

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

The LORD JUSTICE-CLERK was absent.

The Court answered the question in the negative.

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

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

HOUSE OF LORDS.

Monday, June 29.

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

WHITEHOUSE v. R. & W. PICKETT.

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

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

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

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

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

This case was reported *ante ut supra*.

At delivering judgment—

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

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

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

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

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

in evidence. This involves a consideration of the Innkeepers' Liability Act of 1863, which altered the common law by limiting their liability for the property of their guests to £30 except in two cases—(1) When such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2) When such goods or property have been deposited expressly for safe custody with such innkeeper.

Taking the second case in the first place, I cannot think that the evidence establishes any such deposit within the meaning of the Act. I do not think that any form of words was needed, but something should be said or done by the guest that would clearly convey to the innkeeper that goods were being deposited with him for safe keeping. Here the guest did not say a word to draw attention to the fact that he was making any deposit whatever. The innkeeper probably never saw the bag at all. The course of dealing would not warrant the effort to spell out any liability. The bag, in my opinion, was left in the office to afford ready access to Mr Buckley whenever he wanted his bag for his trade purposes, he thinking it as safe and convenient a place as he could find. His removal of it to his bedroom each night demonstrates that he did not think he had fixed the innkeeper with any special liability by leaving it during the day in the office. The respondent cannot eke out a special undertaking by the notice that the proprietors would not be responsible for any valuables left in bedrooms, but would "take charge of same in office," and adding a reference to the statute. This, in my opinion, only invited guests to make deposits for safe custody as contemplated by the Act. Once it is decided that there was no deposit for safe keeping it is manifest that the duty or obligation was entirely altered. The decision on this point colours the whole case, although, of course, the question of negligence has to be separately considered.

This latter question is somewhat more difficult and needs close examination, but after the best consideration I can give the case I am unable to arrive at the conclusion that on the actual evidence the respondents are liable. Most probably the loss was due to the theft of three daring confederates who had been shadowing Buckley, and according to the poster notice of the police had been following him from town to town—London, Manchester, Liverpool, Lancaster, Carlisle, and Glasgow. If Buckley had made an express deposit for safe custody the respondents would be liable, but as he did not do so, and only left his bag in the office in the way described, to be taken such good care of as the course of business in the hotel permitted, and as was extended to their own property, I cannot see any proof of negligence that would render the respondents liable.

It was urged by the appellant that the door from the private sitting-room into the passage was not always locked, and that the door next the bar-room was not always

"snibbed" when the bar or sitting-room had, for the moment, no one in attendance. But there can be no doubt, I think, that the usual practice was to have a close attendance and also to keep the door secure. An occasional departure from a settled practice owing to the exigencies of the hotel business, would not justify a speculation or guess that this might have led to the loss. The probability that has found most favour on all sides for the theft is that it occurred while the bar was attended by one of the family, whose attention was called away by one of the confederates whilst the others stole the bag. I would not on this speculation hold that the respondents were to be held liable for "wilful act, default, or neglect." There is no affirmative evidence bringing home to the respondents direct negligence from which the loss resulted.

I think that the appellant's argument seeking to hold the respondents liable by the imputation of neglect for the theft from the office is coloured by the fact that the theft was from the office where the bag would have been left if deposited for safe keeping and losing sight of the fact that it was not so deposited.

I think that the judgment appealed from should be affirmed with costs.

LORD JAMES OF HEREFORD—I have entertained considerable doubt as to the judgment that should be given in this case, and it is after great hesitation that I have arrived at the conclusion I am about to state.

Under the provisions of the Innkeepers Act 1863, the pursuer, in order to recover a greater sum than £30, has to prove (1) that the lost articles were expressly deposited with the defenders for safe custody, or (2) that the defenders have been guilty of neglect in relation to the articles. The facts governing the first of these issues are scarcely in dispute, but it is the inference that ought to be drawn from them that has occasioned the doubts I have entertained.

It seems that Buckley, the pursuer's traveller, had for years been in the habit of visiting and staying at the defenders' hotel. On Saturday, February 17th, 1906, Buckley paid one of his business visits to Edinburgh and arrived at the defenders' hotel, bringing with him two bags, one containing articles "for personal use, the other jewellery. The porter, a man named Sims, took charge of the bags, taking the first to Buckley's bedroom, and placing the second (containing jewellery) in the corner of the office," behind an ice chest. The place of deposit was substantially the same as that in which Buckley's trade bag had on previous occasions been deposited, and therefore Sims, with the knowledge and in the presence of Buckley, placed it there.

I think it must be taken that Reginald Pickett was aware that the bag was so deposited, and that he also knew that it contained jewellery, but nothing passed between him and Buckley on the subject. The whole action of Sims was controlled by his knowledge of the previous habit of

dealing with the bag, and so he knew that Buckley wished, and Pickett did not object, to the bag being left in the place I have mentioned.

Within a few hours this bag was found to be missing, probably stolen by means of a well arranged plan. Upon these facts I come to the conclusion that the bag was, as I have already stated, deposited in a place under the control and supervision of the defenders with the object that it should be in a safer place than if it were in Buckley's bedroom. And I also think that the habit of dealing with the bag, which had grown up, amounted to a permission by the defenders that the bag might be placed in a position more or less under their personal observation and supervision, and which thereby would be a safer place than the bedroom occupied by Buckley. This view of the permission seems also to have been shared by Buckley. It was reasonable for him to think that the room occupied by the defenders and their servants would be a safer place for his deposit than his empty bedroom.

But now there still remains to be considered the question whether the bag was expressly deposited for safe custody with the defenders. In my judgment it was not.

I agree with the opinion expressed in the Court below, that some meaning must be attached to the word "expressly." The Legislature must have meant that if the goods were merely deposited with the innkeeper, liability for loss would not ensue. Such a deposit may be made for other purposes than safe custody, say, to be handed to someone applying for the goods. Such a deposit may also possibly be for safe custody, and no liability arise unless some facts exist which satisfy the word "expressly."

My view is that the Legislature intended that before the innkeeper should be liable proof should be given that he received into his charge goods with the intention of making himself liable for their safety. That he should possess, or at any rate have an opportunity of possessing, knowledge of the nature and value of the goods deposited, so that he might regulate the extent of his control over and care of them with some relation to the liability that would attach to him if the goods were lost.

If this be the proper meaning to be attached to the word "expressly," I have arrived at the conclusion that the jewellery bag was not expressly deposited with the defenders, and that therefore they are not liable upon this ground under the exception mentioned in the statute.

But the second exception still has to be dealt with. Were the defenders guilty of negligence in relation to the goods that were lost? When the case was before the Lord Ordinary this was the ground of action mainly insisted upon.

The Lord Ordinary in his judgment says that "the effect of the Act was to throw the *onus* upon the guest whose property had disappeared in the innkeeper's custody to prove that it had so disappeared through the default or negligence of the innkeeper

or his servants." Of this statement of the rule of law Lord McLaren approves, and I see no reason for taking any other view of the innkeeper's liability.

The Lord Ordinary also finds "that there is no direct evidence of negligence, but the pursuer says it must be inferred from the disappearance of the goods coupled with the facts disclosed in the proof, which he says instruct both a laxity in the system adopted by the defenders in storing their customer's property and negligence on the part of those in charge."

There being no direct evidence of negligence, I have difficulty in finding it to be established from the fact of the loss or from the admitted conduct of the defenders. Goods may be stolen notwithstanding that the utmost care is taken of them. Then I seek in vain for particular proof of the alleged negligence. Certain hypotheses are presented as to the way in which the theft might have been committed, but in order to establish negligence it is not enough to surmise the manner of loss and then to say opportunity for a theft may have arisen through causes which were not shown to have any connection with such loss.

Whatever "laxity"—to use the words of the Lord Ordinary—existed, it must have been the practice of the inn, which apparently was known to Buckley, and not guarded against by him or complained of. I doubt also whether it is right to say that the goods were "stored" by the defenders. The practice of placing the goods in or near the office was well known, and had been pursued to the knowledge of the customer for a long time, but I cannot find that any measure of positive personal supervision was demanded or expected by him.

I wish to observe that if the trial had been before a jury, and it had been found by them that the defenders had been guilty of negligence, a grave question would arise whether such a verdict should be set aside, for it may be that some evidence of negligence might be discovered; but this is an appeal against the judgment of the Lord Ordinary upon the whole case, and your Lordships have to review his findings upon the facts as well as the law of the case. With sincere respect for the authority of that learned Judge, I cannot avoid differing from him and agreeing with the Judges of the Extra Division.

So it appears to me that on this second ground also the pursuer's case fails, and that therefore the judgment of the Court below is correct, and that the appeal must be dismissed.

LORD ROBERTSON—(Read by the LORD CHANCELLOR)—I think the judgment appealed against sound.

By statute an innkeeper is no longer liable, on the old common law ground, for goods lost in his house except to the extent of £30. Beyond that he can only be liable on one or other of the two grounds stated in the statute, that is, if the goods have been deposited with the innkeeper expressly for safe custody, or if they have been stolen or lost through the wilful act,

default, or neglect of the innkeeper or his servant.

Now, on the first of those alternatives the appellant has no case at all. Buckley, the traveller, says, in so many words, that he cannot remember ever asking the respondents to take charge of the bag. What he did was simply to put the bag in a place, which he thought at once safe and accessible during the day, while, on the other hand, at night he took it to his own bedroom—the bag being in each case placed and taken away without reference to the respondents. There is, therefore, no suggestion that this practice was initiated by, or based upon, any original and continuing trust, made and accepted, which should apply to the whole course of Buckley's visits. The thing was done simply on Buckley's estimate of the physical conditions of safety afforded by the place in question, and not on any guarantee of the respondents, as is shown by his considering his own bedroom, when occupied by himself, still safer than the office. In the one case, as in the other, the respondent was not consulted. They knew, of course, that he put his bag there and that he took it away, in each case at his own hand.

In the other matter, of neglect, it is necessary to see first what duty is said to have been neglected. The hypothesis of the argument is that there was no legal deposit expressly for safe custody, and the duty must therefore be one applicable to any goods not deposited for safe custody, of large value or small value. The appellant has no affirmative case on this subject, and the suggestions made are merely hints that this valuable bag ought to have had more care taken of it, which, of course, is simply giving the statute the go-by. When the proved facts are examined, it is plain enough that the bag got exactly the same protection that everything in the office got, including the respondents' own till. Unless, then, there is ground for holding, in fact, that the till was neglected, there is no ground for holding that this bag was neglected. And ground there is none. It is true that no one sat on the bag, any more than on the till; but there is no scintilla of evidence of any desertion of the room which held both. Nor does the fact of the theft of itself evidence neglect, for it is now plain that three thieves were at work, and it is plausibly suggested that two might engage the occupant of the room in conversation while the third abstracted the bag. These are among the risks which of old fell on the innkeeper, and now do not.

I must frankly say that I think the case a clear one for the respondents.

LORD COLLINS—(Read by LORD ASHBOURNE)—I am of opinion that this appeal should be allowed and the judgment of the Lord Ordinary restored.

The Innkeepers Act (of the provisions of which the Lord Ordinary finds that sufficient notice was given) cuts down the absolute liability of the innkeeper to his

guest for loss or injury to goods, such as those here in question, brought to his inn, to £30, except (1) where they have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2) when such goods or property shall have been deposited expressly for safe custody with such innkeeper.

It has been held that the word "wilful" in the first exception is to be read as applying to "act" only—*Squire v. Wheeler*, 16 L.T. 93.

The Lord Ordinary, without deciding whether there was an express deposit for safe custody within the second exception, held that the goods in respect of which the action was brought were stolen or lost through the negligence of the defenders or their servants, and awarded the pursuer damages accordingly to the amount of £1790.

I agree that it is not necessary to decide here that there was an "express" deposit for safe custody, though, on the other hand, it would not be a very unreasonable inference to draw, from 16 years' uniform practice, that the innkeeper accepted an obligation with regard to the bag containing jewellery higher than that under which he received the ordinary luggage of his guest. But it is enough to say that with regard to it he was at least in the position of a bailee for reward, and bound as such to a high degree of care. The statute, no doubt, in such case throws the *onus* of proving negligence on the guest, and there was, in my opinion, evidence of negligence on the part of the innkeeper or his servants which a jury, had the case been tried by one, would have been fully justified in treating as having caused the loss. There was evidence from which a jury might well have inferred that one at least of the defendants was aware that the plaintiff's bag had been placed for greater security in the office, and as to one door, at all events, giving access to it, the defenders admitted that the rule was that when no one was in the office it should be kept snibbed. There was evidence that this precaution had not been uniformly adopted on the day in question, and that no special precautions had been taken to make sure that someone should be always on the spot to keep an eye on the things left for safety in the office. The learned Judge who tried the case, and heard and saw the witnesses, was at least as well entitled as a jury to draw inferences of fact from evidence which, in my opinion, must have been left to a jury had there been one, and I am certainly not prepared to differ from his conclusions. The argument of the respondents seemed to me to ignore the high degree of diligence incumbent upon the defendants as bailees for reward, even though there had not been the express deposit for safe custody mentioned in the section. It was equally a bailment for reward whether express or implied, and the risk involved and the degree of care required were well understood, but there was a pressure of business in the hotel that night, and less than

reasonable care seems to have been adhibited. The fact that they were equally negligent in the custody of the money in their own till, even if relevant in the case of a gratuitous depository (see *Doorman v. Jenkins*, 2 A. and E. 256), cannot excuse a bailee for reward.

I agree with the Lord Ordinary in his conclusion and his reasons.

Their Lordships refused the appeal.

Counsel for the Appellant (Pursuer, Respondent) — Danckwerts, K.C. — Robertson Christie. Agents — Gardiner & Macfie, S.S.C., Edinburgh — Christopher & Roney, London.

Counsel for the Respondents (Defenders, Reclaimers) — The Solicitor-General (Ure, K.C.) — Munro. Agents — Cuthbert & Marchbanks, S.S.C., Edinburgh — A. & W. Beveridge, Westminster.

COURT OF SESSION.

Friday, June 5.

FIRST DIVISION.

KENNEDY AND ANOTHER (OWNERS OF "WELSHMAN") v. CLYDE SHIPPING COMPANY, LIMITED (OWNERS OF "PORTLAND") AND OTHERS.

Ship—Expenses—Limitation of Liability—Competitive Claims on Limited Fund—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 504.

Observed per Lord President — "Where no question is raised as to the right of petitioners," under the Merchant Shipping Act 1894, "to have their liability limited, and where the ship, as it were, tables its stake, then such expenses as are given against the petitioners over and above the limited fund must be strictly restricted to the expenses of lodging the claims and taking decree, and not extended to any expenses incurred in the competition between the claimants."

Process—Interlocutor—Alteration of Form of Interlocutor.

"When an interlocutor is signed and given out to the parties, . . . if anything is to be said about altering the form of it, it must be said at once."

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 504, provides—"Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply . . . in Scotland to the Court of Session, . . . and that Court may determine the amount of the owner's

liability, and may distribute that amount rateably among the claimants, . . . and may proceed in such manner and subject to such regulations . . . as to payment of any costs as the Court thinks just."

David M'Allister Kennedy and John Kennedy, owners of the s.s. "Welshman," presented a petition under the Merchant Shipping Act 1894, section 504, for limitation of liability arising out of a collision in which the s.s. "Welshman" was in fault.

Claims were lodged by the Clyde Shipping Company, Limited, and others (the owners, officers, and crew of the s.s. "Portland," the injured vessel), N. Adshead & Son and others (cargo owners), Fletcher Son, & Fearnall, Limited, and others (cargo owners), James Sterling (cargo owner), and Arrols Bridge and Roof Company, Limited, and others (cargo owners).

The First Division on 12th April 1907 appointed consignation of £2500, 16s., with interest at 4 per cent. per annum from the date of the collision, being the whole sum for which on the tonnage of their ship the petitioners were liable. As the claims lodged exceeded the sum consigned, the Court remitted to Mr Richard Clancey to adjust and settle the claims and report thereon. After certain objections to Mr Clancey's report had been successfully maintained by certain of the claimants, the Court on 18th March 1908 pronounced an interlocutor, which after granting warrant to the Accountant of Court to deliver up the consignation receipt, and to the Commercial Bank of Scotland, Limited, to pay to the claimants or their agents the sums to which they had been respectively found entitled, proceeded as follows—"Find the petitioners liable in expenses to the respective claimants, including the expense of the remit to Mr Clancey and the procedure thereunder, and the objections to his report, and remit the accounts thereof to the Auditor to tax and to report."

The Auditor having lodged his reports, the petitioners objected to various items on the ground that only one set of cargo owners should get full expenses, and argued—Section 504 of The Merchant Shipping Act 1894 left the Court absolute discretion as to expenses, but the rule in *Burrell v. Simpson & Company*, July 19, 1877, 4 R. 1133, 14 S.L.R. 667, should be followed, and only one set of cargo owners should get full expenses, and the other cargo owners should only get the expenses of lodging their claims and of the appearance to take decree.

The Court continued the case in order to consult the Auditor.

At advising—

LORD PRESIDENT—I have looked into the case of *Burrell v. Simpson*, 4 R. 1133, and I draw attention to the fact that while the form of interlocutor here is "Find the petitioners liable in expenses to the respective claimants, including the expenses of the remit to Mr Clancey and the procedure thereunder, and the objections to his report," the interlocutor in *Burrell* was "Find the petitioner liable to the claimants in the