

compel us to resort to an obsolete device when the means of equitable adjustment are ready to our hand. Lord Eldon in the *Peterhead* case defined a heritor to mean "an owner of houses or lands," and the present assessment was imposed by the combined consent of the owners within and beyond the burgh of Annan.

I have not found in any of the decisions since the case of *Lockhart*, or any of the best writers, any indication of the view that this case established the doctrine so earnestly pressed on us, that there could be no heritor in a royal burgh except the corporation, in the sense of the Statute of 1663. On the contrary, Mr Bell in his Principles, speaking of the Church, says—"Section 1164. When the parish is mixed, both landward and burghal, the building or repairing of a church is a parochial charge to be defrayed by all the owners of lands and houses in proportion to their real rents." And in the last edition of *Dunlop's Parochial Law* (p. 18), it is stated as the tendency of the decisions that there is and should be no distinction between royal burghs and burghs of barony or regality in this matter.

I say nothing as to the patrimonial rights arising out of the erection and repairing of churches and manse. These may stand on a different footing. But as to the mode of assessment, I am of opinion that the heritors here were within their right in imposing this assessment on the real rent, and that the rent must be ascertained by the valuation roll.

LORD YOUNG—I agree with your Lordship's opinion in all respects. The fundamental proposition here is, that by the statute law of Scotland, the manse—the residence of the parish minister—is provided by taxation of the heritors in respect of their heritable property within the parish. In the old days of valued rent it was laid on it. In these days of real rent—of more equitable incidence of taxation—it is laid on the real rent according to the valuation roll. The expense of provision for repair of a manse is simply a tax on lands and houses within the parish, and where a manse has to be provided or repaired, there is no ground for any distinction—at least in my mind—between one part of the parish and another—that one part is a royal burgh makes no difference in the incidence of the tax. The proprietors of houses thus are simply proprietors within the parish, and liable to the tax equally with those in other parts of the parish which are not burghal.

LORD RUTHERFURD CLARK—I also concur in your Lordship's opinion.

LORD CRAIGHILL was absent on Circuit when the case was heard.

The Court adhered.

Counsel for Pursuer (Respondent)—Lord Advocate (Balfour, Q.C.)—Dickson. Agents—T. & R. B. Ranken, W.S.

Counsel for Defender (Reclaimer)—Solicitor-General (Asher, Q.C.)—Graham Murray. Agents—J. & A. Hastie, S.S.C.

Friday, October 26.

SECOND DIVISION.

[Sheriff of Lanarkshire.]

GALLAGHER V. BURRELL & SON.

Reparation—Master and Servant—Liability for Servants' Acts—Negligence in a Matter unconnected with the Service.

In an action by a widow for damages for the death of her husband, who had been killed, as she alleged, through the fault of a servant of the defenders, it appeared that the act complained of had been done by the defenders' servant at the request of the deceased himself, and that in any view it was entirely unconnected with the servant's employment. The Court on these grounds *assoluted* the defenders.

Mrs Susan Gallagher, the pursuer of this action, sued Messrs Burrell & Son, shipping agents, Glasgow, for payment of £500 as compensation for the loss of her husband, who was drowned owing to the alleged fault of a man in their employment named Monteith, at a lock on the Forth and Clyde Canal near Grangemouth. The pursuer averred that on the 27th July 1882, her husband, who was the skipper of a barge plying on the canal, was proceeding to Grangemouth with a boat laden with pitch, and had got as far as No. 4 lock, and had nearly cleared it, when the sluice-gate was prematurely opened by Monteith, who was in charge of a barge of the defenders lying outside the lock. The result was that the helm of Gallagher's boat being struck by the water which was thus admitted, swerved round, and the tiller of it knocked him overboard, and he was drowned.

The defenders denied liability (1) on the ground that it was at the request of the deceased himself that Monteith had raised the sluice, and (2) that this act, assuming it to have constituted fault on Monteith's part, had not been performed by him as their servant.

They pleaded—"The defenders are entitled to absolvitor, in respect—(1) Neither they, nor any person for whom they are responsible, caused the accident in question; and (2) Alexander Monteith was not acting as their servant, but as deceased's assistant, and at his request, in raising the sluice."

The proof disclosed the following facts:—Monteith was on board the "Goliath," and west of the No. 4 lock fell in with Gallagher, who was on the "Fibre." Gallagher offered to "give him the lock" (*i.e.*, let him pass through first), but as he was in no hurry he declined the offer, and lay in the reach above the lock to wait his turn. When the "Fibre" was inside the lock, there was another boat, the "Bouncer," between it and the "Goliath." When Gallagher was trying to take the "Fibre" out of the lock his boat got jammed, and he called to the driver of his horse, a man named Dunn, to go on with the horse, and to Monteith to "give him three nicks on the sluice." The meaning of this was to raise the bar of the sluice admitting water to the lock to the extent of three teeth, in order that the boat might by the admission of the water be straightened in the lock, and that she might be the more easily drawn out.

Monteith accordingly did this at Gallagher's request. This was proved by the evidence of Monteith, and by that of a Mrs M'Guire, who lives close by the lock, and heard Gallagher call to Monteith to do so.

The Sheriff-Substitute (LEES) found "that on 27th July 1832 Patrick Gallagher, now deceased, was drowned in the Forth and Clyde Canal at No. 4 lock, near Grahamston, through being swept into the water by the helm of the boat which he was steering through said lock: that on said occasion the sluice of one of the upper gates of said lock was, in violation of the rules applicable to the management of the canal, and to the obvious danger of Gallagher, opened by Alexander Monteith, a servant of the defenders, Burrell & Son, and the water thereby rushing in caused the helm to slew round rapidly, whereby Gallagher was struck and swept into the water as aforesaid: that Monteith was engaged at the time in the navigation of one of his employers' boats, and was waiting his turn to get his boat through the lock, and that it was within the scope of his duties to aid in opening the sluice and gates of the lock at the proper time: that the pursuer was the widow of the said Patrick Gallagher, and as such was entitled to compensation for the death of her husband from any person through whose fault his death was caused: that the defenders Burrell & Son, as the employers of the said Alexander Monteith, were responsible to her for his fault." He therefore repelled the defences, and decerned against Burrell & Son for payment to the pursuer of the sum of £150.

Note.—Gallagher was a man of about 36 years of age, and is shown to have been a cautious and experienced boatman. His boat was heavily laden, and the lower gates of the lock had been opened in order to allow the boat to be drawn out on its passage eastwards. Two boats lay in waiting to get through the lock, and the one on which the defenders' servant was engaged was second in turn. I mention this as furnishing a natural explanation of his alleged wish to get Gallagher's boat through the lock as fast as possible.

"It has been explained in the interlocutor how the unfortunate occurrence took place, and it is not denied. Practically the only question of fact is, whether or not Gallagher by his negligence contributed materially to his death? Now this is a matter which the defenders must establish if they are to escape liability. Monteith says that Gallagher told him to raise the sluice-bar three or four nicks, and he explains that his object was to get the aid of the force of the inrushing water in slewing his boat round from a slanting to a straight position. Monteith's evidence as to some such request having been made is corroborated by Mrs M'Guire, who says that she thought the request came from some one in the lock.

"On the other hand, there are considerations which tend strongly to the view that Gallagher did not make any such request. To take such a step would have been a violation of the rules of the canal, and obviously was attended with much risk to a heavily-laden boat, as his boat was. It is plain that if the water be let in through the upper gates before the lower gates are closed, there would be, firstly, a great waste of water, and secondly, if the gates be not fully opened

they would be brought together by the rush of the water and jammed against the vessel passing out of the lock. It is clearly proved that the impropriety and the danger of what was done were well known; but Monteith explains that it is quite usual to act as he did when heavy boats are passing through, though it would be dangerous to do so with light boats. On this he is flatly contradicted by the other witnesses, who point to the risk to a heavily-laden boat of being sunk if the water was allowed in in this manner.

"But Monteith is also contradicted on a very important point by the other witnesses, for he says that the boat had been drawn half-way through the lock when Gallagher requested him to open the sluice; whereas all the other witnesses who speak on the point say it had barely moved, or not moved at all. But Monteith's version of the matter is not only contradicted, but is hardly credible, for if the boat had advanced about 36 feet or so, as he says, it is not easy to see how the inrush of the water could have any appreciable effect on the helm, or have been of any service to Gallagher. Then it is to be noticed that this alleged request was heard by no one else, although the other witnesses had more or less an opportunity of hearing it if made, and not unnaturally Monteith would have a tendency to exculpate himself in a matter in which beyond all question he was to blame, and to lessen that blame or to associate Gallagher in it. Taking all these things into consideration, I am not satisfied with the evidence of the defenders on this the vital point of the case; and accordingly I consider it my duty to hold that they have failed to establish contributory negligence on the part of Gallagher.

"It is pleaded, that, even supposing Monteith was to blame, they are not responsible, as he was not doing what he did in obedience to their orders, and that he should not have done it. The plea, however, is so obviously bad, that it would be a mere waste of time to offer any comment on it in repelling it."

The defenders appealed, and argued—It was clear from the proof that Monteith only interfered with the sluice at the deceased's own request, and in doing so he only acted in a neighbourly and friendly spirit, and in no sense in discharge of his masters' duty. There was in any view contributory negligence on the part of Gallagher.

The pursuer replied—The Sheriff-Substitute was right in holding it not clearly proved that such a request had been made to Monteith by the deceased. That being so, Monteith interferes recklessly in the matter, and as he was engaged in the defender's work at the time, the act being one by which they were to benefit in the greater speed given to the voyage of the "Goliath," they as his masters were liable in damages—Fraser on Master and Servant (3d ed.), 262.

At advising—

LOLD JUSTICE-CLERK—I do not see that there is any need to have the argument resumed, because in my opinion the case on the face of the proof has not been proved, and the Sheriff's note is quite inconclusive.

In the first place, I am of opinion that if Monteith did what he said he did, he was not acting for his employer but only doing a neighbourly act to help a friend through the lock. It was no

part of his duty to help the other men on lighters through the lock. No doubt it may be said that it might be for his masters' benefit that Gallagher should get through the lock quickly, but he says he was in no hurry, and without further evidence I cannot assume that he interfered with the sluices in discharge of his duty to his master while Gallagher was going through. He was then simply a volunteer doing a friendly act. If therefore a servant volunteers to do a helping action for another servant in difficulties, his master is not liable for any accident arising therefrom. If a footman, seeing a carriage carelessly driven and the horse thrown down, gets off the box of his master's carriage and helps the driver of the horse, he does not do so in discharge of his master's duty. Therefore I have great doubts of the foundation of the case. But apart from this the evidence is perfectly clear that Gallagher asked Monteith to raise the sluice in order that an impetus might be given to his barge, which had stuck in the passage through the lock, and which the horse was unable to move. Mrs M'Guire states that she heard some one from the lock call out to Monteith to open the sluice, and I cannot doubt that this is true.

I am therefore compelled to come to the conclusion that the pursuer cannot succeed. Of course one has great sympathy with the poor widow and children, as well as with an occurrence fatal to the man, but I think it was an accident and misadventure. Therefore on the whole matter I cannot see that Monteith in doing a friendly act is to blame, or that his masters are responsible for that act.

LORD YOUNG—I come very easily to be of the same opinion. The substance of the case is this. An accident occurs while the "Fibre" is being navigated through lock No. 4. I think it is clearly proved that when the vessel got to the level of the lock, and it became necessary to pass on, there was a good reason that it should be shoved forward from behind. A voice was then heard from the barge calling out quite in the usual way to move her a nick or two. It was understood and answered by letting in a little water from behind in order to give the barge an impulse, and it was done in a friendly way by Monteith. Now, I do not think that Monteith was in fault at all, and no case of liability has been established against him as a wrongdoer. Unfortunately an accident occurred, and has not been accounted for, but I cannot say on the evidence which is before us that Monteith was in fault for doing what was a common thing, asked and completed in the usual way. If this be so, then there is no case against the master, because he is only responsible for his servant's fault. But even if Monteith were in fault in respect to this voluntary service, I agree with your Lordships it was not in the course of his master's service. His master did not employ him to assist the "Fibre" or other barges through the lock. Therefore on the whole matter, in my opinion, the action, both on the facts and the law, fails altogether.

LORD CRAIGHILL—I am of the same opinion. Liability can only be established against the defenders on the assumption that Monteith was acting in their employment. But this is not proved, and indeed in my opinion the contrary has been

established. Monteith never imagined he was doing any duty incumbent on him in his duty towards them. That he only did what he did out of good neighbourly feeling is as clear as it well could be.

LORD RUTHERFURD CLARK—I concur.

The Court found "that the witness Monteith in the matter complained of acted on the request of Patrick Gallagher, and *separatim* that in doing so he was not acting in pursuance of his employment by the said defenders," and therefore sustained the appeal, and assoilzied the defenders.

Counsel for Appellants (Defenders)—Mackintosh—Guthrie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Respondent (Pursuer)—Campbell Smith—Rhind. Agent—William Officer, S.S.C.

Friday, October 26.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

HODGE (MORRISON'S TRUSTEE) v.

MORRISONS.

Bankruptcy—Act 1621, c. 18—Disposition by Insolvent in Defraud of Prior Creditors—Conjunct and Confident—Presumption—Provision to Children.

A tenant of two subjects held on long leases assigned them by assignations bearing to be gratuitous to his son and daughters. Eighteen months afterwards he died insolvent, and his estates were sequestrated. In an action of reduction at the instance of a trustee in his sequestration, who represented creditors prior to the date of the assignations—*held*, after a proof, (1) that the assignation in the son's favour was inept as being undelivered; (2) (*diss.* Lord Rutherford Clark) that on the evidence the assignation to the daughters was proved to have been delivered, and that the presumption of insolvency at the date of the assignation, arising from the insolvency at the date of challenge, had been overcome; and (3) (*diss.* Lord Rutherford Clark) that the daughters had given value for the assignation in the shape of money contributed by them from their own earnings while living in family with their father.

Duncan Morrison, merchant, Poolewe, was tenant under a minute of lease between Sir Kenneth Mackenzie of Gairloch and himself, dated in 1868, of a piece of ground in the village of Poolewe. The lease was to endure for sixty years from Whitsunday 1865, the rent being 5s. per annum. He was taken bound to erect upon the ground a substantial building of not less value than £50, to be used as a shop. He entered into possession of the ground, and built a shop upon it, which he occupied as trading premises up to the time of his death after mentioned. He also became tenant under Sir Kenneth Mackenzie of a rood of ground in Poolewe for sixty-two years from Whitsunday 1878, at a rent of 10s. per annum. He was taken bound to build upon the