

I may refer to my opinion given to-day in the case of *M'Dougall v. Nisbet* for a further examination of the statutory provisions applicable to the case.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Petitioner and Respondent—Lees, K.C.—Craigie. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders and Appellants—Campbell, K.C.—T. B. Morison, Agents—Webster, Will, & Company, S.S.C.

Saturday, November 19.

FIRST DIVISION.

[Sheriff Court at Paisley.]

MACKIE v. J. & R. RAMSAY.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), secs. 7 (1) and (2)—Undertakers—Occupier of Factory—Purchase of Grain Stored in Warehouse—Factory and Workshop Act 1901 (1 Edw. VII, c. 22), sec. 104.

A firm of grain millers bought from certain grain merchants a quantity of peas, being a portion of a larger mass of peas lying in bulk in a store belonging to a third person. At the date of the sale the purchasers received from the sellers a delivery-order for the quantity of peas purchased out of the mass of peas in the store. Upon the purchasers taking delivery the peas were shovelled into bags by the servants of the warehouseman from the mass in the warehouse, and lowered by the servants of the warehouseman by means of a sling to a lorry in the street below. In the course of this operation one of the full bags fell upon and killed a carter in the employment of the purchasers who was receiving them on the lorry.

In a claim by the representatives of the deceased carter under the Workmen's Compensation Act 1897 against his employers, *held* that the purchasers were not occupiers of the warehouse in the sense of the Factory and Workshop Acts, and therefore were not undertakers within the meaning of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) enacts—Sec. 7 (1)—“This Act shall apply only to employment by the undertakers . . . on or in or about a . . . factory.” Section 7 (2)—In this Act . . . “factory” has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any . . . warehouse . . . to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895.” . . . “Undertakers” in the case of a factory . . . means the occupier thereof within the

meaning of the Factory and Workshop Acts 1878 to 1895.”

The Factory and Workshop Act 1901 (1 Edw. VII, c. 22), which came in place of the Factory and Workshop Acts 1878 to 1895, enacts—sec. 104— . . . “For the purpose of the provisions of this Act the person having the actual use or occupation of a . . . warehouse, or of any premises within the same or forming part thereof . . . shall be deemed to be the occupier of a factory.”

This was an appeal on a stated case from a decision of the Sheriff-Substitute at Paisley (LYELL) in an arbitration under the Workmen's Compensation Act 1897 between Mrs Annie Adam or Mackie, 3 Kilnside Road, Paisley, as an individual and as tutor of her pupil children, the claimant and respondent, and J. & R. Ramsay, Seedhill Mills, Paisley, the appellants.

The facts proved were stated in the case as follows:—“On 11th March 1904 the appellants bought in the Corn Exchange, Glasgow, from Messrs John Jackson & Company, grain importers, Glasgow, 200 bolls of peas, which peas formed portion of a larger parcel of about 600 bolls belonging to Messrs Jackson, and then lying in bulk at the store of Mr William Finlay, warehouseman, 87 Lancefield Street, Glasgow. This store is a building of considerable size exclusively devoted to the business of warehousing grain in bulk and bags for brokers and wholesale houses, and a notice under the Factory and Workshops Act is exhibited in the building. At the time when the contract of sale was made the appellants, who are grain millers in Paisley, received from Messrs Jackson, the sellers, a delivery-order entitling them forthwith to take delivery of the said 200 bolls at the said store, but by custom of trade and under the rules of the Glasgow Corn Trade Association, in accordance with which the contract was entered into, the appellants might take delivery in such instalments as they might from time to time require within fourteen days from the date of the sale, during which time the appellants were not liable for storage, and the goods lay in the store at the risk of the sellers. Goods such as these when sold *ex store* are proportionately dearer than goods *ex quay*, the difference in price being exacted to cover, *inter alia*, the seller's liability for storage during the said fourteen days. On the 19th and 21st of March respectively the appellants took delivery of a portion of the peas, and on the 22nd March they sent the late Joseph Mackie, husband of the respondent, who was then a carter in their employment, to take delivery of thirty-one bags of the said peas. The peas were shovelled into bags by the servants of the warehouseman, Mr Finlay, from the bulk that was lying on the floor of the third storey of the store, and the full bags were then lowered also by the servants of Mr Finlay, by means of a sling, to the lorry standing on the street below, where the deceased Joseph Mackie was receiving them. In the course of the operations one of the full bags slipped either from the sling or the window, crushed Mackie beneath its weight, and killed him.

It was admitted that since the initiation of the present proceedings the respondent has raised an action of damages against Mr Finlay on account of the death of her husband, and that she has also taken proceedings against him for compensation under the Workmen's Compensation Act 1897. These latter proceedings were taken so as to bring the claim within the statutory six months."

The Sheriff-Substitute held "that the property in the 200 bolls of peas passed to the appellants when the contract was made; that the store is a warehouse within the meaning of the Factory and Workshop Act 1901 and the Workmen's Compensation Act 1897; that on the 22nd March 1904 the appellants were persons having the actual use of the portion of the warehouse where their peas were stored, and therefore must be deemed occupiers of a factory within the meaning of the 104th section of the Factory and Workshop Act 1901, and as such occupiers the undertakers within the meaning of the Workmen's Compensation Act 1897, section 7, and therefore liable in compensation."

The questions of law stated for the opinion of the Court were—"(1) Is the respondent barred from proceeding with this application in respect that she has also raised the other actions specified? (2) Is the said store a warehouse within the meaning of the statutes? (3) If so, were the appellants on 22nd March 1904 persons having the actual use of the warehouse, and as such occupiers of a factory within the meaning of the 104th section of the Factory and Workshop Act 1901? (4) If so, were the appellants on the occasion libelled undertakers within the meaning of the Workmen's Compensation Act 1897, section 7 (2)?"

By the consent of both parties it was found unnecessary to answer the first question, and it was conceded by the appellants that the second question should be answered in the affirmative.

On questions (3) and (4) it was argued by the appellants that the property in the 200 bolls of peas did not pass to them when the contract was made, as the 200 bolls bought had not been separated from the bulk, and the sellers continued to pay for the storage—*Hannen v. Craig & Rose*, February 4, 1859, 21 D. 433; *Anderson & Crompton v. Walls & Co.*, November 15, 1870, 9 Macph. 122. The sale was one of unascertained goods, and until particular goods were appropriated to the contract the whole remained the property of the sellers. At the time of the accident the bag of peas which fell on Mackie was still under the charge of the servants of the warehouseman and had not been delivered to the appellants. Even if the property had passed to the appellants they were not "occupiers" of the warehouse in the sense of the Factory Acts. The "occupiers" under the Factory Acts meant the person having the control of the factory and responsible for the observance of the provisions of the Acts.

Argued for the respondent—It was expressly provided by section 7 (2) of the

Workmen's Compensation Act that "factory" included a warehouse. Also "undertaker," as employed in section 7 (1) of the Act, meant in the case of a factory the "occupier" of the factory. By section 104 of the Factory and Workshop Act 1901 (which had come in place of the Factory and Workshop Acts 1878 to 1895) the "occupier" was the person having the "actual use" of a warehouse or of "any premises within the same or forming part thereof." Here the appellants undoubtedly had the "actual use" of the warehouse, or at least of "part thereof." The peas purchased by them became their property either on the presentation of the delivery-order or on their being separated from the larger heap and filled into sacks for delivery. Prior, then, to the time of the accident the position was that a quantity of peas, the property of the appellants, was lying in this warehouse, and under section 104 of the Factory and Workshop Act 1904 this fact made the appellants "occupiers" of the warehouse and therefore "undertakers" in the sense of the Workmen's Compensation Act.

LORD PRESIDENT—The questions involved in this case are short, but after considering them with the aid of the able argument of counsel I think it is impossible to uphold the judgment of the Sheriff-Substitute. There are four questions altogether, but it is not necessary that the first should be answered, and it is conceded by the appellants that the second question must be answered in the affirmative. The third question is as follows. [*His Lordship read the third question.*] The appellants bought from Messrs John Jackson & Company, grain importers, Glasgow, 200 bolls of peas, which were a portion of a larger parcel of 600 bolls belonging to Messrs Jackson, and were then lying in bulk in the store of Mr William Finlay. No peas were separated from the mass and set aside for the appellants or otherwise appropriated to their contract. They had no right to any particular peas, but merely a right to receive delivery of 200 bolls out of a mass. The peas were shovelled into bags by the servants of the warehouseman from the mass lying on the floor of the warehouse, and lowered by a sling to a lorry on the street below, where the deceased Joseph Mackie was receiving them. One of the full bags slipped either from the sling or the window and crushed Mackie to death.

When the accident happened the peas were still in the hands of the servants of the warehouseman and had not been delivered to the appellants. It thus becomes necessary to consider the application of section 104 of the Factory and Workshop Act 1901 to the circumstances of the case. [*His Lordship read the 104th section.*] The question therefore comes to be, whether the appellants were at the time of the accident occupiers of the warehouse within the meaning of section 104. I am clearly of opinion that they were not. The appellants had not at the time of the accident received delivery of the peas contained in

the bag which slipped. These peas were still in the hands of the warehouseman by his servants, and they were not lowering them as the property of the appellants but of the sellers, and they would not become the property of the appellants until they were delivered to and accepted by them.

The result, in my opinion, is that the third question, whether the appellants were occupiers of a factory within the meaning of the Act must be answered in the negative. The only person other than the keeper of the warehouse who could in any reasonable sense be said to be in the actual use and occupation of the store was the owner of the peas. If 200 bolls had been set apart for and accepted by the appellants in the warehouse so that the warehouseman was keeping these particular bags of peas for the appellants I could have understood the contention of the respondents. But as matters actually stood it appears to me that the appellants were not occupiers of the warehouse at the time of the accident. I therefore think the Sheriff-Substitute has erred, and that the 3rd and 4th questions should be answered in the negative.

LORD M'LAREN—The injury or cause of action out of which these proceedings have taken shape was that the husband of the respondent lost his life by a bag of peas falling upon him from the window of a warehouse while he was engaged in taking delivery. The accident was a sad one, and happened to a man whose employment did not involve risk. It suggests that someone was to blame, and I understand the question of responsibility is to be sifted in another proceeding. In this proceeding it is not necessary to allege fault against anyone. The Workmen's Compensation Act gives a workman a claim to compensation against his employer on certain conditions, and the only question is whether the workman in this case is within the conditions. An endeavour has been made to bring this case within section 7 of the Act of 1897, it being pointed out that for certain purposes a warehouse is a factory. Section 7 (2) enacts that "factory" includes any "warehouse" to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895. This is the first element in the construction of the statute for the purposes of the case. The second element is that the word "undertakers" as used in section 7 (1) is defined in section 7 (2) to mean, in the case of a factory, the occupier thereof within the meaning of the Factory and Workshop Acts. With these definitions in view we come to the concrete question, whether in the sense of the Compensation Act and the Factory Acts the employer of a carter who was sent to a warehouse to take delivery of the peas sold to him is to be regarded as the occupier or an occupier of the warehouse within which the bags of peas were stored. While the language is wide in order to prevent evasion, yet "occupier" plainly means the person who runs the factory or warehouse, who regulates and controls the work that is done there, and who is responsible for the

fulfilment of the provisions of the Factory Acts within it. This cannot be predicated of a person who had a mere casual interest in the warehouse by being the owner or purchaser of a parcel of goods stored in the warehouse. In my reading of the statute it would make no difference—I speak with all due reserve—whether the injured man was employed by the seller or the purchaser of the goods to take them away. I am clearly of opinion that a person who merely gets the ordinary trade use of a warehouse for storing his goods in it is not an occupier of the warehouse in the sense of the Act of Parliament. That would make absolute nonsense of the Act, and therefore I come very clearly to be of opinion that the representatives of this workman had no claim against his employer on the ground that he was occupier of a factory.

LORD KINNEAR—I am of the same opinion. I quite agree with your Lordship that as this was a sale of unascertained goods the property could not pass until specific goods of the description purchased were unconditionally appropriated to the contract.

But the question which we have to determine does not so much depend on the relation of the buyer and the seller as on the relation of the buyer to the warehouseman.

We are told that Messrs Jackson, who were the owners of 600 bolls of peas then lying in bulk at the store of Mr Finlay, sold part of them and handed to the purchasers a delivery-order for the part sold. The purchaser had thus no interest whatever in the warehouse, and no concern with the warehouseman except that he held a delivery-order on presentation of which he would be entitled to demand delivery of a certain quantity of peas to be taken out of a larger quantity held by the warehouseman for the vendor. In the meantime the peas stored in the warehouse do not belong to the purchaser, he is not liable to pay the storage rent, and he has no contract of any description with the warehouseman. I am quite unable to see that he is in any intelligible sense the occupier of the warehouse. But the Sheriff-Substitute finds that he was the occupier in order to show that as the occupier of the warehouse he was occupier of a factory within the meaning of the Factory Acts, and therefore liable as the undertaker within the meaning of the Workmen's Compensation Act for injuries suffered in or about the warehouse. But the specific ground on which the Sheriff-Substitute holds that the appellants are undertakers is that they are occupiers within the definition of section 104 of the Factory and Workshop Act 1901. If that is sound, all the provisions of the Act for the use of dangerous machines for the prevention of accidents and for the regulation of dangerous trades are imposed, not upon persons having any kind of superintendence or control of a factory or its machinery, but upon anybody who happens to present a delivery-order, and it follows that these unfortunate customers of the customers of the warehouse must be made liable in the statutory fines for non-performance of the statu-

tory duties imposed upon them. I think it quite impossible to hold anything of the kind.

I have no doubt therefore that the Sheriff-Substitute's decision must be altered, and that the judgment proposed by your Lordship is right.

LORD ADAM was absent.

The Court recalled the findings of the Sheriff-Substitute and answered the third and fourth questions in the negative.

Counsel for the Claimant and Respondent—Orr—W. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Appellants—The Lord Advocate (Dickson, K.C.)—Constable. Agents—Simpson & Marwick, W.S.

Tuesday, November 22.

FIRST DIVISION.

[Exchequer Cause.

INLAND REVENUE v. CADWALADER.

Revenue—Income-Tax—Liability to be Assessed for Income-Tax—Residing in United Kingdom—Income-Tax Act 1853 (16 and 17 Vict. c. 34), sec. 2—Income-Tax Act 1842 (5 and 6 Vict. c. 35), sec. 39, Sched. D, Fourth and Fifth Cases.

An American citizen having his ordinary residence and practising his profession in New York took a lease for three years of a furnished shooting lodge in Scotland with certain rights of shooting and fishing. The lessor was bound to maintain the buildings, to keep the grounds in order, to pay all rates and taxes, and to pay the wages of certain servants whose services were at the disposal of the lessee. The lessee resided at the shooting-lodge for a period of two months in each year during the shooting season, but the lodge was available for his occupancy at any time. He had no place of business in the United Kingdom, and during his stay therein his residence in New York was kept open so that he could return at any time.

Held that the lessee was a person "residing in the United Kingdom" within the meaning of the Income-Tax Acts, and accordingly was liable to assessment for income-tax.

The Income-Tax Act 1853 (16 and 17 Vict. c. 34), sec. 2, enacts that income-tax is to be "payable yearly for and in respect of the several properties, profits, and gains respectively described, or comprised in" . . . *inter alia*, Sched. D of the Act. Sched. D—"For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom for any kind of property whatever, whether situate in the United Kingdom or elsewhere." . . .

The Income-Tax Act 1842 (5 and 6 Vict. c. 35), sec. 39, enacts—"No person who

shall on or after the passing of this Act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain at one time or several times for a period equal in the whole to six months in any one year shall be charged with the said duties mentioned in Schedule D as a person residing in Great Britain in respect of the profits or gains received from or out of . . . any foreign possession . . . or foreign securities." . . . Sched. D, Fourth Case, dealing with the computation of duty to be charged in respect of interest from securities in foreign countries, enacts—"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year without any deduction or abatement."

Schedule D, Fifth Case, of the said Act, dealing with the computation of duty to be charged in respect of possessions in foreign countries, enacts—"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain." . . .

This was an appeal under section 59 of the Taxes Management Act 1880 (43 and 44 Vict. c. 19) by Thomas William Cooper, Surveyor of Taxes, Dundee, from a determination of the General Commissioners of Income-Tax for the District of Brechin, in the county of Forfar, at a meeting held at Brechin on 15th December 1903. At this meeting John Lambert Cadwalader had appealed against an assessment of £3000 made upon him under Schedule D of the Income-Tax Acts for the year ending 5th April 1904.

The assessment was made under authority of the Finance Act 1903 (3 Edw. VII, c. 8), sec. 5, and the Income-Tax Acts of 1853 (16 and 17 Vict. c. 34), sec. 2 (quoted *supra*), and of 1842 (5 and 6 Vict. c. 35), sec. 100, Cases Fourth and Fifth (quoted *supra*).

The facts stated in the case for the opinion of the Court of Exchequer as found or admitted before the Commissioners were set forth in the opinion of the Lord President as follows:—"The appellant (Mr Cadwalader) is an American citizen, having his ordinary residence in New York, where he practises as a barrister.

"By a minute of lease entered into between the commissioners of the Earl of Dalhousie of the first part, and the appellant of the second part, dated 16th March and 2nd and 3rd April 1900, there was let to the appellant for the period of three years from 1st February 1900, at the yearly rent of £1500, payable in advance on 1st February yearly, the sole and exclusive right of shooting and sporting over the grouse shootings of Millden, together with Millden Lodge and the furniture therein, and also with a right of fishing in the rivers and streams within the territory let. It was stipulated in the lease that the furniture and other effects in the lodge and outbuildings should be delivered over, per inventory, to the appellant,