will under which Mrs Smellie was entitled to a sum of £1300. But at that date Mrs Smellie was so ill that she was unfit to transact business or to be informed of her brother's death; and accordingly the agents in the executry, Messrs Hope, Todd, & Kirk, not being able to get a discharge from Mrs Smellie, lodged a sum of £1200 in the Bank of Scotland, their own bank, on deposit-receipt in these terms—"Received from Messrs Hope, Todd, & Kirk, for Mrs Isabella Smellie, £1200, which is placed to their credit in deposit-receipt."

At the close of the debate I thought that perhaps the judgment might be supported on these grounds, that in order to avoid intestacy and also to give effect to the evident intention of the testatrix that Margaret Smellie should take the residue of her estate, the Court should be astute to hold that the expression "money in banks" in the holograph will was sufficient to cover the sum lodged in the Bank of Scotland by Messrs Hope, Todd, & Kirk. But on reconsideration I have come to be of opinion that to do so would be to strain the meaning of the words by which the testatrix inadvertently limited what she intended to be the residuary clause of the will. The £1200 was not paid to the testatrix nor to her agents, nor paid into her bank to her credit. It was paid into the bank of Messrs Hope, Todd, & Kirk, and lay subject to their control, being merely ear-marked in order to indicate the person to whom it should ultimately be paid. On these grounds I agree with the view which your Lordships take.

The Court recalled the interlocutor reclaimed against, and sustained the claim of the Rev. Alexander Masson and others with regard to the £1200 in question.

Counsel for the Pursuers and Real Raisers, and Claimants and Reclaimers, the Reverend Alexander Masson and Others—Mackenzie, K.C.—Chree. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Claimant and Respondent, Miss Margaret Smellie—Graham Stewart—Wilton. Agent—Robert H. Wood, S.S.C.

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*Tuesday, December* 1.

## SECOND DIVISION.

[Sheriff Court at Greenock.

## M'INTYRE *v.* A. RODGER & COMPANY.

*Master and Servant—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1)—*Accident Arising Out of and in the Course of the Employment.*

A, a workman in the employment of a firm of shipbuilders, was engaged in oiling the machine at which he was working with a brush, which he knew was not the one belonging to his machine. B, another workman, to whose machine the brush belonged, and who required it for his work, came up and demanded it. On A asking him to wait a moment, B pulled the brush out of A's hand, and in doing so unintentionally injured A by drawing his hand across the sharp end of a piece of iron which he was carrying, and cutting it.

*Held* that the accident was one arising "out of and in the course of" the employment in the sense of the Workmen's Compensation Act 1897, sec. 1 (1), and that A was entitled to compensation under the Act.

*Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381, *distinguished.*

In an arbitration under the Workmen's Compensation Act 1897, on a claim by John M'Intyre, plater, Port-Glasgow, against A. Rodger & Company, shipbuilders and repairers there, the Sheriff-Substitute (GLEGG) assoilzied the defenders.

The pursuer appealed, and the following case was stated by the Sheriff-Substitute:—"This is an arbitration in which the appellant prays for decree against the respondents for a weekly payment of £1, in respect of injuries received to his right hand while in their employment. Proof was led and parties heard on 13th October, and on 14th October 1903 I pronounced the following interlocutor:—'The Sheriff-Substitute having considered the cause, finds in fact (1) that John M'Intyre, the pursuer, entered the employment of Anderson Rodger & Company, the defenders, as a plater, on 23rd April 1903, and continued in that employment till the aftermentioned occurrence on 30th May 1903; . . . (3) on 30th May the pursuer was working at a punching-machine in the company's works, and at the time in question was engaged in oiling the punch; (4) for the oiling he used a brush about 15 inches in length; (5) such brushes were not supplied by the workmen, but were made by them from materials supplied by the company, and the custom was that each machine had a brush which was considered to belong to it; (6) the brush used by the pursuer did not belong to the machine at which he was working, and had been obtained by him from another workman named Williams; (7) the pursuer was aware that the brush did not belong to his machine, and that he had no right to retain it from the workman to whose machine it belonged, but he was not aware to whose machine it did belong; (8) it belonged to the machine of John Clark; (9) on the occasion in question John Clark, who had been getting a "slip" of iron cut at the smithy, came for the brush in order to proceed with the work on which he was engaged; (10) Clark was angry at the brush having been removed, and impatient at the delay which its absence caused to him and other workmen in their work; (11) he came up to M'Intyre angrily, said the brush was his, and took hold of it; (12) the pursuer said, "Wait a moment"—meaning that he would have finished with it in a moment

—but Clark swore at him and pulled the brush out of his hand; (13) in doing so, Clark, but not intentionally, drew M'Intyre's hand across the sharp end of the "slip" which he was carrying under his arm, and cut the hand in which the pursuer was holding the brush; (14) in consequence of this injury the pursuer was totally disabled from work for thirteen weeks, when his incapacity ceased, and he returned to the same employment and earned as much as before; . . . (16) that the injury to M'Intyre's hand was not attributable to his serious or wilful misconduct: Finds in law that the injury did not arise out of and in course of the employment: Therefore assoilzies the defenders from the conclusions of the petition.' . . .

"It was admitted that the appellant was a workman, the respondents were the undertakers, and the place where the accident occurred was a factory, all within the meaning of the Workmen's Compensation Act 1897.

"The question of law for the opinion of the Court is, whether, on these facts, the personal injury to the appellant was caused by accident arising out of and in the course of the employment, within the meaning of the Workmen's Compensation Act 1897?"

Argued for the claimant and appellant —The Sheriff-Substitute's judgment was wrong In the present case the accident was not caused by a quarrel between workmen who were not engaged at their work. Both the claimant and Clark were engaged in doing something in the course of their employment at the time when the accident occurred. There was no wrongous act outside the scope of the employment. The claimant was oiling the machine with the brush and Clark was attempting to get the brush in order that he might proceed with his work. The case was thus distinguished from *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381, and *Armitage* v. *Lancashire and Yorkshire Railway* [1902], 2 Q.B. 178. In both these cases the act which caused the accident had no relation whatever to the employment.

Argued for the respondents—The case fell within the rule applied in *Falconer, supra,* which had been approved of in *Armitage, supra.* The accident did not arise "out of" the employment. It was caused by the violent interference of Clark, for which there was no warrant or necessity. M'Intyre must also be held to blame, because he knew he was using a brush that he had no right to use. The accident arose from a wrongous act outside the scope of the employment. Such an act was not a danger incidental to the employment.

LORD JUSTICE-CLERK—Many of these cases present very fine distinctions, and it necessarily must be so from the very nature of the statute itself. I think the question here is, whether it can be said on the facts stated by the Sheriff-Substitute that what happened did not arise out of the employment. Clark in doing what he did had no intention of injuring M'Intyre, although no doubt it was a careless thing to do. But a master is liable for a careless act done by a workman in the course of his employment, if that careless act causes injury to another.

In the case of *Falconer* the majority of the Court decided that there was no liability, and if I thought this case to be on all fours with *Falconer* I should be of opinion that the same decision should be given here. But I think this case is distinguishable from *Falconer.* If two workmen—as was the case in *Falconer*—leave their work and begin to indulge in horseplay, they are not doing their master's work, but, on the contrary, are doing what is absolutely inconsistent with the carrying on of their master's work, and I think it cannot be said that anything which happens in consequence of such conduct arises out of the employment. The moment they begin to do something for their own gratification or amusement, apart from their work, any accident arising out of that does not in my opinion arise out of the employment. This is the distinction which I draw between this case and *Falconer*, in which, concurring with Lord Trayner, I held that there was no liability. What happened here arose out of and in the course of the employment.

I therefore think that the Sheriff-Substitute is wrong, and that his finding should be recalled and the case remitted back to him to settle the compensation.

LORD YOUNG—These cases under the Workmen's Compensation Act are always interesting, and not infrequently difficult. The law which was established by that statute is an exceptional law—very exceptional—for it subjects to damages an employer of workmen for an accident not caused by his fault or by the fault of anyone for whom he is responsible. If there is fault on his part or on the part of anyone for whom he is responsible, the law provides a remedy, and gives compensation irrespective of the Workmen's Compensation Act. The Legislature thought it proper and just that workmen engaged in work of a dangerous character, in premises of a kind specified in that Act, should be compensated for any injury which occurred to them by accident in the course of their employment, whether such injury arose from the fault of their employer or not. Now, the accident which we are dealing with in the present case undoubtedly occurred to M'Intyre in the course of employment, and within premises to which the exceptional law I have referred to was applicable. There is, in terms of the statute, an exception to the liability on the part of the master. He is not liable if the accident is attributable to the serious and wilful misconduct of the injured workman. But it is not suggested in this case that there was any serious and wilful misconduct on his part. Nor am I disposed to impute the injury to anything of the character of

wilful or deliberate fault on the part of Clark. It was simply an accident arising out of the dangerous work in which the men were engaged at the time.

I must confess I should have had very great difficulty in agreeing with the judgment in the case of *Falconer*. I was not present when the case was decided, but if I had been I think that I should have been disposed to concur with Lord Moncreiff. In that event there would have been an equal division of opinion and the case would have had to be sent to Seven Judges.

I can quite imagine a case in which death or bodily injury might occur to a workman engaged at work and within premises dealt with by the Act, and yet where the master would not incur liability. Suppose a person having ill-will to the workman, and, intending to murder him, came into the premises and killed or injured him while engaged in his work. I think that that is a case which does not fall within the scope, meaning, intention, or good sense of the statute, and that the statute was not meant to make an employer liable for death or bodily injuries so occasioned.

But take another case, illustrative of a class of cases which in my opinion do fall within the scope of the statute. Suppose a man is engaged at work at the top of a long ladder placed against a high wall in premises dealt with by the Act. And suppose someone passing by, from carelessness but without any intention of evil, comes against the ladder and brings it down, and the man working on the ladder is killed by the fall. Or suppose that a stroke of lightning brings down the wall and the ladder, and that the workman engaged at his work at the top of the ladder is killed by the fall. I should have thought it clear that these were cases falling within the statute, and dangers which the statute was intended to provide against. They are illustrations of accidents occurring to a man in the course of a dangerous employment—accidents incident to that employment—and caused through no fault or negligence on the part of the workman.

It is unnecessary, however, to deal further with the subject in the meantime. In the present case I am of opinion with your Lordship that the accident occurred during and in course of the employment and arose out of it, and that the workman is entitled to compensation in terms of the statute.

LORD TRAYNER—In dealing with the Workmen's Compensation Act I think we should be careful not to extend the exceptional liability which that statute imposes beyond the limits which the statute itself expresses. At the same time, as that Act was passed to benefit workmen in dangerous or hazardous employment, it must be construed fairly, if not liberally, in their favour. Looking at the statute in that light, I am of opinion with your Lordship in the chair that the Sheriff here has erred. I see no reason, and have heard none, to induce me to doubt the soundness of the decision pronounced in the case of *Falconer*. On the contrary, my opinion of its soundness is fortified by the fact that it has been approved and followed by the Appeal Court in England. If this case was the same as the case of *Falconer* I should not hesitate to repeat the decision there given. But the cases are distinguishable in respect of a matter which I pointed out in the course of my opinion in the case of *Falconer*. I there said — "If the accident had arisen from the fault or neglect of a fellow servant when engaged in his work—that is, his employer's work — liability would have attached, because in that case it would have arisen out of the employment—out of the employment it may be, badly or carelessly executed—but still out of the employment. It would be properly incidental to the employment" (*Falconer*, 3 F., at p. 567). I think that fairly describes the case before us. At the time the accident took place the two men were both engaged in their employer's work. They had not been so friendly with each other as they might have been, though I do not see much reason, or indeed any reason, to condemn the conduct either of one or other. But they were both at work, M'Intyre doing his work and Clark anxious to get at his work, and in the course of preparing himself for the continuance of his work. I think it was an accident arising out of the employment in which they were both engaged. In these circumstances I think that *Falconer's* case does not rule this one, and that the decision of the Sheriff should be recalled and the case remitted to him to fix the compensation to be awarded.

LORD MONCREIFF—I am of the same opinion. The appellant in this case in order to succeed had to distinguish the case on the facts from the case of *Falconer*. I think he has succeeded in doing so, but the distinction is certainly a fine one, for, stated in one way, the facts of this case show that the accident occurred in the course and in consequence of a quarrel between two men, Clark and M'Intyre. There is not much blame attaching to either of them, but in point of fact they were both to some extent to blame, M'Intyre, the appellant, had taken away another man's brush, or at least a brush which did not belong to him, and on the other hand Clark, whose brush it was, when he tried to get it from M'Intyre, used unnecessary violence and attempted to take it by force. In that respect the facts here are less favourable to the appellant than the facts were to the injured workman in the case of *Falconer*, for the injured workman in *Falconer's* case was doing his work and was absolutely free from blame, the injury being caused by two fellow workmen who were working near him and who had stopped their work in order to have a bear fight. Nevertheless I think the view can be taken that in this case both Clark and M'Intyre were at work in their employment, that M'Intyre was actually working, and that Clark—if not actually engaged at his work—wished to get to it, and was

trying to retrieve his brush in order to do his work. Accordingly I think this case can be distinguished from that of *Falconer*, and I concur with the judgment which your Lordships have proposed.

The Court pronounced this interlocutor—

"Sustain the appeal: Answer the question of law therein stated in the affirmative: Therefore recal the dismissal of the claim, and remit to the arbitrator to assess the damages payable to the appellant, and to decern therefor."

Counsel for the Claimant and Appellant—Shaw, K.C. — Wark. Agents — J. & J. Galletly, S.S.C.

Counsel for the Respondents—Campbell, K.C.—Younger. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

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*Thursday, December 3.*

## FIRST DIVISION.

[Sheriff-Substitute at Dundee.

## BERLITZ SCHOOLS OF LANGUAGES, LIMITED *v.* DUCHENE.

*Contract—Assignability—Delectus Personæ—Agreement not to Teach within Specified Radius.*

A, who carried on a system of teaching known as the B. School of Languages, engaged C as a teacher in his schools. By the terms of his agreement C undertook that he would not during his engagement, or for two years after that engagement was concluded, teach certain languages in or near a town where A had established or should thereafter establish a B. School of Languages. Thereafter A transferred his business to a company—the B. Schools of Languages, Limited, — and assigned the contract with C. *Held* that the company had no title to enforce the restriction against C, in respect that neither the contract as a whole nor the restriction as an independent obligation was assignable without A's consent.

In October 1901 Georges Abraham, who then carried on a system of teaching languages known as the Berlitz Schools of Languages, engaged Jean Duchene as a teacher in these schools. By the terms of his engagement Duchene undertook to teach in any branch of the Berlitz Schools established or to be established in the United Kingdom, on specified terms. The agreement also contained the following clause:—"The said Duchene agrees that during his employment, and for two years after he shall have left or been dismissed from the service of the employer, he will not teach or give instruction in French, German, Spanish, or Italian privately or in any school or academy, or otherwise howsoever, in any town in which he shall have been employed by the employer, or in any town where there is a branch of the Berlitz Schools of Languages, and within a ten miles radius of such towns, either in his own name or in the name or names of any other person or persons, or as principal, assistant, apprentice, or pupil teacher, and will not, directly or indirectly, induce any person or persons to cease from attending the said schools and classes of the employer, and shall not at any time or in any place use the name of Berlitz, either alone or in conjunction with any other name, in any public notice or advertisement, or in any way as an inducement to prospective pupils of the said Duchene or any person by whom he may be employed or in any way connected, by representing to them that they will be taught on the Berlitz method."

In pursuance of this engagement Duchene taught in the Berlitz Schools, first at Glasgow, and afterwards at Dundee, until September 1902, when he left.

In January 1902 Abraham transferred his business to a company known as the Berlitz Schools of Languages, Limited. This was not intimated to Duchene, but his salary was thereafter paid by the company.

A formal deed of assignment was executed by Abraham in favour of the company, dated 29th October 1902, which contained the following clause relative to the contract with Duchene:—"Including but without limiting this generality, a contract bearing date the twenty-first day of October One thousand nine hundred and one, and made between the said Georges Abraham of the one part, and Jean Duchene of the other part, relating to the engagement and employment of the said Jean Duchene as a teacher in the schools of the said Georges Abraham in Great Britain and Ireland, together with all right competent to the said Georges Abraham to enforce the prohibition expressed in the said contract by interdict or otherwise, and that either in his name or in their own name and with or without his consent or concurrence, to hold the same unto the company, its successors and assigns absolutely."

Duchene having established a school for teaching French in Dundee, known as the Cercle Français, the Berlitz Schools of Languages, Limited, with the consent and concurrence of Abraham, and Abraham for his interest, brought the present action in the Sheriff Court at Dundee. The conclusions of the action were "To interdict the defender from at any time prior to 1st September 1904 teaching or giving instruction in the French language privately or in any school or academy or otherwise howsoever in Dundee, or in any other town in which there is a branch of the Berlitz Schools of Languages, and within a 10 miles' radius of such towns, either in his own name or in the name or names of any other person or persons, or as principal, assistant, apprentice, or pupil-teacher, and from directly or indirectly inducing any person or persons to cease from attending the schools and classes of the pursuers; and particularly, but without prejudice to this generality, from teaching or giving instruction in the French language in connection