COURT OF SESSION

Tuesday, June 29.

FIRST DIVISION.

[Lord Cullen, Ordinary.

EMPIRE GUARANTEE AND INSURANCE CORPORATION, LIMITED [LIQUIDATORS] *v.* OWEN & SONS, LIMITED.

Insurance—Bankruptcy—Master and Servant — Employers' Liability Policy — Valuation of Policy in Liquidation of Insurance Company—Ascertainment of Workmen's Claims by Settlement for a Sum—Assurance Companies Act 1909 (9 *Edw. VII, cap.* 49), *sec.* 17 (1), *Sched. VI* (*d*).

An insurance company having gone into liquidation, a firm of manufacturers, who were insured with the company under an employers' liability policy, lodged a claim in respect of accidents resulting in total disablement to two of their workmen which had occurred prior to the date of the liquidation. After the date of the liquidation the firm discharged their liability to the workmen for sums of £55, 5s. 9d. and £77, 7s. respectively, but lodged a claim to be ranked for £1018, 9s. 4d. They contended that the valuation of their claim should be made as at the date of the winding up, and that the Assurance Companies Act 1909, sec. 17 (1), Sched. VI (*d*), which provides rules for the valuation of an employers' liability policy in the case of the winding up of an assurance company, should be applied. They offered, in the event of the dividend on their claims coming to more than they had paid, to accept the amount they had paid. The liquidators merely admitted the claim to an ordinary ranking on the amount actually paid to the workmen. *Held* that the Assurance Companies Act did not apply, since the value of the policies had *de facto* been ascertained—in the one case by the death of the workmen, and in the other by the compromise of the claim—and that the deliverance of the liquidators should be sustained.

The Assurance Companies Act 1909 (9 Edw. VII, cap. 49) enacts—Section 17 (1)—"Where an assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of a policy of any class, or of a liability under such a policy requiring to be valued in such winding up, shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule to this Act."

Sixth Schedule—"*Rules for Valuing Policies and Liabilities.*— . . . (*D*) *As respects Employers' Liability Policies — Rule for Valuing a Weekly Payment.*—The present value of a weekly payment shall, if the incapacity of the workman in respect of which it is payable is total permanent incapacity, be such an amount as would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and in any other case shall be such proportion of such amount as may, under the circumstances of the case, be proper. *Rule for Valuing a Policy.*—The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment."

J. M. Macleod, C.A., Glasgow, and Joseph Patrick, Glasgow, official liquidators of the Empire Guarantee and Insurance Corporation, Limited, presented a note to the Court of Session for approval of their deliverances.

The *note, inter alia*, stated — "That on 31st December 1900 the Empire Guarantee and Insurance Corporation, Limited (hereinafter referred to as the company) was incorporated under the Companies Acts 1862 to 1898, and forthwith commenced the business of insurance in all its branches except those of life and fatal accident insurance. By special resolution, confirmed by the Court on 16th October 1901, an alteration of its memorandum of association was effected whereby the objects of the company were extended so as to include life and fatal accident insurance. 2. That on 14th July 1911 the Court ordered the winding up of the company and appointed the petitioners official liquidators. 3. That on 22nd August 1911 the Court ordered all parties having claims against the company to lodge their claims and proofs of debt with the official liquidators or their agents on or before 1st November 1911, and appointed the said date to be advertised once in each of the *London* and *Edinburgh Gazettes*, and twice a-week for two consecutive weeks in the *London Times*, *The Scotsman*, and *Glasgow Herald* newspapers, and an advertisement was duly published accordingly."

Joseph Owen & Sons, Limited, lodged claims in reply, on which the liquidators made the following deliverances :—

"1. *Liquidators' Deliverance.*

"Statement of account against the company for the period from to 30th June 1911 showing a sum due to claimant of £1352, 4s. 5d.

"*Liquidators' Deliverance.* — The liquidators reject this claim on the grounds that a subsequent claim has been lodged.

"JOHN M. MACLEOD.
JOSEPH PATRICK.

"2. *Liquidators' Deliverance on Amended Claim.*

"Statement of account against the company for the period from to 30th June 1911 showing a sum due to claimant of £1018, 9s. 4d.

"*Liquidators' Deliverance.* — The liquidators admit this claim to an ordinary ranking for £17, 4s. 6d. The claim for the balance is rejected in respect that it represents sums claimed to secure annuities for workmen on the footing that they were permanently injured, notwithstanding the fact that the claimants have settled each claim for a small payment. The claimants have declined to state the sums paid in settlement by them. The liquidators on disclosure of said payments are prepared to give ranking for these sums. "JOHN M. MACLEOD.
JOSEPH PATRICK."

On March 12, 1915, Owen & Sons, Limited, lodged answers to the note, in which they stated, *inter alia*—"(Ans. 2) The respondents (*i.e.*, Owen & Sons, Limited) were insured with the corporation in respect of their liability for workmen's compensation and other risks under a policy current at the date of the liquidation. While the policy was current, and before the corporation went into liquidation, two accidents took place which resulted in the permanent total disablement of two of the respondents' workmen, John Rimmer and Walter Tom Everatt. The dates of said accidents were respectively 13th August 1908 and 7th April 1909. (Ans. 3) By letter to the respondents dated 7th November 1911 the liquidators invited parties insured with the corporation to endeavour to compromise the weekly payments. The respondents settled the said two claims by a payment to Rimmer of £55, 5s. 9d. on 24th February 1913, and by a payment to Everatt of £77, 7s. on 18th July 1913. Rimmer died on 15th January 1913, and the above sum of £55, 5s. 9d. was paid into Court in discharge of the balance of the amount due to him under the Workmen's Compensation Act. The amount paid to Everatt was in respect of a compromise. (Ans. 4) The respondents in the first instance claimed in the liquidation for the arrears of the weekly payments due to Rimmer and Everatt, and for the value of the liability of the corporation for prospective payments of one-half of their respective wages computed on the Post Office Annuity Scale Tables. Inasmuch, however, as the Assurance Companies Act 1909 provides that 75 per cent. of the cost of such an annuity is to be taken, the respondents lodged an amended claim under which they claimed 75 per cent. of such cost. The liquidators have admitted the claim to the extent of £17, 14s. 6d., being the sums which had actually been paid by the respondents to their said workmen at the date of the liquidation, and *quoad ultra* have rejected the claims. The liquidators have stated that they are prepared to give the respondents a ranking for the sums actually paid by them in settlement of the workmen's claims. The respondents, however, maintain that under the provisions of the Assurance Companies Act 1909, sec. 17, they are entitled to be ranked in terms of their amended claim. (Ans. 5) The respondents accordingly submit that the deliverance of the liquidators should be recalled, and that they should be appointed to admit the respondents to an ordinary ranking for £1018, 9s. 4d. If the dividend on the respondents' amended claim should amount to more than the sums actually paid by them in settlement of the workmen's claims, the respondents are willing and hereby offer to accept as the dividend on their claim the total amount paid or incurred by them in connection with the settlement of the workmen's claims. The liquidators were informed of this before the deliverance on the respondents' claim was made."

In their replies thereto the liquidators, *inter alia*, stated—"(Reply 4) The claim and amended claim of these claimants, the deliverance of the official liquidators, and the section of the statute founded upon, are referred to for their respective terms, and beyond which no admission is made. Admitted that the liquidators are prepared to rank these claimants in addition to the said sum of £17, 4s. 6d. for the sums actually paid by them in discharge of the claims in question. *Quoad ultra* denied, and explained that these claimants have only a claim under their said policy against the company to be indemnified for the actual loss sustained by them. Such actual loss only amounts to £132, 12s. 9d., and for this sum, plus the said sum of £17, 4s. 6d., the official liquidators are prepared to rank these claimants. In place of a ranking for this additional sum of £132, 12s. 9d. these claimants desire to be ranked for £868, 12s. 1d. in order that they may obtain profit to that extent instead of the indemnity to which they are alone entitled. The section of the Act of 1909 relied upon by these claimants is inapplicable to the facts in regard to their claim. The liability under the policy in question is ascertained and no estimate is competent."

The Lord Ordinary (CULLEN) on 16th March 1915 approved of the said deliverances.

Note.—"I think that I must refuse this appeal. In the case of *The Life and Health Assurance Association* I held that the effect of the Act was to stop the running of the insurance at the winding-up, and accordingly that a claim in respect of an accident to a workman which occurred after that period could not be proved in the liquidation. I do not read the English decision in the case of *The Law, Car, and General Insurance Corporation* as deciding anything more than that. The present question relates to a claim which had emerged before the winding-up. No doubt the Act of 1909 in the case of a policy requiring to be valued supplies a rule which is binding where it applies; but I think it is obvious from the rule that it is intended to apply where at the date of the valuation the claim has not resolved itself into a claim for an ascertained amount. Now here, before the proof was put in by the appellants, the liability to the workman in each case had been finally ascertained at a certain figure by compromise. In accordance with the general rule applicable to contingent claims, I think that these ascertained figures must be taken as the figures at which the claim is to be stated. I do not read the Act as altering that general rule. It provides a rule for valuing such

an insurance liability where its amount has not been *de facto* ascertained. But here, at what I hold to be the proper date of valuation, viz., the date at which the claim is lodged, the amounts had been finally ascertained, and I think these are the amounts on which the appellants are entitled to rank."

Owen & Sons, Limited, reclaimed to the First Division, and argued — The present situation was covered by the Assurance Companies Act 1909 (9 Edw. VII, cap. 49), section 17 (1), Schedule VI (*d*), and consequently the valuation provided in the schedule should be here applied as at the date of liquidation. In the present case the Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), section 49, which referred to contingent claims, did not apply. The date of liquidation was the most suitable date for applying the valuation, since it was a fixed date applicable to all claims, and would leave no interval between past and future claims unaccounted for—*in re Law, Car, and General Insurance Corporation*, L.R., [1913] 2 Ch. 103, Kennedy, L.J., at 131; *in re Life and Health Assurance Association, Limited* (*Berry's Claim*), reported *ibidem* in note, p. 137.

Argued for the liquidators—At the date of the liquidation the claim was merely contingent. If the workman died before the date of valuation, then the Assurance Companies Act 1909 (*cit. sup.*) could not apply, since the liability was thereby ascertained —*in re Law, Car, and General Insurance Corporation* (*cit. sup.*), Buckley, L.J., at 125. The Act could not be taken to read out the common law as to the ranking of contingent claims. Though, no doubt, the claim arose at the date of liquidation, it could only be valued at a later date—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sections 206, 208; Bankruptcy (Scotland) Act 1913 (*cit. sup.*), sections 45 to 62; Palmer's Company Precedents (11th ed.), Part II, 504, 511; *in re Dodds, ex parte Vaughan's Executors* (1890), 25 Q.B.D. 529.

At advising—

LORD MACKENZIE—This is a reclaiming note against a judgment of the Lord Ordinary pronounced in a note presented by the liquidators of the Empire Guarantee and Insurance Corporation for approval of their deliverances. The company was ordered to be wound up by the Court on the 30th June 1911. At that date the reclaimers, Joseph Owen & Sons, were insured with the corporation in respect of their liability for workmen's compensation and other risks under a policy current at the date of the liquidation. While the policy was current, and before the corporation went into liquidation, two accidents took place which resulted in the permanent total disablement of two of the respondents' workmen, John Rimmer and Walter Tom Everatt. The dates of these accidents were respectively 13th August 1908 and 7th April 1909. The liquidators wrote to Owen & Sons on 7th November 1911 inviting them to endeavour to compromise the weekly payments. Owen & Sons settled the two claims by a payment to Rimmer of £55, 5s. 9d. on 24th February 1913, and by a payment to Everatt of £77, 7s. on 18th July 1913. Rimmer died on 15th January 1913, and the sum of £55, 5s. 9d. was paid into Court in discharge of the balance of the amount due to him under the Workmen's Compensation Act. The amount paid to Everatt was in respect of a compromise.

Owen & Sons lodged two claims with the liquidators. The first, lodged on 31st October 1911, was admittedly made up on a wrong principle, and need not be further referred to. It was rejected by the liquidators. The second claim was lodged on 17th July 1914, and showed an amount due to Owen & Sons of £1018, 9s. 4d. The deliverance of the liquidators as regards this is in these terms—"The liquidators admit this claim to an ordinary ranking for £17, 4s. 6d. The claim for the balance is rejected in respect that it represents sums claimed to secure annuities for workmen on the footing that they were permanently injured notwithstanding the fact that the claimants have settled each claim for a small paymemt. The claimants have declined to state the sums paid in settlement by them. The liquidators on disclosure of said payments are prepared to give ranking for these sums." The Lord Ordinary has approved of this deliverance. Owen & Sons having condescended in the pleadings in this case on the amounts for which they had settled, the liquidators in their reply 5 state they are willing to rank them for the amount of their actual loss. The total amount is £132, 12s. 9d., made up of the two sums above mentioned of £55, 5s. 9d, and £77, 7s. This represents the total amount of their liability for the two accidents. Owen & Sons insist that they are entitled to be ranked for the full amount of their claim—£1018, 9s. 4d. It is therefore obvious that according to their argument, if, as was stated to be possible, a dividend of 10s. per £ is paid, the result would be a large profit to the reclaimers. The soundness of their argument must be tested by this, though no doubt the reclaimers say —"If the dividend on the respondent's amended claim should amount to more than the sums actually paid by them in settlement of the workmen's claims, the respondents are willing and hereby offer to accept as the dividend on their claim the total amount paid or incurred by them in connection with the settlement of the workmen's claims."

The reclaimers' contention is founded on the effect which they say should be given to the Assurance Companies Act 1909 (9 Edw. VII. cap. 49), sec. 17 (1), and the Sixth Schedule (D).

The effect of the statute, the reclaimers contend, is to liquidate as at the date of the winding-up the amount which the company has to pay, and that the amount must be calculated in the manner prescribed by the Sixth Schedule (D). It appears to me the Lord Ordinary has rightly rejected this argument. We were referred to the case of the *Law, Car, and General Insurance Cor-*

poration (*J. King & Son's &c. Claims*), [1913] 2 Ch. 103, in which a previous judgment of the Lord Ordinary in the present case (Lord Cullen) was approved. The report of the latter case, *In re Life and Health Assurance Association* (*Berry's Claim*), is only to be found in [1913] 2 Ch. 137. These cases, however, dealt with the question whether the assured is entitled to claim in respect of liabilities which may have emerged under the policy after the date of the winding-up order. It was held that, inasmuch as the assured was entitled to a ranking in respect of the proportion of the last premium paid which effeired to the unexpired portion of the period in respect of which the premium was paid, any claim emerging after the date of the liquidation was excluded.

This does not aid the reclaimers here. The methods of valuation prescribed in the schedule apply to the case of a policy requiring to be valued as provided by section 17 (1). The answer in the present case is, in my opinion, that the provisions of section 17 (1) of the schedule do not apply—the policy does not require to be valued because the value of the weekly payment has *de facto* been ascertained by the death in the one case and the compromise in the other. I am accordingly of opinion that the judgment of the Lord Ordinary is right.

LORD SKERRINGTON and LORD ORMIDALE concurred.

The LORD PRESIDENT and LORD JOHNSTON were not present.

The Court adhered.

Counsel for Owen & Sons, Limited, Reclaimers—Moncrieff, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S., and Moncrieff, Warren, Paterson, & Company, Glasgow.

Counsel for the Liquidators, Respondents—Sandeman, K.C.—Wilton. Agents—E. & A. Denholm Young & Company, W.S.

Friday, June 11.

FIRST DIVISION.

[Lord Anderson, Ordinary.

EVANS *v.* EDINBURGH CORPORATION AND OTHERS.

Reparation—Negligence—Road—Obstruction—Door in Garden Wall Opening Outwards on to Public Thoroughfare—Liability of Owner of Door—Liability of Road Authority—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *secs.* 3, 47, 94, 123, *Schedule C—Edinburgh Municipal and Police Act* 1879 (42 *and* 43 *Vict. cap. cxxxii*), *sec.* 151.

A foot-passenger was proceeding along a public street in Portobello when a door in the wall of a garden adjoining the street was suddenly opened outwards and struck him, causing serious injuries. He brought an action of damages against (1) the owners of the property, and (2) the lord provost, magistrates, and councillors of Edinburgh as road authority, averring that the owners were at fault in having a door opening outwards on the street, and that the road authority was at fault in not compelling the owners to make the door open inwards.

Held that the action was irrelevant, inasmuch as the mere existence of a door opening outwards on to a public road, and nothing more was averred, (1) did not constitute negligence on the part of the owners, nor (2) constitute negligence on the part of the road authority in the absence of any statutory duty.

Held that the Edinburgh Municipal and Police Act 1879, sec. 151, did not apply, and that in the absence of averments as to the standing of the road in 1878 the pursuer could not invoke any obligation imposed on the road authority by the Roads and Bridges (Scotland) Act 1878, as it was uncertain whether the road came within the definition of "highway" in section 3 and so under the statute.

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), enacts—Section 3—". . . 'Highway' shall mean and include all existing turnpike roads, all existing statute labour roads, all roads maintained under the provisions of the Highland Roads and Bridges Act 1862, and all bridges forming part of any highway, and all other roads when declared to be highways under the provisions of this Act, all public streets and roads within any burgh or police burgh not at the commencement of this Act vested in the local authority thereof, but shall not include any street or road so vested, or any street or road or bridge which any person is at the commencement of this Act bound to maintain at his own expense." . . .

Section 47—"From and after the commencement of this Act the highways and bridges situated within any burgh shall be by virtue of this Act transferred to and vested in the local authority of such burgh, and such local authority shall have the entire management and control of the same, and shall possess the same rights, powers, and privileges . . . as the trustees under this Act possess . . . in reference to roads, highways, and bridges . . . in the landward part of the county . . . and shall also have and may exercise with reference to the construction, maintenance, and repair of the roads, highways, and bridges within their respective boundaries such and the like powers and authorities as they possess with reference to any streets within their respective boundaries." . . .

Section 94—"From and after the second Monday of December One thousand eight hundred and seventy-eight the sections of the Edinburgh Roads and Streets Act 1862, from four to twenty-two, both inclusive, and from seventy-nine to eighty-six, both inclusive, shall be and the same are hereby repealed, and the body of trustees thereby constituted under the name and description of the City of Edinburgh Road Trust shall