

Galloway v. Campbell's Trustees, July 11, 1905, 7 F. 931, 42 S.L.R. 712, followed.

Observations (per Lord Kinnear) on the competency of special cases where there is no real litigation between the parties.

A Special Case was presented for the opinion and judgment of the Court by George Dalziel, W.S., Edinburgh, and others, the trustees acting under the trust-disposition and settlement of the late Thomas Shaip Mitchell Innes of Phantassie, first parties, and Miss Isabella Mitchell Innes, a daughter of the truster, and the four children of Mrs Christina Mitchell Innes or Anderson, a deceased daughter of the truster, second parties.

The Case set forth, *inter alia*—" . . . The first parties are satisfied that it would be in the best interests of the trust estate to sell the estate of Phantassie, and the second parties are desirous that the first parties should do so. A question, however, has arisen as to whether the power of sale conferred by the trust-disposition and settlement extends to the estate of Phantassie, and the first parties are not prepared to sell without having the matter judicially determined; further, it is necessary to have this judicially determined in order to satisfy intending purchasers, and to enable the first parties to afford an unquestionable title to a purchaser. The first parties maintain that the general power of sale conferred on them by the trust-disposition and settlement does not extend to the estate of Phantassie, which is otherwise specifically dealt with throughout the deed. The second parties maintain that the power of sale conferred on the first parties extends to the whole trust-estate, including the estate of Phantassie, which was the only heritable estate left by the truster."

The question of law was—"Are the first parties entitled, under the powers of sale conferred by the trust-disposition and settlement of the said Thomas Shaip Mitchell Innes, to sell the estate of Phantassie? or, otherwise, Are they entitled to do so with the consent of the beneficiaries?"

Counsel for the first parties cited *Galloway v. Campbell's Trustees*, July 11, 1905, 7 F. 931, 42 S.L.R. 712.

LORD PRESIDENT—In this case, had it not been for the decision in *Galloway v. Campbell's Trustees* (1905, 7 F. 931), I should have had great doubt whether the question stated here could be competently raised in a special case, because parties are agreed as to the expediency of the sale, and there is no proper contention between them. But *Galloway v. Campbell's Trustees* is a direct precedent, and I am prepared to follow it. On the merits I have no doubt whatever that the trustees have power to sell.

LORD KINNEAR—I agree, but should like to add that though I think we must follow *Galloway v. Campbell's Trustees*, 1905, 7 F. 931, in this case, I still think that the Court must always be cautious in entertaining cases of this kind where there is no

real litigation, because if any conflict of interest should arise hereafter of which we know nothing at present, our answer to this question will not be *res judicata*, and yet may embarrass the decision of a real question of disputed right. If therefore it seemed probable that a purchaser might object to the title, I would be against entertaining the question now. But, looking at the whole case, I agree with your Lordship that that is hardly a practical difficulty, because if a purchaser, which is hardly probable, should take objection, it would still be open to him to bring the question before the Court.

LORD MACKENZIE—I agree with your Lordship.

LORD JOHNSTON was sitting in the Lands Valuation Appeal Court.

The Court answered the first branch of the question in the affirmative, and found it unnecessary to answer the second branch.

Counsel for the First Parties—Macphail, K.C.—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Blackburn, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Wednesday, December 20.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

M'MILLAN v. BARCLAY, CURLE, & COMPANY, LIMITED.

Reparation—Master and Servant—Liability at Common Law and under the Employers' Liability Act 1880 (43 and 44 Vict. c. 42)—Averments—Relevancy.

A rivet boy, whose duty it was to run about the deck of a ship, then in course of construction, and pick up and throw overboard red-hot parings falling on it from above, slipped and fell over the side thereof and was killed. In an action of damages at the instance of his father against the employers, laid alternatively at common law and under the Employers' Liability Act 1880, the pursuer averred that the defenders were in fault in failing to fence the deck, that this was a usual and necessary precaution, and that the defenders knew or ought to have known that the deck in question when wet (as it was on the day of the accident) was specially liable to become slippery. He also averred that it was the duty of the defenders' foreman, under whom the deceased was working, to take precautions against his falling over the side of the deck, that such precautions were usual and necessary in the circumstances, and that he had failed to take them.

The Court, while allowing an issue under the Act, dismissed the action, so

far as laid at common law, as irrelevant, on the ground that the pursuer's averments did not disclose a defective system or the failure to supply a competent foreman.

On 2nd October 1911 Thomas M'Millan, ship's rigger, Whiteinch, brought an action against Barclay, Curle, & Company, Limited, engineers and shipbuilders there, for payment of £500 at common law, or alternatively for £85 odd under the Employers' Liability Act 1880, as damages and solatium for the death of his son, who was fatally injured while at work in the defenders' employment.

The pursuer averred—“(Cond. 2) On or about the 5th day of July 1911, and for some time previous thereto, the said deceased Thomas M'Millan junior was in the employment of the defenders at the construction of a vessel in their shipbuilding yard at Whiteinch. He was engaged as a rivet boy, and on the said 5th July he was working in that capacity on the promenade deck of said vessel. The said deck was composed of teak, and the seams thereof were filled in with pitch, and it was the duty of the deceased to watch the rivetters who were engaged on the boat deck about 8 feet above, and to pick up and throw over the side of the vessel by means of two small sticks used like tongs the red-hot parings of the rivets thrown down by them upon the promenade deck. These red-hot parings were thrown down over the deck in all directions, and it was necessary for the deceased in performing his work to keep a sharp look-out on the rivetters to see that none of the parings fell upon himself, and to watch where they did fall. He had to run quickly from place to place as they fell and pick them up before they set fire to the pitch on the deck or marked the teak wood. While so employed he worked under the orders and supervision of John Graham, a foreman in defenders' employment, whose sole or principal duty was that of superintendence, and who was not ordinarily engaged in manual labour. (Cond. 3) About 11 o'clock a.m. on said 5th July 1911 the pursuer was engaged at the said work; when running to pick up a red-hot paring he slipped on the deck of said vessel, and falling over the side thereof, a distance of 55 feet or thereby, was instantaneously killed. The said deck was in a slippery condition. The pitch had become hard, and rendered footing uncertain, and the teak wood had become slippery in consequence of a rainfall that morning. Teak wood when wet always becomes slippery and uncertain to walk on. At the place where the deceased fell over there was no fencing of any kind at the edge of the deck, and nothing to prevent one who slipped on the deck from going over the side. (Cond. 4) The death of the said deceased Thomas M'Millan junior was due to the fault and negligence of the defenders. It was their duty to take all usual, reasonable, and necessary precautions for the safety of the workmen in their employment. They knew or ought to have known that the hard pitch at the seams of the said deck

made the footing uncertain, and that teak wood when wet is especially liable to become slippery. They ought, when they employed a boy like the deceased to work on the said deck, at work which necessitated his running quickly from one part of the deck to another, while taking care to avoid falling particles of red-hot rivets, to have taken precautions against his falling over the side of the deck through a stumble or slip thereon. This precaution was rendered more necessary on account of the height of the said deck from the ground. Such precautions could easily have been taken at the time the said accident happened. The stanchions, through which the rails of the said promenade deck were to be put, were in position, and ropes could easily have been fastened to them in such a way as to prevent any accident. Such a precaution is a reasonable one to take, and is usually taken in similar circumstances. The defenders, however, failed to take that or any other precaution, and left a space of several feet at the edge of the said deck without any fencing or other protection, and the accident to the deceased resulted from this failure. After the accident they erected a wooden fence at the said place. The deceased Thomas M'Millan had not much experience of the effect of heat upon a teak wood deck, and he did not appreciate the danger to which he was exposed. (Cond 5) Alternatively, the said accident was due to the fault of the defenders' superintendent, the said John Graham, for whom the defenders are responsible, in respect that he failed in the duty of superintendence entrusted to him. He was in charge of the work on the day and at the time in question, and it was his duty to take all necessary and reasonable precautions for the safety of the pursuer's said son. He ought to have erected a fence or railing along the side of said ship at the part thereof where the pursuer's said son was working. The said John Graham knew that pursuer's said son was employed on said promenade deck, and that the said teak wood deck became specially slippery after a shower of rain such as had fallen that morning and he also knew that the side of said ship at the part thereof where the pursuer's said son was working was unfenced and unprotected. He knew or ought to have known that the state of the deck constituted a great danger to anyone engaged, as the deceased was, in running quickly from one part to another. He could easily have erected a fence by means of a rope fastened to the iron stanchion which was in position along the edge of the deck. He failed, however, to take this or any other precautions for the safety of pursuer's said son, and this failure caused the said accident.”

The defenders pleaded, *inter alia*—“(1) The pursuer's statements are irrelevant. (4) The accident not having been due to fault or negligence on the part of the defenders, or of anyone for whom they are responsible, the defenders are not liable in compensation therefor.”

On 13th November 1911 the Sheriff-Sub-

stitute (CRAIGIE) allowed a proof before answer.

On the requisition of the pursuer the cause was remitted to the First Division of the Court of Session. He proposed an issue in ordinary form with alternative schedules.

Argued for defenders—(1) The action was irrelevant at common law. At common law an employer had discharged his duty when he had provided a competent staff, sufficient plant, and a safe system of working. In this case the competence of the staff and the sufficiency of the plant were not called in question, and the pursuer's averments did not disclose a defective system. They showed that the danger was occasioned by a casual shower of rain, and that it was of a temporary nature, calling for temporary precautions, which arose in the ordinary course of carrying on the work, and was not due to a defective system. That being so the defenders were not liable—*Harper v. James Dunlop & Company, Limited*, December 5, 1902, 5 F. 208, 46 S.L.R. 174; *Thomson v. Baird & Company, Limited*, November 26, 1903, 6 F. 142, 41 S.L.R. 152. Even if the pursuer had averred that there was a duty on the defenders to provide a permanent fence, such an averment would not by itself have been sufficient to make the case relevant at common law unless he had also averred facts and circumstances from which a dangerous system could be inferred—*Burns v. Henderson & Company, Limited*, June 2, 1905, 7 F. 697, 42 S.L.R. 586; *Forsyth v. Ramage & Ferguson*, October 25, 1890, 18 R. 21, 28 S.L.R. 26. This he had failed to do. (2) The action was also irrelevant under the Employers' Liability Act, for there was no duty on the defenders or their servants to fence the deck in question.

Argued for pursuer (the Court having called for a reply on the first branch only of the defenders' argument)—(1) The action was relevant at common law. The danger was permanent and not casual. It continued so long as the boy was working on the deck, and the provision of a rail would have been only a reasonable precaution—*Wallace v. Culter Paper Mills Company, Limited*, June 23, 1892, 19 R. 915, 29 S.L.R. 784; *Smith v. Baker & Sons*, L.R. [1891], A.C. 325.

LORD PRESIDENT—It is clear that there is here no relevant averment of liability at common law. There is no averment of a defective system; there is no averment that the defenders failed to employ a competent foreman, or that they stunted their foreman in proper materials required for the performance of his duties. All that is said is that the boy, running about the deck, which was wet and slippery and not sufficiently protected by a bulwark, slipped and fell over the edge. It is said that nothing had been erected in the nature of a temporary fencing. If it was the want of a fence that caused the accident, that was not a defective system; it was a matter which was under the control of the head workman. It is quite true that the

employer is bound to provide for the safety of his workmen, and if he fails to provide some piece of machinery or structure which is necessary to protect them against what is a permanent danger, then the employer is himself liable, because he is held to have known of that danger. But he cannot be supposed to know of what may be called a casual danger emerging in the course of the work, such as that to which the boy in the present case was exposed. All he can do to protect his men against such a danger is to provide a competent foreman. There is no averment that the employer in the present case failed to provide a competent foreman, and therefore there is no fault averred at common law.

On the other hand I think a relevant case has been stated under the Employers' Liability Act, because it is said that the employers' foreman, John Graham, knew of the danger, should have erected a temporary fence to protect the workmen, and failed to do so. The pursuer may be able to prove, as he avers, that there is a general custom to fence a place of this kind. On that point it would not be proper for the Court to say anything. Unless the pursuer is able to prove that there is such a general custom, and that the failure to put up a temporary fence at this place was negligence, he will fail in his action. But he may be able to prove this, in which event he will be entitled to succeed.

I therefore think we should allow the issue under the Employers' Liability Act.

LORD DUNDAS and LORD JOHNSTON concurred.

LORD KINNEAR was absent.

The Court dismissed the action so far as laid at common law and allowed an issue under the Employers' Liability Act 1880.

Counsel for Pursuer—M'Clure, K.C.—J. A. T. Robertson. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defenders—Moncrieff—Gilchrist. Agent—Harry H. Macbean, W.S.

Tuesday, January 9, 1912.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

AMMON v. TOD.

Agent and Client—Expenses—Compromise of Action—Agents' Right to be Sisted as Parties to the Cause and to Obtain Decree for Expenses as Agents-Disbursers.

The defender in an action against whom decree with expenses had been pronounced in the Sheriff Court appealed to the Court of Session. Pending the appeal the parties settled the case without the knowledge of the pursuer's agents, the pursuer accepting a sum in full of all his claims against