

vation (for it is no more than a reservation) contained in Lord Davey's opinion at p. 43 of the *San Paulo* case, thus—"Whether it would be possible in any case for a sole owner of a foreign business having exclusive power of control over it, but resident in this country, successfully to maintain that he did not carry on a business here, it is unnecessary to say. That question, which is probably one of fact, will be dealt with when it arises according to the circumstances of the case." The form in which the question is put rather suggests the reply. I am of opinion that the question which Lord Davey adumbrated arises for decision here, and that it should be answered for the Crown.

LORD LOW concurred.

LORD ARDWALL—I concur generally in the opinion of Lord Stormonth Darling, and propose only to touch on a ground regarding which I have some difficulty, namely, the question of whether the mere possession of "full control" by a person in this country brings the business over which such control exists within the category of "a business carried on partly in this country." I do not think it is necessary to decide this question, and desire to reserve my opinion upon it. The second finding in fact stated by the Commissioners, and which has been quoted in full by Lord Stormonth Darling, taken along with the third finding of the Commissioners, to the effect that "the managers and other employees associated and employed in the carrying on of said business of Thomas Ogilvie & Sons have no power to act in the carrying on of the trade apart from the authority express or implied which they hold from the said Thomas Ogilvie senior," and the fact that Thomas Ogilvie senior resides in Scotland, appear to me, in view of the provisions of the statutes and the decided cases, to settle the question put to us in the respondent's favour, because it appears that it is the firm of Thomas Ogilvie & Sons resident in Scotland who carry on the business in question by means of "salesmen and agents" at their "branch" (as they call it) in Canada. There is, accordingly, no such question regarding "control" as arose in the case of *Kodak Limited v. Clark*, (1903) 1 K.B. 505, where although a British company had in a sense the control of an American company by reason of owning 98 per cent. of the American company's shares, yet because the American company was a separate company with different interests and entirely distinct and separate management from the British company, the American company was held not to be partly carried on in this country; nor is *Colquhoun's* case an authority for the present, where the active partners were in Australia and a sleeping partner, possessing some powers of control but exercising none, lived in this country. In such cases, and in several other reported cases, it became a question of importance whether although a power of control existed to some effects, it was ever so exer-

cised as to constitute a "carrying on" of the business in this country. In the present case, however, not the control merely but the whole command and management of the Canadian business rests with the "firm" of Thomas Ogilvie & Sons, which is resident in Scotland. The "salesmen and agents" in Canada have no powers except what are delegated to them expressly or impliedly by the said "firm," that is, by Thomas Ogilvie senior.

I am accordingly constrained to hold that the business of Thomas Ogilvie & Sons, of which the appellant is the sole partner, is partly carried on in this country, and that the present case falls under Case I of Schedule D of the Income Tax Acts.

The LORD JUSTICE-CLERK concurred in the opinion of Lord Stormonth Darling.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellant—The Dean of Faculty (Campbell, K.C.)—Mitchell. Agents—J. & A. F. Adam, W.S.

Counsel for the Respondent—The Solicitor-General (Ure, K.C.)—Munro. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Wednesday, June 17.

## SECOND DIVISION.

[Sheriff Court at Glasgow.]

### MULLEN v. D. Y. STEWART & COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1—Accident Arising Out of and in Course of Employment—Workman Injured Rescuing Fellow Workman Engaged in Horseplay.*

Some workmen, members of a squad which was working overtime in iron-works, during a necessary pause in operations, left the works at 9.40 p.m., and went to a neighbouring public-house to obtain some refreshment. The works were situated partly on one side of a street, partly on the other, and a line of rails, sunk to the street level, crossed the street from one portion of the works to another, on which laden bogies were drawn by squads of workmen by means of ropes. While three of the workmen who had gone for refreshment were returning to work, they saw a bogie being drawn from one portion of the works to the other, and one of them, in a spirit of mischief, took hold of the rope at a point between the bogie and the men who were drawing it, and proceeded to pull against them. While so doing he slipped and fell across the rope, and was in imminent danger of being crushed against the wall at the entrance to the works. Another

of them, A, ran to his assistance and succeeded in extricating him, but was himself crushed against the wall and severely injured.

*Held* that the accident to A did not arise out of and in the course of his employment.

In an arbitration under the Workmen's Compensation Act 1906 between Owen Mullen, labourer, Glasgow, and D. Y. Stewart & Company, Limited, St Rollox, Glasgow, the Sheriff-Substitute (A. O. M. MACKENZIE) refused to award compensation, and at the request of Mullen stated a case on appeal.

The following facts were set forth as established—“(1) On 2nd September 1907 the appellant was in the employment of the respondents in their works at St Rollox. (2) These works are situated partly on the north and partly on the south side of a public street called Charles Street. (3) A single line of rails, sunk to the level of the causeway, has been laid across the street to enable steel castings to be moved on bogies from the one part of the works to the other. (4) On entering the works on the south side of the street the rails are flanked on either side with brick retaining walls 2 feet in height, and built so near the rails that there is no room for a man between the wall on either side and a bogie passing on the rails. (5) The bogies, which are of iron, weigh about three tons, and the castings carried on them weigh on the average about as much. (6) On the day mentioned the appellant was one of a squad of eight men employed in coremaking at a place in the works to the north of Charles Street, and some distance to the west of the line of rails already mentioned. (7) As the job at which the squad was engaged was not completed at 6 p.m., being the close of the ordinary day's work, the squad returned after a short interval for supper to work overtime until it was finished. (8) The work which remained to be done was the blackwashing of a number of loam cores. (9) At 9.40 p.m. a certain number of the cores still required a second coating of blackwash, but none of them was quite dry enough to receive it, and accordingly there was a short pause in the work. (10) Taking advantage of this interval the appellant and two of his companions left the works and went to a public-house about three or four minutes' walk distant for a glass of beer, and after spending a minute or two there they proceeded to return to the works with the intention of finishing their job. (11) In order to reach their working place the appellant and his companions had to cross the rails already mentioned, and when they came near them they saw that a squad of men were engaged in hauling a bogie loaded with a steel casting by a rope from the north to the south side of the street. (12) This rope, which was about 15 feet in length, was attached to the bogie by a hook at about 18 inches from the ground. (13) The appellant and his companions were upon the pavement on the south side of the street, and were able to cross the rails in front of the men who were hauling the

bogie. (14) Two other members of the appellant's squad, who had left the works at the same time and for a like purpose as the appellant and his companions, were a short distance behind them when they crossed the rails. (15) On coming to the rails one of these men, James M'Ginlay by name, seized the rope at a point between the hindmost member of the hauling squad and the bogie, and saying 'Now comes the tug of war' began to pull against the squad. (16) In doing this M'Ginlay slipped and fell across the rope, and as he could not at once regain his feet and the bogie was coming near the narrow entrance to the works on the south of the street, his position was very dangerous. (17) The appellant, whose attention had been attracted by a cry, seeing M'Ginlay's precarious situation, ran to his assistance, and having reached him just before the bogie entered the narrow way he succeeded in hoisting him on to the top of the retaining wall on the west side of the rails at a point just inside the entrance, but before he could get clear of the rails himself the bogie jammed his left foot against the retaining wall. (18) The injuries which the appellant thus received were so serious that it was found necessary to amputate his foot above the ankle, and he has been since the accident and still is totally incapacitated for work. (19) It was a common practice in the respondents' works for workmen who were going to work overtime to a late hour to take advantage of any break that might occur in the work after 9 p.m. for the purpose of obtaining refreshments outside the works. (20) Sometimes when it was seen that the work of a squad would last till midnight or later, express permission was given to the men belonging to it to take a short interval for the purpose of going out for food, but it was not proved that they had any implied permission to leave the works for that purpose without leave, or that the practice of doing so was recognised or sanctioned by the foreman or other officials of the works. (21) On the night of 2nd September the foreman of the appellant's squad left the works at 8 p.m., and the appellant and his companions did not receive permission from anyone to leave the works for the purpose of obtaining refreshments outside. (22) The work which remained to be done by the appellant's squad at 9.40 p.m. would have taken about an hour to finish, but after the accident the squad stopped work for the night. (23) The appellant and his companions did not give their names to the gatekeeper when they left the works at 9.40 p.m. Along with the rest of their squad they were paid overtime up to 10 p.m. . . .”

In these circumstances the Sheriff-Substitute found in law that the appellant's injuries were not sustained by accident arising out of and in the course of his employment, and he accordingly assoilzied the respondents, with expenses.

The *question of law* for the opinion of the Court was—“Whether the accident which occurred to the appellant on 2nd September 1907 arose out of and in the

course of his employment with the respondents."

Argued for the appellant—The accident arose out of and in the course of his employment—*London and Edinburgh Shipping Company v. Brown*, February 16, 1905, 7 F. 488, 42 S.L.R. 357; *Rees v. Thomas*, [1899] 1 Q.B. 1015; *Benson v. Lancashire and Yorkshire Railway Company*, [1904] 1 K.B. 242; *Blovelt v. Sawyer*, [1904] 1 K.B. 271; *Keenan v. Flemington Coal Company, Limited*, December 2, 1902, 5 F. 164, 40 S.L.R. 144; *Morris v. Mayor of Lambeth*, 1905, 22 T.L.R. 22.

Counsel for the respondents were not called upon.

LORD STORMONTH DARLING—The Sheriff-Substitute in this case has come to the conclusion that the injuries sustained by the appellant were not sustained in an accident arising out of and in the course of his employment. I am of opinion that his conclusion is a sound one.

The manner in which the accident took place is clearly set forth by the Sheriff-Substitute, and there is no dispute as to the facts. It occurred at a time when the appellant was outside of the works of his employers and not upon their premises. I do not think that that fact, although in certain circumstances it might be of great importance, would, in the present case, have prevented the appellant obtaining compensation if the injuries he met with had been sustained while he was engaged in his employers' service. It appears, however, that the appellant and two comrades were returning to the works after having obtained a glass of beer during an interval in their employment—a perfectly legitimate and indeed a necessary proceeding in view of the fact that they were working overtime and had not nearly completed the task they had in hand. While thus returning to the works the appellant suddenly saw a fellow workman (M'Ginlay) in a position of considerable danger and went to his assistance. I need not refer to the circumstances in detail, as they are fully stated by the Sheriff-Substitute. The act of the appellant, was undoubtedly a very meritorious one, but the question which we have to decide is whether the injuries he sustained while carrying it out are injuries for which he can claim compensation under the Act. Mr Christie maintained that they were, and dwelt on the fact that he was acting in the interest of his employers. In a certain sense of course that is true, for it is always to the advantage of employers to have accidents, and possible claims for damages, prevented when possible. But the real question is, was the appellant's act done to prevent an accident to a fellow workman in the course of the latter's employment and for which he might have made a claim against his employers. The answer must clearly be in the negative. M'Ginlay was not engaged in his employers' business; in fact, it would appear that he was actually interfering with those who were engaged in carrying it on. However plucky therefore and

praiseworthy the appellant's act may have been, I entirely fail to see how the accident which he unfortunately sustained can, from any point of view, be regarded as having arisen out of and in the course of his employment. That being so, it follows that he is not entitled to compensation under the Act.

LORD LOW—I am sure that we have all great sympathy with the appellant, who has lost one of his feet in trying to save a fellow workman from a position of danger. But this cannot influence our judgment on the question which we have to determine—whether he has a claim for compensation under the statute. I am of opinion that he has not, and I go upon this, that in no reasonable sense could the accident be said to have arisen out of the employment. I do not think that the appellant's claim for compensation is affected by the fact that M'Ginlay was a fellow workman. The case would, in my judgment, have been the same if M'Ginlay had been a stranger, or if instead of falling in front of a hutch belonging to the respondents he had fallen in front of a tramway car. I am therefore of opinion that the decision of the Sheriff-Substitute was right.

LORD ARDWALL—I concur with your Lordships: I think that the appellant here deserves very great sympathy and very great praise. But the question we have to decide is whether the accident arose out of and in the course of his employment with the respondents.

Shortly before the accident happened the appellant, along with two of his companions, had left the works and had gone to a public-house for a glass of beer. Now, I do not think that that fact would have disentitled the appellant to recover compensation. In the circumstances it was most reasonable to go and get some refreshment. The men had been at work all day, it was now after 9 p.m., they had one more hour's work before them, and the public-house was probably the only place they could get some refreshments. But the question still remains whether the accident arose out of his employment. I am of opinion that it did not. It arose out of an attempt by the appellant to rescue a workman named M'Ginlay from danger. If M'Ginlay had been engaged on his master's work at the time of the accident, and the appellant had also been engaged in his master's work, the case would have fallen under the case of *The London and Edinburgh Shipping Company v. Brown*, 7 F. 488. But these are not the circumstances before us. M'Ginlay had improperly begun to play with a rope by means of which another squad of men were hauling a bogie from the north to the south side of the street, and he had fallen across the rope, so that at the time of the accident M'Ginlay had not returned to his own working place. He was not engaged on his master's work. On the contrary, he was impeding another squad of men in their work, and he was in no different position as regards the respondents than he would have been if he had

been a stranger who had fallen in the street in front of a lorry or a tramway car. And it is obvious that in neither of these cases could it have been said of Mullen, if he had been injured in trying to rescue M'Ginlay, that the accident arose out of and in the course of his employment. I am therefore of opinion that the judgment of the Sheriff-Substitute was right.

The LORD JUSTICE-CLERK was absent.

The Court answered the question in the negative.

Counsel for the Appellant—Hunter, K.C.,—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—J. R. Christie. Agents—Mackay & Young, W.S.

## HOUSE OF LORDS.

Monday, June 29.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord James of Hereford, Lord Robertson, and Lord Collins.)

### WHITEHOUSE v. R. & W. PICKETT.

(In the Court of Session, November 16, 1907, 45 S.L.R. 113, and 1908 S.C. 218.)

*Innkeeper—Limitation of Liability to £30—Exceptions to Limitation—Negligence—Deposit—“Expressly for Safe Custody”—Innkeepers' Liability Act 1863 (26 and 27 Vict. cap. 41).*

The Innkeepers' Liability Act 1863, which limits the liability of an innkeeper for goods or property brought to his inn by a guest to £30, excepts the two cases—“(1) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2) where such goods or property shall have been deposited expressly for safe custody with such innkeeper.”

*Held* (1) that to bring an innkeeper within the first exception the guest must prove the neglect which in fact resulted in the loss of the property, carelessness not directly connected therewith being insufficient and not raising any presumption that the loss was due to it, and (2) that to bring him within the second exception the guest must on giving the property say or do something sufficient to bring home to the innkeeper the responsibility he is incurring. *Diss.* Lord Collins, on the facts of the case, on the ground that even without “express” deposit, an innkeeper entrusted with property was a bailee for reward bound to exert a certain degree of carefulness, and that there was evidence in the case upon which a jury could find that the innkeeper had failed therein and so been

neglectful in such a way as to have caused the loss.

This case was reported *ante ut supra*.

At delivering judgment—

LORD CHANCELLOR—I shall move your Lordships to dismiss this appeal. The contentions of the appellant were twofold. In the first place, he maintained that there had been a deposit expressly for safe custody. In the second place, that his property had been lost through the neglect of the innkeepers. It is unnecessary to recapitulate the facts which have been fully stated in more than one of the opinions already expressed.

I cannot think that pursuer should succeed on his first contention. Under the statute innkeepers are liable beyond £30 if property has been deposited with them expressly for safe custody.

The word “expressly” is not used without a purpose. It means that an intention by the bailor is not enough. That intention must be brought to the mind of the bailee or his agent in some reasonable and intelligible manner, so that he may, if so minded, insist on the precautions specified in the proviso. Pursuer's traveller caused to be placed in the office without a word spoken a bag of undeclared contents which was laid in a corner of the room; and there is nothing more of substance proved in this case on this point except that he had been in the habit of depositing similar property in that or an adjoining room for some years, also without word spoken. The Act meant to secure for the innkeeper, by warning, an opportunity of safeguarding himself when a heavy risk which he cannot refuse is placed on him. There is no ground for saying he had such a warning here.

As to the second point, I see no sufficient evidence. Obviously it was for pursuer to prove it if he could. He proved that his own traveller and other travellers also were somewhat careless as to the place where bags and parcels were deposited; and that the innkeeper or his servants were sometimes careless in fastening the doors of the office and the parlour, or in keeping someone constantly there. But no evidence was given to prove how in fact the pursuer's bag was lost, or that it must have been lost through neglect either in leaving doors unlocked or in leaving rooms unwatched. The facts are equally consistent with loss by methods which implied no disregard of reasonable care, and the place chosen for deposit was chosen by the pursuer's own traveller. If it were enough to show that this property may have been stolen through the innkeeper's neglect, an innkeeper might be liable in every case of unexplained loss. Nor is it enough to prove, if it were proved, that the innkeeper was neglectful in general. He is not liable unless the loss was due to his neglect, which is quite a different thing.

LORD ASHBOURNE—There is practically little dispute as to the facts, although there is a sharp difference of opinion as to the law applicable to the circumstances proved