable to real property—*Mant v. Leith*, March 13, 1852, 15 Beav. 524. In the Trust Act 1867 (30 and 31 Vict. c. 97), trustees were not empowered to borrow money on railway mortgages, but they were by the Trust Act 1884 (44 and 45 Vict. c. 84), sec. 3.

The defenders argued—The questions raised were (1) Whether a mortgage over a railway company's property was an investment on "real security," and there was no doubt that it was. But, secondly, it was a good investment for trustees to make, and there was no allegation that the trustees had acted fraudulently or even negligently. The Court of Session by instructions to its own officers, judicial factors, &c., had allowed them to invest funds on railway securities—*Lloyd's Curator*, December 1, 1877, 5 R. 289; Accountant of Court's Memorandum, December 12, 1877, quoted in *Thoms' Judicial Factors* (2d ed.) 76. If judicial factors could be allowed to make such investments, then trustees might also.

At advising—

LORD JUSTICE-CLERK—I do not think there is

any ground for interfering with the judgment of the Lord Ordinary. The procedure which was mentioned by Mr Gillespie forms a strong commentary on the matter. The Legislature and the Court have sanctioned investments of this kind where there was no restriction, and it does not seem to me that on the ground that this was not an investment on real security we should interfere with the actings of the trustees, as it was a good investment when made. This was a real security, because the loan does not depend on personal security, but on the security of the company's undertaking, and also because there is a right in real property conveyed by the security. I therefore think we should adhere to the Lord Ordinary's interlocutor.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuer—Chisholm. Agents—Wallace & Begg, W.S.

Counsel for Defenders—Gillespie. Agents—Tait & Johnston, S.S.C.

Wednesday, January 12.

SECOND DIVISION.

[Sheriff Court of Lanarkshire.]

CONGLETON v. ANGUS.

Reparation—Master and Servant—Fellow-Servant—Common Employment.

A firm of carting contractors were employed by the owner of certain bags of grain to remove it to a store kept by a store-keeper. While a carter in their employment was assisting, according to his duty, in sending the grain up to the fifth floor of the building, where it was to be stored, a bag of grain fell upon him through the fault of one of the men in the employment of the store-keeper, and caused injuries which resulted in his death. Held that the case was ruled by *Woodhead v. The Gartness Mineral Company*, February 10, 1877, 4 R. 469; and *Maguire v. Russell*, June 10, 1885, 12 R. 1071, and that the store-keeper was not responsible, the deceased having been engaged in a common organisation of labour with the man who was in fault.

David Bannerman, grain merchant in Glasgow, employed Robert Buchanan & Son, carting contractors, Robertson Street, Glasgow, to deliver for him a quantity of wheat in bags at the stores of James Angus, a forwarding agent and general storekeeper in Robertson Street, Glasgow. On 16th September 1885 a lorry belonging to Robert Buchanan & Son, laden with the wheat bags, and under charge of James Congleton, a carter in their employment, was discharging the bags at Angus's store. The bags were raised to the fifth storey of the building by means of a chain or rope attached to a hoist which was worked by a man underneath. A man named

Gilchrist, who was in the employment of Angus, was standing in a door on the fifth storey to receive the bags when they were hoisted up. The bags were slung by Congleton, who then had the duty of attending to the guy-rope to steady the bag as it ascended. One of the bags fell from the height of the fifth storey owing to a fault on the part of Gilchrist in letting it go, and it fell upon Congleton, and injured him so much that he died.

His widow raised an action of damages concluding for £5000. She averred that the accident happened through the negligence of Gilchrist. She also averred that Gilchrist, who was an old man, was unfit by age and infirmity for the work, and that the defender was in fault in not having appointed a fit and competent person to do the work.

The defender pleaded, *inter alia*, that the pursuer was not entitled to damages for the death of the deceased, seeing that it was due to the fault of a person or persons engaged in a common employment with him.

On 23d June 1886 the Sheriff-Substitute (LEES) pronounced this interlocutor—"Finds that on 16th September 1885 William Black Congleton, otherwise known as William Black, now deceased, was sent by Robert Buchanan & Son, carting contractors, in whose service he was then employed, to carry certain wheat belonging to David Bannerman, grain merchant, Glasgow, to the defender's store in Robertson Street, there to be stored: Finds that one of the bags of wheat having been raised to the fifth storey of the store was, by the default of John Gilchrist now deceased, a servant of the defender, allowed to fall on the said William Black Congleton or Black, whereby he was injured so severely that he had to be taken to the infirmary, where he remained under treatment till his death in March last: Finds that in these circumstances the pursuers, as being the widow and children of the said William Black Congleton or Black, are entitled to reparation from the defender for the loss they have suffered through the fault of the defender's servant acting on his behalf: Therefore repels the defences, and decerns against the defender for payment to the pursuer Catherine Mullen or Congleton, otherwise known as Catherine Mullen or Black, the widow of the deceased, of the sum of £100, and to James Congleton as tutor-at-law on behalf of the other pursuers James Congleton and Elizabeth Congleton, of the sum of £150, being £75 to each of the said James and Elizabeth Congleton, with the legal interest on said sums from the date hereof till payment: Finds the defender liable to the pursuers in expenses, &c.

"*Note.*—... The defender further urges that the two deceased were in a common employment—that is, I presume, in his employment. The principle of common employment has certainly been extended so as to cover a good deal, but I am not aware of any case in which it has been stretched to this extent. The recent case of *Gorman v. Morrison* [June 10, 1885, 12 R. 1073] seems adverse to this view, and I may also refer to the cases of *Wylie v. Caledonian Railway Company*, 9 Macph. 463; *Calder v. Caledonian Railway Company*, 9 Macph. 833; and *Adams v. Glasgow and South-Western Railway Company*, 3 R. 215, and to the case of *Barclay v. Paton, Brown, & Company* [decided in the Sheriff Court of Lanarkshire, 27th April 1886]."

The defenders appealed to the Court of Session, and argued—The accident here was admittedly due to the fault of Gilchrist, a man in the defenders' employment (for the appellant did not dispute the Sheriff's judgment on the facts), but the pursuer and he were engaged in a common employment, and thus this case came within the principle of the case of *Woodhead* (quoted *infra*). That principle was that a man who entered into an employment was bound to take the risks incidental to that employment, and the example of fellow-workmen was merely an illustration of a much larger principle. It was not necessary to constitute "common employment" that all the workers were paid by the same master. There were two cases which would be cited against the defenders' view of this case—*Abraham v. Reynolds and Another*, January 12, 1860, 5 H. & N. 143; *Wylie v. The Caledonian Railway Company*, January 27, 1871, 9 Macph. 463. These cases were really inconsistent with, and must be held as overruled by, the doctrine of *Woodhead v. The Gartness Mineral Company*, February 10, 1877, 4 R. 469. That case was followed in *Wingate v. The Monkland Iron Company*, November 8, 1884, 12 R. 91; *Maguire v. Russell*, June 10, 1885, 12 R. 1071. The English cases were—*Rourke v. The White Moss Colliery Company*, May 3, 1876, L.R., 1 C.P.D. 556; *Lovell v. Howell*, February 16, 1876, L.R., 1 C.P.D. 161. *Wilson v. Merry & Cunningham*, May 29, 1868, L.R., 1 Sc. App. 332, was also in the defenders' favour. *Gregory v. Hill*, Dec. 14, 1869, 8 Macph. 282, must now, since *Woodhead's* case, be regarded as an authority in the defenders' favour.

Argued for the respondents—The case of *Abraham v. Reynolds* had been distinguished and saved in the case of *Woodhead*, and therefore, the facts being quite analogous, was an authority on this case. There was not here any common employment. Gilchrist and Congleton were not under one master, or members of one organisation. They were working for different ends—*Wylie* (quoted *supra*); *Calder v. The Caledonian Railway Company*, June 16, 1871, 9 Macph. 833; *Adams v. The Glasgow and South-Western Railway Company*, December 7, 1875, 3 R. 215. The present case more nearly resembled *Gorman v. Morrison* than *Maguire*, and *Wylie's* case, the authority of which was expressly saved in that of *Woodhead*, was entirely in point.

At advising—

LORD CRAIGHILL—This is an appeal from the judgment of the Sheriff Court of Lanarkshire at Glasgow in an action at the instance of the respondent Mrs Congleton against the defender Angus for damages, claimed on the ground that the respondent's husband suffered injuries, resulting in his death, through the fault of the defender. The circumstances of the case are these—Mr Bannerman, a corn merchant in Glasgow, employed Robert Buchanan & Son to carry from the place in which for the time it was stored a quantity of wheat to a store in Robertson Street, Glasgow, which was at the order of the defender. There were two contracts for the performance of this work. One was with Robert Buchanan & Son, carting contractors, and the other with the defender. The work to be done by Buchanan & Son was not merely to carry wheat to the building of which the store was a part, but to assist

in raising the wheat from the lorry to the store, which was on the fifth floor of the building. Under the other contract the wheat was not merely to be stored, but assistance was to be rendered by the defender in raising it from the lorry to his premises. And thus it came to pass that there was in the raising of the wheat to the loft a contribution of service by Buchanan & Son and a contribution of service by the defender, each through his servant assisting in raising the wheat from the cart to the store. In other words, this part of the contract was a joint work, or a work which constituted a joint employment.

Such were the contracts and such the work to be done. The husband of the pursuer was the carter employed by Buchanan & Son. He carted the wheat in question on the day on which the accident occurred to the premises of the defender, and also assisted in the raising of the sacks. Gilchrist, a servant of the defender, was also employed in this work—his part being to receive the bags as they severally were raised, to release them from the sling in which they were hoisted, and then to place them in the part of the loft where they were to be kept. One of the bags had been raised to the level of the loft. Gilchrist caught the bag, but through some failure on his part the bag, in place of being brought into the loft, slipped from Gilchrist's hands, fell upon the pursuer's husband, and injured him so that he died. Damages are now sued for, and the question is, whether in these circumstances the pursuer is entitled to recover? Two grounds of liability are alleged. The first is, that Gilchrist was not fit for the work to which he was put by the defender. Were this established, personal fault would be brought home to the defender, and the liability of the latter would be a necessary result. But what has been alleged has not been proved. Indeed, the contrary has, I think, been established. The other ground of liability is, that there was fault on the part of Gilchrist in allowing the bag to slip from his hand, and that for this fault the defender must answer. That there was fault on the part of Gilchrist was not disputed at the debate. What was insisted on by the counsel for the defender was, that as Congleton, the pursuer's husband, and Gilchrist were engaged in a common work or employment, the master of the one servant is not answerable for the fault of the servant of the other. This view of the law appears to me to be supported by the case of *Woodhead*, July 10, 1877, 4 R. 469, by the case of *Wingate*, November 8, 1884, 12 R. 91, and by the case of *Maguire*, June 10, 1885, 12 R. 1071. The principle upon which these three cases were decided—and they are the latest decisions upon the subject—covers the present case, and consequently I think that the interlocutor complained of by the defender must be recalled and the appeal sustained. There are, no doubt, earlier cases, the application of some of which to the present would not only justify but call for an opposite decision, and an ingenious attempt was made on the part of the respondent to show that not the more recent but the earlier cases ought to govern the decision on the present occasion. In this, however, he did not succeed. The applicability of the more recent cases to the present seems to me to be perfectly plain, and unless these are to be disregarded our decision

must be in conformity with the views of the law upon which they were determined. Once a plain ground of judgment has been adopted by the Court, not on one but on several occasions, trivial differences of facts not affecting the principle of decision are not a ground on which a different judgment should be pronounced.

LORD RUTHERFURD CLARK—I am of the same opinion. The case is ruled by the cases of *Woodhead* and *Maguire*, and that being so, there is an end of the matter.

LORD TRAYNER concurred.

The LORD JUSTICE-CLERK and LORD YOUNG were absent.

The Court pronounced this interlocutor:—

“Find (1) that in September 1885 David Bannerman, grain merchant in Glasgow, employed Robert Buchanan & Son, carting contractors there, to deliver at the defender's store in Robertson Street, Glasgow, a quantity of wheat in bags; (2) that William Black Congleton, then in the service of the said Robert Buchanan, accordingly carted the said wheat to the said store; (3) that it was his duty to deliver it there, and in doing so to sling the bags before they were hoisted from the cart or lorry to the fifth storey of the building in which they were to be stored, and to guide the guy-rope of the chain by which they were hoisted; (4) that John Gilchrist, a servant of the defender, received the bags as they were hoisted to the said storey, and while so engaged allowed one of them to slip from his hold, when it fell upon Congleton and so injured him as to cause his death; (5) that this fault on the part of Gilchrist was the cause of the accident, as at the debate was admitted by the defender; (5) that the employment in which he and Congleton were thus engaged was a common employment and for a common purpose, and was undertaken by Congleton with all its risks: Find in law that these being the facts, the defender is not responsible for the injury sustained by Congleton, and is not liable in compensation to the pursuer as representing him: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against, assolzie the defender,” &c.

Counsel for Pursuer (Appellant)—Graham Murray—Ure. Agents—Drummond & Reid, W.S.

Counsel for Defenders (Respondents)—Macfarlane—Patrick Smith. Agent—W. R. Patrick.