

last paragraph). . .” The Lord Ordinary disallowed that issue upon the ground that there was not sufficient specification of facts to support it. I have come to the conclusion that the specification given by the defender is all that can be fairly asked to be given. He has given such names as he could. He has certainly not given many, but at the same time I do not think that this is a class of statement where it could be expected that he should be able to give names. After all, these matters really depend upon the particular kind of facts with which you are dealing, and I think that accounts for what may be called the seeming divergency between the cases that were quoted to us. There was, for instance, the case where a clergyman had been slandered by being called a drunkard (*Hunter v. MacNaughton*, 21 R. 850) and the reply was that he was a drunkard. There it was quite evident that if you were going to say that a clergyman was a drunkard, you must be in the position of being able to prove several times and occasions on which he was drunk, and it was held that he would not have been entitled to an issue without averring them. On the other hand, the Queensferry Street case (*Mason v. Tait*, 13 D. 1347) is almost exactly on all fours with this, where the same class of imputation about a public-house was made, and there a counter-issue in general terms was given. Accordingly, I think we may approve of this counter-issue.

There was only one other matter mooted in respect to this, which I mention just to dispose of it. It was said that the counter-issue would complicate the matter, because it was only asked for by Kyle and not asked for by the other defenders. I do not think it complicates the matter at all. The other defenders have chosen not to take a counter-issue. Well, the only result of that is that they cannot prove the facts that the counter-issue raises. They have chosen to risk their case upon the belief that they can show that the pursuer will fail upon the primary issue, and that is their affair. After all, these trials, although they are all to be tried together, are separate trials in the sense that the case of each defender is raised separately upon the leading issue, and a verdict upon the leading issue will have to specify each and all of the defenders and say whether the verdict applies to him, and therefore there will be no difficulty in keeping the counter-issue appropriate to the only person who has raised it.

LORD KINNEAR—I agree upon all the points. The question whether those of the defenders who made no actual statement themselves on the subject complained of to the Court of Appeal did or did not cause the agent Kyle to make such statements, is a question of fact which must go to the jury. It is a question, no doubt, which may be to a greater or less degree determined by considerations of law, but it will be for the judge who presides at the trial to explain such considerations to the jury, and there is really no difficulty raised by

the form of issue in distinguishing the functions of the judge and jury on that matter. I think that the difficulties that are supposed to arise upon the counter-issue must also be disposed of, so far as any such may exist, by the presiding judge. I therefore agree that the third issue proposed by the pursuer and the counter-issue proposed by Mr Kyle should be allowed.

LORD PEARSON—I also agree.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor, approved of the third of the issues proposed for the pursuer, approved of the counter-issue proposed for the defender Robert Kyle, and appointed the said issue and counter-issue to be the issues for the trial of the cause.

Counsel for Pursuer (Respondent)—Watt, K.C.—R. S. Horne. Agents—Alex. Morison & Company, W. S.

Counsel for Defenders (Reclaimers)—Morison, K.C.—Duncan Millar. Agents—Clark & Macdonald, S. S. C.

Thursday, July 15.

#### FIRST DIVISION

[Lord Guthrie, Ordinary.

KEMP & DOUGALL v. THE DARN-GAVIL COAL COMPANY, LIMITED.

*Master and Servant—Reparation—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 6—Relief—Negligence—Defective Plant—Liability of Colliery Company for Injury Caused to an Employee of Parties not under Contract to them through their Defective Waggon when Beyond their Premises.*

A colliery company contracted with a railway company for the carriage of coals to a vessel at G., to be delivered alongside the vessel. The coals were conveyed in waggons hired for the purposes of the colliery from a firm of waggon builders. At the docks, which belonged to the railway company, the waggons were taken over by a firm of stevedores for the purpose of loading the ship, under a contract between them and the railway company. To load the ship the waggons had to be run up a gradient on to a platform and there tipped. One of the stevedores' workmen, who was engaged in running a waggon down again to the railway lines, was injured through a defect in the brake of the waggon. The workman having recovered compensation under the Workmen's Compensation Act 1906 from his employers, they claimed relief from the colliery company on the ground that it was in fault in supplying a defective waggon. *Held (diss. Lord Johnston, and rev. judgment of Lord Guthrie, Ordinary)*

that, as the operation in which the workman was injured was outside the contract in which the colliery company was interested, there was no relation of duty on its part towards the injured workman, and that the colliery company must therefore be *assolizied*.

*Caledonian Railway Company v. Warwick*, November 26, 1897, 25 R. (H.L.) 1, 35 S.L.R. 54, *followed*; *Elliot v. Hall* (1885), L.R., 15 Q.B.D. 315, *distinguished*.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), section 6, enacts:—

“Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and (2) if the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act.”

On 23rd April 1908 Kemp & Dougall, stevedores, Grangemouth, brought an action against the Darngavil Coal Company, Limited, Glasgow, for declarator that the defenders were bound to free and relieve them of all liability in respect of a claim and award under the Workmen's Compensation Act 1906 made against them at the instance of Thomas Laing, coal trimmer, Grangemouth, one of their employees who had sustained injuries in their service, and to indemnify them from all payments made and to be made in respect thereof. They also sought repayment of the compensation paid and of the expenses connected with the arbitration proceedings.

The following *narrative* is taken from the opinion (*infra*) of Lord Kinnear:—“This is an action by which a certain firm of stevedores, who have been found liable under the Workmen's Compensation Act to pay compensation to a workman injured in their service, claim relief from the defenders, who are a colliery company, on the ground that the accident was really caused by their fault or negligence, and therefore that the injured workman would have had a good action against them at common law founded upon fault. The parties are agreed that this plea, which is undoubtedly a perfectly good one under the Workmen's Compensation Statute, must be considered in exactly the same way as if we were dealing with it in a direct action by the injured workman himself against the defenders, and therefore the question is whether the

pursuers have proved that the injured workman was hurt by any fault of the defenders.

“The facts are, I think, clearly enough established. The defenders are a colliery company. They were under contract to deliver coal to a boat at Grangemouth, which is some distance from the seat of their colliery, and they forwarded their coals by the Caledonian Railway. They were in the habit of running their own trucks on the Caledonian Railway Company's line, or at least of having them run by the Caledonian Railway Company, and the coals in question were accordingly loaded on trucks belonging to or hired by them—because I think counsel agreed that it makes no difference whether they were hirers or owners—and were conveyed by the Caledonian Railway Company to Grangemouth. When they arrived at Grangemouth the Caledonian Railway Company engaged a firm of stevedores, the employers of the injured workman, to load the ship, and in the course of loading the workman was injured in consequence of a defect in the brake of one of the defenders' waggons. It appears that this waggon had been in use for a good many years, that the brake blocks were worn down, and that although the defect caused by the wearing of the brake blocks might have been obviated by a perfectly simple operation for the readjustment of the parts of the machinery, no inspection was made so as to show that the readjustment was required, and no readjustment was made. The consequence was, that on the workman proceeding to work the brakes by means of the lever handle, the brake slipped past, being met with no resistance, the lever handle whirled round, and the man was hurled head over heels among the trucks and was injured. I do not think there is any doubt as to the cause of the injury, and I think it is proved also that the brakes left the defenders' possession for their journey to Grangemouth in a defective condition. That the defect might have been remedied only makes it more manifest that there was a call upon the defenders to anybody to whom they owed a duty in the matter of inspecting the brake and remedying the defect in the very simple way in which I have said it could be done. The question therefore is, whether there is any liability on the defenders to the injured workman in respect of that failure to provide a waggon fitted for its purpose, and to take reasonable care that it was not so defective as to make it dangerous to people working it.”

The defenders pleaded, *inter alia*—“(1) The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. . . . (3) The said accident not having occurred through any fault on the part of the defenders, they are entitled to be *assolizied*.”

On 28th November 1908 the Lord Ordinary (GUTHRIE), after a proof, granted decree as craved.

*Opinion*.—“By an award in an arbitra-

tion in the Falkirk Sheriff Court, the pursuers have been found liable for compensation, at the rate of £1 per week, under the Workmen's Compensation Act 1906, to Thomas Laing, a workman injured in their service at a hoist at Grange Dock, Grangemouth Harbour, on 21st October 1907. The pursuers seek relief of that obligation, under section 6 of the 1906 Act, on the ground that the accident was caused by the defenders' fault, and that there was a legal liability on the defenders to pay damages to Laing.

"The defenders deny fault, and further plead that there was no legal liability on them to pay damages to Laing, because he was guilty of contributory negligence.

"*I. Defenders' Fault.*—The accident happened through the defective condition of the brake on a waggon hired by the defenders from Pickering & Company. This brake could be worked from either side of the waggon, and is hence called an 'either-side brake'; but it acted by blocks on the wheels of only one side, which slowed or stopped the wheels on the other side, because the axles run with the wheels. This waggon with others was hired by the defenders from Pickering & Company under the contract by which Pickering & Company undertook the maintenance and repair of the waggons.

"The pursuers' attack on the brake is inaccurately stated. They blame the thinness and inequality of the brake blocks (which seem to have been in use since 30th April 1902), and a defective mended spring, and a general looseness of the fitting of the brake. But it is proved by the defenders' witnesses who made the experiment that notwithstanding the thinness and inequality of the blocks, and the condition of the spring, and the general loose fitting of the parts, a few minutes' work would have made the brake safe and efficient by lengthening in the one case, and shortening in the other, the rods (called 'push rods' or 'brake levers') by which the change of the brake handle from 'off' to 'on' and 'hard on' is made to press the cast-iron blocks against the steel wheels. On the end of each of these rods there is a row of projections corresponding to a row of holes on the link (either the 'toggle link' or the 'twin link') which joins the rod to the rest of the brake machinery. If the block, when the brake handle is put 'on,' does not grip the wheel rim, or grips it inadequately, the rod may be lengthened or shortened, as the case may be, by knocking out a lynch pin which passes through the projection in use at the time, and taking up the rod by the number of holes required. This operation may require a hammer and chisel.

"The question then is, Were the defenders, as in a question with Thomas Laing, to blame for the brake being unadjusted at the time of the accident?

"They say, *first*, that while they were employers of the Caledonian Railway Company for the conveyance of coal from their collieries to Grangemouth, and while the pursuers were employed by the Caledonian

Railway Company to load the coal from the waggons into the steamer, and while the defenders knew that the coal was going to Grangemouth to be loaded by the hoists into the 'Prima' by the pursuers, or other stevedores, there was no relation, contractual or otherwise, between them and the pursuers, and no duty due by them to the pursuers. This may be so, but it is irrelevant under the statute. The only question is as to the relation, if any, between the defenders and Thomas Laing; and on that question I hold the defender had a duty at the moment of the accident to see, by reasonable inspection, that the brake of the waggon in question was in such a condition that it could be used with safety by Laing. The waggon, hired by them for their exclusive use, was in their service at the time, because it was in course of being returned to them. In the work he was doing Laing was forwarding their interests to have the waggon speedily returned. And they knew, or ought to have known, that it was practically impossible for him or his employers to inspect the waggon brakes before use, and that such inspection by stevedores never takes place. (*Elliot v. Hall*, 15 Q.B.D. 315; *M'Lachlan v. s.s. Peveril Co., Ltd.*, 23 R. 753.) *Second*, they say that they had no responsibility for the waggon in question at the time of the accident. Hired by the defenders from Pickering & Company, and hauled for the defenders by the Caledonian Railway Company from their collieries at Birkrigg to Grangemouth, their responsibility for it ceased, they say, when it arrived alongside the German steamer 'Prima,' which they were loading under an 'alongside' contract. But, as already pointed out, the waggon was still in the service of the defenders at the time of the accident. They were responsible for it to Pickering & Company under the hire contract, and they could call upon the Caledonian Railway Company to return it at once to them, the rate for conveyance charged by the Caledonian Railway Company covering the return journey to the defenders' colliery. It was painted with the name of their company, in the same way as waggons which were their property.

"The defenders next try to shift the blame on to Laing, or the pursuer, or the Caledonian Railway Company.

"They blame Laing because they say the defect must have been obvious to him. . . . [*This plea was departed from in the Inner House.*] . . .

"Nor can the defenders escape by blaming the pursuers. They would not be entitled at their own hand to make repairs or adjustments, and they know that the railway company (and in the case of such waggons as the one in question, the persons or companies from whom the waggons are hired and who undertake their repair) profess to inspect the waggons.

"The Caledonian Railway Company may or may not have been in fault, as well as the defenders. It is stated in the evidence that they inspect waggons, including the brakes. But the defenders did not bring

any evidence as to how often this is done, and whether it merely consists in looking at the brakes without testing them. It is not proved that the defenders had any sufficient ground for trusting to the Caledonian Railway Company's alleged inspection. But if they had any contract, express or implied, with the Caledonian Railway Company to warrant such trust, they will have their relief.

"The only possibilities which remain are accidental injury to the brakes after the defenders' inspection had taken place, or the fault of the defenders, or of those, namely, Pickering & Company, for whom they are responsible.

"The defenders suggest that the brake may have got into the condition which produced the accident between Ross Junction, where Pickering & Company are said to inspect the waggons, and Grangemouth, a distance of 30 miles, or after arrival at Grangemouth. Nobody suggests that such a change on a brake ever happened from such a journey and in such a short space of time before, and there is no evidence, on this waggon or on any of the other waggons which came down with it through Ross Junction, or from witnesses, of any unusually rough treatment or accident. Nor are the gradients between Ross Junction and Grangemouth, or at the hoists, as severe as several between Birkrigg and Ross Junction. On the question of the effect of rough usage, James M'Ghie, the defenders' despatch clerk at Birkrigg Colliery, was asked, 'Might that usage affect the condition of the brake?' He replied, 'Well, I could hardly say; I do not think so.' Besides, the extent of adjustment necessary to make the brake safe and efficient suggests that the defect had been of some standing, although the danger to brakemen using it may have been recent. To make it safe and efficient requires the alteration not of one but, according to the defenders' witness Mr Steel, of three holes on the toggle joint, or, according to Mr Moore, another of the defenders' witnesses, of four holes. The fair result of the evidence is that the brake, if, when it left Ross Junction, it was not in the dangerous condition it was in at the time of Laing's injuries, was, at all events, in a condition requiring adjustment, which condition should have been ascertained at Ross Junction by the defenders or those acting for them, and which adjustment, whether it would have made the brake absolutely efficient or not, would have prevented the lever dropping to the ground and the consequent injury to Laing. Mr Steel, Messrs Pickering's works manager, called for the defenders, says, 'if our inspector had seen that the brake required that adjustment, it was his duty to adjust it.'

"There remains the defenders' fault alleged by the pursuers in failing, through their repairing agents, Pickering & Company (or, if they did not choose to trust to Pickering & Company, at their own hand) to make a proper inspection of the waggon brakes, if not at Grangemouth Harbour, at all events at Ross Junction. In the absence

of any evidence of when, or where, or by whom, or by what method the waggon was inspected by Pickering & Company, I cannot hold that such an inspection is proved to have been made by Pickering & Company as leads to the necessary inference, or even to the probability, that the accident must have resulted from some cause operating after the waggon passed Ross Junction. It is said by Mr Steel that the rods were readjusted a month before the accident. But neither Cullen nor M'Neill, by one or other of whom the readjustment is said to have been made, was examined.

"II. *Contributory Negligence*—... [*This defence was given up in the Inner House.*]

"I therefore negative the defenders' case, both on fault and contributory negligence, and I find for the pursuers."

The defenders reclaimed, and argued—The pursuers had no claim against the defenders unless the injured workman had a claim, and he clearly had not, for (1) there was no fault or negligence on the defenders' part, and (2) even if there were, the defenders were under no duty towards him. (1) *On the question of fault*—The defenders were not liable for the upkeep of the waggons, for that lay on the owner, and he specially contracted to keep them in good repair. Moreover, the defenders had done all that could reasonably be expected of them to see that the waggons were safe. The defenders were not bound to guarantee the safety of their property towards third parties, but only to take reasonable care, and that only so long as it was within their own custody. The waggon in question had been out of their custody for three days, and the defect might have been caused during that time. No attempt had been made to trace the history of the waggon or to prove that it was defective when it left the defenders' custody. Both the defenders and the railway company had inspected it, and had it been defective then it would not have been passed. The pursuers should have inspected it before allowing their employees to use it, and they could not recover damages for their own negligence—*Paterson v. Kidd's Trustees*, November 5, 1896, 24 R. 99, 34 S.L.R. 69; *Wood & Company v. A. & A. Y. Mackay*, March 13, 1906, 8 F. 625, at p. 635, 43 S.L.R. 458. (2) *As to the alleged duty on the defenders' part towards the injured workman*—There was no duty on the defenders' part towards the pursuers' employees, who were in the position of third parties. There was no liability *ex domino*, and therefore the pursuers must show either (a) some implied obligation towards the pursuers' employees, or (b) some exceptional danger inherent in the waggon itself—*Caledonian Railway Company v. Warwick*, November 26, 1897, 25 R. (H.L.) 1, 35 S.L.R. 54. Neither was present here. The case of *M'Lachlan v. s.s. "Peveril" Company, Limited*, May 27, 1896, 23 R. 753, 33 S.L.R. 634, relied on by the pursuers, was not in point, for it depended on implied invitation and was in the same category as *Heaven v. Pender*, (1883) L.R., 11 Q.B.D. 503, and *Indermaur v.*

*Dames*, (1866) L.R., 1 C.P. 274. There was no such invitation here either in regard to place or time. The case of *Elliot v. Hall*, (1885) L.R., 15 Q.B.D. 315, also relied on by the pursuers, depended not only on implied invitation but also on contract (*vide* opinion of Grove, J., at p. 320), and there was no contract here between the defenders and the injured workman. Moreover, the case of *Elliot* was overruled by that of *Warwick (cit. supra)*. Reference was also made to *Le Lievre & Dennes v. Gould*, [1893] 1 Q.B. 491, at p. 497.

Argued for respondents—The Lord Ordinary was right. There was a duty on the defenders to see that the waggons were safe. A person who sent out plant to be used for his benefit by others was bound to exercise the same care *quoad* them as *quoad* his own employees—*Elliot v. Hall (cit. supra)*, at pp. 319 and 321; *Edwards v. Hutcheon*, May 31, 1889, 16 R. 691, 26 S.L.R. 550; *Robinson v. John Watson, Limited*, November 30, 1892, 20 R. 144, 30 S.L.R. 144. The defenders were clearly in fault, for there was no proof of any proper inspection of the wagon on their part. The fact that the owners of the wagon had contracted to keep them up did not relieve the defenders of liability. The condition of the brake showed that it must have been defective for some considerable time, and the defenders had failed to show any recent repair. Where the duty to repair had been delegated and the delegation had not been effective, the duty was not fulfilled—*Macdonald v. Wyllie & Son*, December 22, 1898, 1 F. 339, 36 S.L.R. 262; *Traill v. Actieselskab Dalbeattie, Limited*, June 7, 1904, 6 F. 798, at p. 808, 41 S.L.R. 614. The pursuers were not bound to inspect the waggons, for they were entitled to assume that the plant supplied was not defective—*Robinson (cit. supra)*; *M'Lachlan (cit. supra)*. The case was governed by *Heaven v. Pender (cit. supra)* and *Elliot v. Hall (cit. supra)*, neither of which was inconsistent with that of *Warwick (cit. supra)*, which was inapplicable here.

At advising—

LORD KINNEAR—[*After stating the facts, ut supra*]—I quite agree to the proposition that the learned counsel for the reclaimers maintained, that in order to answer that question in the affirmative it must first be shown that there was some relation of duty between the defenders and the injured workman which required them to exercise due and reasonable care for his safety. It is not at all necessary that there should be any direct contract of employment between them, because the action is not based upon contract but upon negligence; but it is necessary for the pursuer in such an action to show there was a duty owed to him by the defenders, because a man cannot be charged with negligence if he has no obligation to exercise diligence. Now I think the principle upon which it may be found in cases of this kind that there is a duty owed by one party to the other is established by the cases of *Indermaur v. Dames* (L.R., 1 C.P. 274) and *Heaven v.*

*Pender* (L.R., 11 Q.B.D. 503), and the rule which results from these decisions appears to me to be this, that there is an obligation on the part of the occupier of property, whether it is fixed or moveable, to those who come upon that property on business which concerns the occupier, and come at his invitation, whether express or implied, to take reasonable care by himself or by others that a person so coming shall not be exposed to unnecessary hazard. That is the rule as I understand it, and the main ground of liability therefore is that the defenders, having the use and control of waggons which workmen were invited to handle for the purposes of their business, were bound to take reasonable care to see that such waggons were in a condition in which they might be worked without unnecessary danger to the workman.

The case which comes nearest to this—except in one point, which I shall advert to—brings out the rule very clearly—the case of *Elliot v. Hall* (L.R., 15 Q.B.D. 315). The defender in that case was a colliery owner, and consigned coals sold by him to the buyers in waggons rented by him from a wagon company for the purposes of his colliery. So far the two cases are identical. One of the trucks was allowed to leave the colliery in a defective state. It was loaded with coal, it was delivered by the colliery to the Midland Railway Company, and it remained on the sidings of the Midland Railway Company for some considerable time, and was then forwarded to its destination and placed on a siding belonging to the buyers. Two days afterwards the buyers' servants began to unload the truck, and one of them was injured in consequence of the defect, which, as I have said, was proved to have existed at the time the truck left the colliery owners' hands. It was held that there was a duty on the part of the defendants to exercise reasonable care with regard to the condition of the truck, and that duty attached as between them and the injured workman, because the injured workman, being a servant of the person to whom the goods were consigned, was by implication invited by the colliery company to go into their waggons and unload them in order to take delivery of his employers' coal. Now that case would, I think, be directly in point but for this very material distinction. The defenders' company in this case were under an obligation to their buyers to deliver the coal alongside the ship at Grangemouth, they had no obligation to load the ship, and they had no interest whatever in the coal after the completion of their obligation to put it alongside the vessel; but then when the coals were brought alongside the ship on the Caledonian Company's Rails, that company—which appears to have an interest in the docks—employed a firm of stevedores to load the vessel. The stevedores' men then took charge of the wagon, not for the purpose of any contract which had been made by the defenders' company, but for the purpose of loading the ship—a business on which they were employed, not by the defenders,

but by the Caledonian Railway Company, and which was altogether outside the scope of the business the defenders had undertaken to perform—for their contract was, not to deliver free on board, but to deliver alongside the ship. For this purpose the waggons had to be run up an inclined plane to the level of a platform on which a crane was situated, so that they might be hoisted up and tipped into the hold, and then when that had been done they had to be run down a corresponding incline in order to be restored to the Caledonian Railway Company's rails for the purpose of sending them back to the defenders. Therefore there was interposed between the defenders and the cause of the accident an entirely new adventure with which they had no concern whatever, and it was an adventure which exposed persons using the brakes to a risk which, so far as appears upon the evidence, they were not exposed to so long as the truck was employed merely on the defenders' own business; because the real source of danger was the necessity for running the trucks down the inclined plane on which the crane was situated, so as to get them back to the rails of the Caledonian Railway Company. Now that was a risk in the course of a business with which the defenders had nothing to do.

If that had been a new question, it might have been one of some difficulty, but it is exactly the question raised and decided in the case of the *Caledonian Railway Company v. Warwick*, 25 R. (H.L.) 1, by the House of Lords. In that case the Caledonian Railway Company had, under a contract, carried certain coals for the use of a Dumfries gas company to the Dumfries station, and when the coals arrived in the waggons at the Dumfries station this obligation undertaken by the Caledonian Railway Company in respect of them was at an end. That was the place of delivery, just as the Caledonian Railway line, which was alongside the ship, was the place of delivery in this case. But then there was an agreement between the Gas Commissioners, for whom the trucks were being brought, and the Glasgow and South-Western Railway Company, that the latter company should haul the coals from Dumfries station, which was the place of delivery, to the premises of the Gas Commissioners, a quarter of a mile distant, and it was in the course of that additional carriage that the accident happened by a reason of a defect in connection with the brakes. The House of Lords held that on these facts there was no duty on the part of the Caledonian Railway Company to the complainer, a breach of which led to the damage complained of, because Lord Herschel, who was then on the Woolsack, said—"The Caledonian Railway Company had performed all their obligations when they handed these waggons over, and I think it would be altogether unreasonable to maintain that there was a duty on the part of the Caledonian Company, after they had fulfilled their contract of carriage, to examine these waggons and see that the

brakes connected with them were in a fit condition for a subsequent journey, on which for their purposes the Glasgow and South-Western Company were going to haul them into the premises of the Gas Commissioners. With that haulage the Caledonian Railway Company had nothing to do—their contract was at an end; it was a new journey along an entirely different railway, and with the incidents of that journey the Caledonian Railway Company were altogether unconnected." Then Lord Herschel refers to the case of *Heaven v. Pender*,<sup>1</sup> L.R., 11 Q.B.D. 503, and explains it. He says that at the time of the accident the waggon was being used on a new journey initiated by the Glasgow and South-Western Railway Company for their purposes, and there was nothing in it which could be said to be comparable to a trap created by or permitted to exist by the Caledonian Railway Company, into which they invited and led the deceased man to come. That is, according to that judgment, the basis of liability. A man who has been injured must be invited expressly or by implication to mount into a defective waggon. If he is not so invited, and if he goes into the defenders' waggon upon some adventure with which they have nothing to do, they have no more duty to take care of his safety than they have to take care of anybody else, and accordingly the ground of liability is displaced.

I think it is important to observe that in the other opinion delivered in the House of Lords in this case, the distinction is taken between liability upon a ground of duty of this kind to some particular person and another kind of liability which is due, not to any individual with whom the owner or occupier of property is brought into any relation of duty, but to everybody—to the public at large; and that principle is very clearly stated by an admirable writer on the subject—Sir Frederick Pollock—that "the law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbour to such risk is held—although his act is not of itself wrongful—to insure his neighbour against any consequent harm not due to some cause beyond human foresight and control." The principle, which Lord Shand refers to in the case I have mentioned, has been explained in a great variety of cases of the transmission or handling, or mere possession of firearms, explosives, inflammable materials, corrosive liquids, or of other things of the same description, which from their very nature imply a very high degree of danger, and therefore call upon people who meddle with them for a corresponding degree of caution. The principle is stated very clearly by Mr Justice Lopes in *Parry v. Smith*, L.R., 4 C.P.D. 325, where he says there may be a right of action founded upon a duty which "attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of

action there need be no privity between the party injured and him by whose breach of duty the injury is caused. . . . It is a misfeasance independent of contract." Therefore the condition on which a man is made liable to people with whom he is not brought into any particular relation, but to any bystander, is that he is dealing with something highly dangerous, which nobody is supposed to meddle with unless he is prepared to take the risk.

On the other hand, the liability which attaches to the occupier of real property, or of such moveable property as we are concerned with in this case, is to use reasonable care and diligence that persons, who are expressly or by implication invited to use it on business in which both are interested, shall not be exposed to risks which are not known or patent to observation and from which a man of ordinary prudence would not be required to guard himself. That is a perfectly good ground of liability in a question with a workman whom the defenders intended either to work their waggons or to unload them, but it is not a ground of liability to anybody else who is invited by a stranger to their business to handle their waggons for a purpose with which they are not concerned. The real ground of liability is that the injured man is engaged on the business of the defender against whom he makes his complaint, and is therefore entitled to rely on that person supplying machinery which will be fitted for the purpose for which he is engaged. The Lord Ordinary observes that the waggons in this case were still being employed on the business of the defenders, because it is necessary they should be unloaded in order to send them back, and it was part of the defenders' business to have them sent back by the Railway Company from Grangemouth as well as to have them carried to Grangemouth in order to deliver their coal; but in point of fact it was not when they were being sent back to the defenders that the accident happened at all, it was when they were being restored by the Caledonian Railway Company, or their stevedores, from the business of loading the ship—with which the defenders had nothing to do—to the railway lines on which they were to be carried back to the defenders. It was therefore, in my opinion, clearly part of a business which the Caledonian Railway Company chose to enter into, but no part of a business in which the defenders' company had been engaged. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, and the defenders assoilzied.

LORD PEARSON—The pursuers, who are stevedores in Grangemouth, were engaged in loading a steamship with a cargo of coal which had come down from the defenders' colliery in railway waggons. One of the pursuers' workmen was injured in the course of the work by reason of a defective brake with which one of the waggons was fitted; and under the Workmen's Compensation Act 1906 he obtained from the

Sheriff an order upon his employers for payment of compensation at the rate of £1 per week.

As your Lordship has explained, the pursuers have raised this action against the colliery owners for indemnity under section 6 of the statute, and the question is whether the injury was caused under circumstances creating a legal liability on the colliery owners to pay damages to the injured workman in respect thereof.

In considering this question it is necessary to have regard to the position of the various parties who in one way or another had to do with the transit and shipment of the coal, and I will note very briefly what appear to me to be the material facts.

The waggons were the property of Messrs Pickering, waggon builders, Wishaw, by whom they had been let on hire to the defenders on a fourteen months' contract from 1st September 1907, it being a condition of hire that the owners were to maintain the waggons in running order, and the defenders were to do the necessary greasing. Then the defenders, having sold a quantity of coal to merchants for delivery alongside the ship at Grangemouth, loaded the coal into waggons at the pit, and contracted with the Caledonian Railway Company for the haulage of the waggons to the point of delivery and their subsequent return empty to the colliery. The journey was entirely over the lines of the Caledonian Railway Company, they being also owners of the dock at Grangemouth.

But there was interposed between the outward and return journeys of these waggons an additional contract, to which the defenders were not parties—a contract between the Caledonian Railway Company as owners of the dock and the pursuers as stevedores. Under this contract the Railway Company contracted with the pursuers to unload the waggons as soon as they had been delivered "alongside" under the haulage contract and to load the cargo on board the ship; and when this was completed the train of empty waggons was made up and taken back by the Caledonian Railway Company to the defenders' colliery in terms of their haulage contract.

Now the accident happened during the time when the haulage contract was suspended, and during the fulfilment of the contract of loading, to which the defenders were not parties, and with which they had no concern. What happened was this. The haulage contract having been performed so far as to bring the loaded waggons to the quay alongside the ship, the shiploading contract was proceeded with. It consisted of three operations—(1) The winding of the full waggons up a gradient on to a platform at the crane; (2) the tipping of each waggon by the crane so as to discharge the coal into the ship's hold; and (3) the return of the empty waggon down the gradient until it came to rest on the level quay. All this was under the stevedores' contract with the Railway Company; and it was at the third stage of it, when the waggon brakes had to be used on the incline, that the accident

occurred. The waggon had not begun its return journey under the Railway Company's contract of haulage, but was in the hands of the stevedores in the course of their contract.

I may say at this point that whoever may be responsible for it, I think it is proved that on the occasion of the accident, and for a considerable time previously, this brake was so faulty and so badly adjusted that it was likely to fail, as it did at the time of the accident, and that it would have been stopped for repairs by any careful inspector.

But the question is, whether—as the statute expresses it—the injury was caused under circumstances creating a legal liability in the defenders to pay damages to the injured workman. If the liability exists, it must rest on some other basis than contract; for there was no contract between the injured workman and the defenders. Was there, then, in the circumstances a duty to him incumbent on the defenders, the breach of which caused the damage complained of? In my opinion the principles on which this case should be decided are those which were applied by the House of Lords in the case of the *Caledonian Railway Company v. Mulholland or Warwick*, which is none the less important as an authority because it was a judgment upon the relevancy of the pursuer's averments. It was urged that the present case was more like that of *Elliot v. Hall* in 1885, which I observe was cited in argument in the case of *Warwick*. I confess I was impressed by the argument which was submitted to us on the case of *Elliot*; but your Lordship has pointed out the distinction between that case and the present, and upon the whole I am of opinion that we must regard the decision in *Warwick* as ruling the case now before us.

LORD JOHNSTON—I agree with the Lord Ordinary, and, but that your Lordships take an opposite view, I should not think it necessary to add anything to what his Lordship has said. But the case is an important one, and I am therefore called upon to give my reasons for differing from the majority of the Court.

The facts as I read them are—the defenders, the Darngavil Coal Company, hire certain of their waggons from a firm of waggon builders, Messrs Pickering & Co. of Rawyards and Wishaw, on a contract. Some, if not the whole of these waggons, are fitted with a brake of exceptional construction, the invention of a Mr McIntosh of the Caledonian Railway Company. An accident to a certain Thomas Laing, a stevedore's labourer, occurred through one of these brakes proving to be out of order.

The defenders are coalmasters, working, amongst other pits, the Birkgrigg Colliery in the Larkhall district on the Stonehouse branch of the Caledonian Railway. The waggon in question was sent in October 1907 along with others with a consignment of coal to be delivered alongside, and not free on board, the s.s. "Prima" at Grangemouth. Now it must be kept in view that

the Caledonian Railway Company are proprietors not only of the railway to Grangemouth but also of the dock at Grangemouth and of the lines of rails on the wharfs, quays, and piers used for the purpose of bringing merchandise and minerals to, alongside, or to other parts of the dock where they fall to be handled. In this case, therefore, the exact point at which the railway proper ends and the dock begins is of no importance. The contract of carriage required the Caledonian Railway Company to carry coal to the ship in traders' waggons and to bring back the returned empty waggons on a tonnage charge for freight. With the operation of transferring the coal from the waggons to the ship's hold the defenders were not concerned. It was performed for the Railway Company, under the contract between them and the ship, by the pursuers Messrs Kemp & Dougall, stevedores, Grangemouth, who had a standing engagement with the Railway Company. The pursuers were therefore not in the position of sub-contractors in relation to the contract between the defenders and the Railway Company, but were outside that contract, having a contractual relation only with the Railway Company. But according to the practice of Messrs Kemp & Dougall the employees of that firm were in use, after tipping the waggons by means of a crane or hoist into the ship's hold, to run the waggons down an incline to a lye where they could be marshalled for their return journey empty. Laing, one of the men in their employment, was injured while performing this last-mentioned operation by reason of the brake of the waggon in question proving to be out of order, and he was awarded compensation against the pursuers Messrs Kemp & Dougall under the Workmen's Compensation Act 1906. I do not think it necessary to consider the details of the defect of the brake. It is sufficient to say that it was one which could have been cured by readjustment of the parts of the brake, and that the amount of readjustment requisite indicates that the brake had for some time been unreliable, and therefore inefficient, and that this could and should have been observed on a proper inspection. There is no ground for saying, or even suggesting, that the insufficiency of the brake was caused by anything which occurred on the journey between the colliery at Birkgrigg and the ship's side at Grangemouth. The pursuers, having been found liable in compensation to Laing, bring this action of relief against the Darngavil Coal Company. Their right to do so is conferred upon them under section 6 of the Workmen's Compensation Act 1906, which provides that "where the injury for which compensation is payable under this Act was caused under circumstances creating legal liability in some person other than the employer to pay damages in respect thereof," the workman may elect to proceed against the employer for the statutory compensation, and if he recovers compensation under the statute the person called upon to pay it "shall be



entitled to be indemnified by the person so liable to pay damages as aforesaid." Accordingly, that the pursuers may succeed in their claim of relief they must show that the injury which Laing sustained was met with under circumstances creating a legal liability in the defenders to pay him damages in respect thereof. The question therefore which the Court has to consider is, whether, if Laing had sued the defenders directly at common law, he would have succeeded in substantiating his claim of damages against them. Such claim could only arise out of contract or out of delict, or at least of *quasi-delict*. Contract as a ground of action at Laing's instance may be at once dismissed. There was no contract relation between the defenders and Laing's employer's Messrs Kemp & Dougall, still less therefore between the defenders and Laing himself. Some other ground for the claim must therefore be found.

I think that that ground is to be found in this, that Laing was not a stranger or volunteer in the matter of the carriage of this coal, but though not coming into contract relation with the defenders, was engaged in an operation incidental to the carrying out of that for which the Railway Company had contracted with them. They were bound to know that the truck in question must be emptied and must be taken from the ship's side to join the train which was to take it back to the colliery, and they were bound to take all reasonable precaution that, so far as this truck in particular was concerned, this operation could be performed with safety by all persons engaged—in fact, the truck was already on its return journey, as it was being taken from alongside to join the train of empties, and the duty of braking it on its journey from alongside the lye where the train of empties was being made up might properly have been performed by one of the Railway Company's servants under their contract with the defenders, and was only done by the stevedores' men as matter of convenient arrangement. It might indeed be contended with considerable force that though in the matter of shipping the coal the pursuers were not sub-contractors, yet in the matter of returning the empty waggons to the lye they were doing under their contract part of what the Railway Company had contracted to the defenders to do, and were therefore really sub-contractors. But without pressing this refinement it must at least be admitted that Laing was doing, by arrangement with the Railway Company, what was necessary to enable the Railway Company to fulfil their contract of carriage with the defenders, and was therefore as far removed from a stranger or volunteer as possibly could be. And I think it safer to proceed on this footing. To such a person I think the defenders did owe a duty, which they have failed to perform, and that the failure involved them in liability for damages to Laing, which under the statute entitles his employers to be relieved by the defenders for any statu-

tory compensation which they have been required to pay to Laing.

If this result is to be reached it is necessary to consider what is the duty which the defenders owed and what is the failure in that duty which involves them in that liability. In the leading case of *Heaven v. Pender* (L.R., 11 Q.B.D. 503), Brett, M.R., enunciated a definition of negligence which, however perspicuous, has been criticised as not entirely comprehensive. I should be far from attempting to supply any alleged deficiency, but I entirely adopt what that learned judge says as a corollary to his definition. The question, he adds, to be solved in such cases as that in which he was and we are at present engaged is—"What is the proper definition of the relation between two persons other than the relation established by contract or fraud, which imposes on the one of them a duty towards the other to observe with regard to the person or property of such other such ordinary care or skill as may be necessary to prevent injury to his person or property?" That relation, the learned Master of the Rolls held, exists "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause damage by injury to the person or property of the other." When that relation exists, the duty arises, in my opinion, to use ordinary care and skill to avoid such damage, and when such duty is neglected their arises a cause of action. It is of the essence of this definition that the obligee in such duty must be a person or of a class definitely ascertained, and so related by the circumstances to the obligor that the obligor is bound, in the exercise of ordinary sense, to regard his interest and his safety. Only the relation must not be too remote, for remoteness must be held as a general limitation of the doctrine.

In the present case I think that such relation did exist and that it was not too remote. In the circumstances the defenders' company were bound, in the exercise of ordinary sense, to recognise that the trucks owned or hired by them, when sent on their contract with the Railway Company to discharge at Grangemouth and be returned, would necessarily fall to be handled by the servants of the Railway Company or others acting in their place. These persons or some of them must rely upon the efficient braking of the wagon at some stage or stages of the journey. Duly regarding, therefore, their interest and safety, they were bound to provide their waggons with efficient brakes. This in regard to the wagon in question they failed to do, and hence the accident. Condemnation of the brake is more than ample in the evidence of the defenders' own witnesses, and in none more so than in that of James Steel, the manager of Pickering & Company, who built and hired out the wagon, and of Robert Thomas Moore, one of the defenders' skilled witnesses. I agree

entirely with the Lord Ordinary when he declines to distinguish between the defenders and Pickering & Company. The defenders seem to regard it that they have done their duty when they have hired their waggons from a firm of such reputation as Messrs Pickering & Company, and when they have satisfied themselves that inspection is made by the employees, not only of Messrs Pickering & Company but of the Caledonian Railway Company, upon the care and skill of whose inspectors they plead that they are entitled to rely, and did rely, and having so relied to be clear of further responsibility. To this I cannot subscribe. If they rely upon the inspectors of either or both companies, they are responsible for the failure in care and skill of these inspectors. And here there has been failure in care at any rate if not in skill, for, as I have already pointed out, it is impossible to conceive that such an amount of readjustment of the parts of the brake of this waggon would have been required had the defect not been one of long standing and apparent.

I am aware that the majority of the Court in the case of *Heaven v. Pender* did not take the more comprehensive view of the learned Master of the Rolls, but decided the case on the principle which has received the technical name of invitation and trap. If all cases of this kind, in order that there should be liability found, require to be brought under the category of invitation and trap, it appears to me that there must be a stretching out of all recognition of the term invitation, just as in England there has been a stretching out of all recognition of the term fraud in an analogous class of cases. (See *Levy v. Langridge*, 4 M. & W. 337). I respectfully think, therefore, that it is safer to face the general question, as the Master of the Rolls did in *Heaven v. Pender*, and find a general principle applicable to such cases. The view which I venture to take is, I think, supported by the case of *Elliot v. Hall* (L.R., 15 Q.B.D. 315), and is not inconsistent with the decision of the House of Lords in *Caledonian Railway Company v. Warwick* (25 R. (H.L.) 1), when the particular circumstances of that case are properly regarded. There the Caledonian Railway Company had performed their contract by bringing their waggon to the Dumfries Station of the Glasgow and South-Western Railway Company, where it might have been, and, strictly speaking, under their contract should have been discharged. But the Glasgow and South-Western Railway Company, under an arrangement to which the Caledonian were no parties, hauled a quarter of a mile down a private siding to discharge at certain works. All that could be said was that the Caledonian Company knew of and took no exception to this use of their waggons. But the operation of haulage on this siding was not connected with the carrying out of their contract of freight, and was no part of their business. It was held, therefore, that they were under no duty to those engaged in the haulage of their waggons over the siding

to see to the condition of these waggons. This is as if, after the defenders' waggons had been brought alongside at Grange-mouth, some use had been made of them by the stevedores or by the ship for their own convenience, of which the defenders were aware and to which they did not object. But it was not in course of such use that the accident happened, but when the waggon having been alongside and been discharged was on its way back to the defenders' colliery, and therefore was within their contract with the Railway Company and being transmitted on their business.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuers (Respondents)—M'Clure, K.C.—J. R. Christie. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders (Reclaimers)—Hunter, K.C.—R. S. Horne. Agents—Drummond & Reid, W.S.

Thursday, July 15.

#### FIRST DIVISION.

[Lord Skerrington, Ordinary.]

NATIONAL BANK OF SCOTLAND,  
LIMITED v. THOMAS WHITE & PARK.

*Right in Security — Agent and Client — Hypothec — Lien over Title-deeds — Possession Obtained while Acting for Client other than Owner — Plea as against Heritable Creditor of Owner.*

A firm of law agents arranged for their client a postponed bond over his property. The bond contained an assignation of writs, but as the title-deeds were in the possession of the prior bondholders they were not given up. Subsequently the prior bonds were assigned to other clients of the law agents, and the title-deeds came into their possession at this time. Still later the prior bonds were assigned to the law agents themselves. The postponed bondholders having called for the production of the title-deeds to enable them to sell and realise their security, the lawyers pleaded a lien.

*Held* that the title-deeds had come into the law agents' possession as acting for others than the owner, namely, the assignees of the prior bonds, and that the law agents consequently had no lien to plead.

On 30th June 1908 the National Bank of Scotland, Limited, brought an action against Thomas White & Park, W.S., Edinburgh, and the partners thereof. In it they craved declarator that the defenders were not entitled as against the pursuers, holders of a bond and disposition in security for £2000 over the subjects