parted with it to a white man, who had given me money with which to buy it, and he told me I was to put it there so that he could go and fetch it." It seems to me that all the argument which Mr. *Millin* has expended on this point of law has nothing to do with the facts, and is quite inconsistent with the case set up by the accused, for he says he had completed the act by putting the liquor where he did in the veld. It is not a case where the accused had only made preparation for an offence; according to his own account, he had completed the offence, only he says there was no offence, because what he had done was in consequence of a preconcerted arrangement with a white man. The case for the Crown is that the preconcerted arrangement was with a coloured person; and that the preconcerted arrangement was with a coloured person, is amply proved by the fact that Plaatje came and fetched the liquor, and that a white man did not appear on the scene. The conduct of the accused in other respects also harmonises with his guilt.

Accused's Attorney: *F. D. Foley.*

[J. M. M.]

MELTZER v. THE RESERVE INVESTMENT COMPANY, LTD.

1915. *October* 26, 27, 28, 29; *November* 18. WESSELS and CURLEWIS, JJ.

Negligence.—Lift.—User by persons other than operator.—Prohibition.—Accident.—Breach of statutory regulations.—Liability of owner of lift.—Sec. 221 *of Mines and Machinery Regulations,* 1913.

The defendants were the owners of premises containing a lift, in charge of an operator. There was a notice in the lift that only the operator was allowed to work the lift. A new button system was installed in the lift, which the operator demonstrated to the plaintiff, who was an employee of the defendants' tenants, and a notice was placed over the buttons directing their use. The defendants knew that the lift was being worked by persons other than the operator, but took no adequate steps to prevent it. There was a small defect in the working of the lift, which was known to the operator, The plaintiff, whilst using the lift, met with an accident and claimed damages. *Held,* that the plaintiff was working the lift by sufferance, and not by invitation of the defendants, who owed no duty to her.

Section 221 of the Mines and Machinery Regulations provides that no persons other than the operator shall work a lift, and prohibits any person from entering a lift unless the operator is first inside. *Held*, that the plaintiff by using the lift in the absence of the operator, was guilty of a breach of the regulations, and assumed the risks attending such user, and that in spite of a breach of the regulations by the defendants, they were not liable

Action for £600 damages for injuries sustained.

The plaintiff was in the employ of tenants of offices on the top floor of premises owned by the defendant company. In the premises was a passenger elevator erected by the defendant company and worked by an operator appointed by the company.

The lift was originally worked by a lever system which was subsequently altered to that of a button system. The plaintiff alleged that when the alteration was made the company caused a notice to be placed in the lift giving directions as to the method of using the buttons for working the lift, and that in breach of the Mines and Machinery Regulations and in breach of a statutory duty which it owed to persons being carried in the lift the defendant company by notice and verbally through its servant, one Dormehl, acting within the scope of his authority, negligently invited persons, including the plaintiff, having business in the premises, to operate the lift. On the 1st March, 1915, the plaintiff, while lawfully in the premises, used and operated the lift, which, however, failed to stop when the button was released, and the plaintiff while endeavouring to escape from the lift, was severely injured. She alleged that she was using the lift at the time of the accident with the knowledge and at the invitation of the company, that the lift failed to stop owing to a defect in the button system, of which the company had knowledge through its agent Dormehl, that the defect endangered life and limb and that it was the duty by regulation on the company to have had the defect made good before allowing the lift to be used.

The plaintiff's action for damages was based on the company's breach of a statutory duty or alternatively on its negligence.

The defendant company denied that it had caused a notice to be placed in the lift giving directions as to the method of using the buttons, that it had invited persons, including the plaintiff, to operate the lift, and that it was aware of any defect in the button system. It pleaded that previous to the injury to the plaintiff it had warned the tenants in whose employ the plaintiff was and the plaintiff that the lift was on no account to be operated except by

the operator, and that the plaintiff had, notwithstanding such warning and in contravention of sec. 221 (1) of the Mines and Machinery Regulations, operated the lift at her own risk. Alternatively the company pleaded that the injury was due to the plaintiff's contributory negligence in opening the door of the lift and endeavouring to jump out while the lift was in motion, and that but for that the plaintiff would not have been injured.

The facts found from the evidence appear from the judgment.

C. E. Barry, for the plaintiff: On the question of the liability of a company for the torts of its servants: see Halsbury's *Laws of England* (Vol. I, p. 212), and *Barwick* v. *English Joint Stock Bank* (L.R. 2, Exch. 259, *per* WILLES, J., at p. 265). Reference must be had to the duties which the servant has to perform, but every act done in the course of the servant's employment is presumed to be done for the principal's benefit until the contrary is proved: see Halsbury's *Laws of England* (*loc. cit.*, footnote (*n*)). Dormehl was not only the lift operator, he also did office work. It is immaterial whether he was prohibited from inviting others to operate the lift. The question is whether it was in the scope of his employment to give the invitation. A lift operator's duties appear from sec. 222 of the Mines and Machinery Regulations. The object of the section is to prevent unauthorised persons operating a lift, while section 221 prohibits others than the operator working the lift. Dormehl's invitation was, therefore, a breach of this regulation, and makes the company liable even if there is no knowledge or negligence on the part of the company. See *Watkins* v. *Naval Colliery Company, Ltd.* (1912, App. Cas. 693). The company is in the position of a carrier for hire; by paying rent the tenants of the building pay for the use of the lift. See *Kelly* v. *Lewis Investment Co.* (1915, B. Amer. Ann. Cas. 570). Where rooms are let for business purposes one of the inducements for paying rent is the fact that there is a lift which can be used during business hours.

The knowledge of Dormehl as to what was taking place was the knowledge of the company. See *Bawden* v. *The London, Edinburgh and Glasgow Assurance Co.* (1892, 2 Q.B. 534). The plaintiff used the lift for the convenience of patients of her employer. The note to the case of *Beatty* v. *Metropolitan Building Co.* (1912, D. Amer. Ann. Cas. 532) explains the position of an employee of a tenant. See also *Griffen* v. *Manice* (52 Lawyers Rep. Ann. 922).

Under the circumstances the notice in the lift giving directions how to work it is an invitation to the public to operate the lift.

If the plaintiff was invited to work the lift there is no contributory negligence on her part. Dormehl knew of the defect in the lift, and that knowledge is also the company's knowledge. See *Stiles* v. *Cardiff Steam Navigation Co.* (33 L.J., Q.B. 310).

B. A. Tindall, for the defendant company: No invitation to work the lift has been proved, and unless that be proved the plaintiff must fail. The case of *Muench* v. *Heinemann* (15 Lawyers' Rep. Ann. N.S. 402) draws a distinction between licensees by invitation and licensees by permission. In the latter case the owner of a lift owes no duty except to refrain from acts of actual negligence. A notice in a lift as to how to work it is not an invitation to work it. The regulations prohibit the public from working a lift. The protest by Van Boeschoten was sufficient to protect the company. See Pollock on *Torts,* 7th ed., p. 511; *Gautret* v. *Egerton and Others* (L.R. 2 C.P. 371).

At the most the plaintiff was a bare licensee, and the question of liability for negligence towards such a person is discussed in *Skinner* v. *Johannesburg Turf Club* (1907, T.S. 852). The plaintiff has not established such negligence as would render the company liable. The duty of the company was not that of an insurer. Its duty is merely to use due care to make its lift safe. The defect proved was not the proximate cause of the accident. The accident was due to the plaintiff's contributory negligence in endeavouring to get out of the lift while it was in motion.

It was not within the scope of Dormehl's employment to give the invitation, and even if such invitation were given the company is not bound by it. See *Arzt* v. *Lit* (15 Lawyers' Rep. Ann. note on p. 403). A servant cannot delegate that which the law says shall not be delegated. See Pollock on *Torts,* 7th ed., p. 89; *Poulton* v. *London and South Western Railway Co.* (L.R. 2, Q.B. 534); *Lord Bolingbroke* v. *Local Board of Swindon New Town* (L.R. 9, C.P. 575).

The case of *Watkins* v. *Naval Colliery Company, Ltd.* (*loc. cit.*) merely decides that where a breach of regulations is the cause of the accident, then such breach is evidence of negligence. See *Morrison* v. *Angelo Deep Gold Mines, Ltd.* (1905, T.S. 775).

Barry, replied.

Cur. adv. vult.

Postea (November 18).

WESSELS, J.: In this case the plaintiff sues the defendant for damages on account of an injury sustained by her whilst using a lift on the property of the defendant company.

The plaintiff was employed as bookkeeper to a dentist, who occupied some rooms on the second floor of the defendant company's premises.

On the 1st March, 1915, one of the dentist's patients wished to descend to the ground floor and the plaintiff offered to fetch the lift for her. The lift was standing at the landing of the first floor. The plaintiff entered the lift, and whilst moving it upwards she saw a lady and her daughter mounting the stairs. The plaintiff from the moving lift asked the lady if she would like to go up in the lift, and upon receiving a favourable reply moved the lift down towards the landing. When it got to the landing the plaintiff released her hand from the button, but notwithstanding this the lift continued to descend at a slow pace. This pace was the ordinary one at which the lift always moved. I find, as a fact, that the plaintiff is wrong when she says that the lift ran away with her. All the lift did was to move down from the first landing towards the ground floor at its normal slow pace. The plaintiff lost her head as the lift began to move and either tried to jump out or tried to lift herself out by holding on to the barrier door. At any rate she stuck her arm out and retained it there until the top of the lift came in contact with it and crushed it. Had she retained her presence of mind, or had she known anything about the working of a lift, no accident would have occurred. The lift might have been stopped by the safety catch inside, or else, if allowed to descend, it would have stopped at the lower landing without a jar, as was shown to us upon our inspection.

I find that but for the fact that there was some obscure defect which caused the lift to refuse to respond accurately to the button —perhaps once in 24 journeys—it was in good order. What this defect is the experts themselves do not know. I also find as a fact that the plaintiff did not know how to work a lift; all she knew was that by pressing one button the lift went up, and by pressing another it went down, and that it stopped if you released the pressure on the button.

I also find that prior to the time the plaintiff used the lift herself, there was a notice on the mirror directly opposite the entrance, to the effect that only the operator was allowed to use the lift, and that this notice was there whilst the plaintiff was in the

employ of the dentist, and that during this period she used the lift. Whether she saw the notice or not I do not know. Mr. *Barry* has urged us to find that she never saw the notice, and that it was not there between December, 1914, and February, 1915. He has undoubtedly produced the evidence of persons who say they did not see it there and that if it were there they ought to have seen it, but this evidence is to my mind unsatisfactory. The notice was undoubtedly there in 1912, 1913, and prior to December, 1914. It had been scratched and scarred and its edges were frayed. It was, however, written in a large hand by Mr. O'Reilly, and I believe him when he says he could read it several yards away. It was not there when the accident occurred, and must therefore have been removed some time before. Mr. Dormehl, the lift operator, states that he caused it to be washed off when the lift was cleaned and that he intended to put a new notice in the same place again, but that he forgot to do so. He puts this cleaning down to some time in February. Now the only reason Dormehl could have had to take the notice down was either, as he says, to clean the mirror, or else because he thought that after the button system was introduced there was no necessity for having it there any longer because he intended to allow the tenants to use the lift themselves and so save himself trouble. In the latter case there would be no point in his removing the notice until the button system had been installed, and then the notice was there during December, 1914, and the larger portion of January, 1915. In the former case the cleaning may, of course, have taken place at any time, but there is no reason to put it down to December, 1914, and to suppose that Dormehl was indifferent at that time as to who worked the lift, for every time it was fused he had all the trouble of putting it right. Now we have the positive evidence of the two O'Reillys, Allardyce and Surgeson that the notice was there after the 1st February, and therefore I see no valid reason for doubting Dormehl when he says that it was during that month that he caused it to be removed. There is no reason for doubting the positive and affirmative evidence of these witnesses, and therefore their testimony must prevail over that of the witnesses who say that they did not see it there. If therefore the plaintiff had looked she must have seen the notice, and that before the date of the accident.

The button system was installed about the latter end of January, 1915, and a notice was placed over the buttons that the lift

ascended by pressing one button and descended by pressing the other, and that it would stop if the button were released. There was nothing in the notice itself to suggest that it was an invitation to the public to work the lift. It did not say that the directions were for the public, the word notice did not even occur, and it may therefore well have been placed there by Dormehl merely as a reminder to himself, or as a precaution in case some indiscreet person found himself unattended in the lift.

The next question of fact to which I wish to address myself, is whether the plaintiff was specially invited to work the lift without the operator or whether she in general with the public was so invited.

Now the story told by the plaintiff, Miss Rosenberg, and Miss Hern is that Dormehl, the operator in charge of the lift, showed them how the button system worked, and told them they were free to work the lift by themselves in future without waiting for him. Dormehl's story is that he was very pleased at the new button installation because he was told that it would prevent fusing of the wires and stoppage of the lift and thus giving him trouble. Whilst he was practising with it on the day it was put in he arrived at the landing of the second floor and saw Miss Hern. He called her to see how it worked, and she, the plaintiff, and Miss Rosenberg came to inspect it. He showed them how it worked and how much simpler it was than the former lever system, and told them it was so simple anyone could work it. He denies that he taught them or that he told them they could use the lift in future without him. I believe him upon this point, and do not believe the plaintiff and her witnesses that he taught them and invited them to work it in future, and I think their own story shows its own improbability. It is clear that they did not use it on that occasion and, therefore, it is unlikely that Dormehl was teaching them. It is also clear that Dormehl asked one of them to press the button and see how easily it worked, but the lady refused to touch it. If he had been teaching them and if they were anxious to learn, it seems to me most improbable that each one would not in turn have tried to see for herself whether she had understood the instructions and whether she could manage it. This is quite enough to show me that Dormehl was not teaching them on that occasion. I find as a fact therefore that Dormehl had only invited them into the lift to show them as a matter of interest or novelty how the new system worked and how simple

and effective it was, and that there was no intention to invite them to work the lift or to teach them so that they could run it themselves. Dormehl undoubtedly knew that the plaintiff and the other lady employees on the second floor used the lift, and after the button system was introduced I don't think he took much trouble to stop them using the lift unattended.

As far as the company itself is concerned it appears to me that during 1913 and 1914 it had great trouble to prevent these ladies working the lift, but as they obstinately persisted in doing so the directors and employees shrugged their shoulders and did not worry their heads any further about the matter. I do not think that any responsible official of the company ever actually invited the plaintiff or any other person to use the lift, but I certainly think that both the Pretoria directors knew that the lift was being used and took no adequate steps to prevent it. Neither of the directors was personally aware that there was any defect in the lift. The agent for the Otis lifts examined the lift from time to time and he never detected any defect, and the same may be said of the Government Inspector of Machinery.

Dormehl, the operator, knew that the lift did not work properly and that it sometimes did not stop when the finger was lifted from the button, but as the pace of the lift is slow and as it is provided with a safety switch inside and other safety devices which always operated, he thought nothing of the defect, and did not consider it worth reporting. The defect seems trifling and apparently quite negligible to one who uses the lift with care and knowledge, though indirectly no doubt it is a defect from which serious consequences might flow.

As regards the precautions prescribed by the law the defendant company was no doubt negligent. It knew that the lift was to be worked by the operator and by him alone, and yet it passively acquiesced in others working the lift; instead of seeing that the operator was always in attendance, it used him to do other work which might involve his absence, and did not compel him to lock the barriers or put the lift out of action. This is no doubt due to the fact that the directors did not realise how dangerous a thing a lift may be.

The plaintiff, on the other hand, paid no regard to the notice in the lift. She either did not see it or did not care to see it. She thought after the button system was inaugurated that she could work the lift as well as the operator, that there would be no fusing

that it was simplicity itself and that there was no need for her to wait for the arrival of the operator. She saw her fellow-employees use it and thought she could do the same. She either did not know of the safety switch and other safety devices, or forgot all about them when, on the day of the accident, the lift began to descend. Had she stood still in the lift nothing would have happened to her. There was no emergency, and to a person with any elementary knowledge of lifts there was no danger. Her action in trying to jump out of the lift or in trying to pull herself out was most imprudent, and judging from the way she gave her evidence I should not have expected her to act as she did, though I have no doubt she did not realise what she was doing.

It appears therefore that there was no invitation to the plaintiff either by the operator Dormehl or by the directors. The plaintiff used the lift to her own convenience, and preferred to take the risks attendant upon operating a lift rather than ring for the operator. At the highest we may say that Dormehl and the directors knew that some of the employees of the dentist were using the lift from time to time. Is the owner under such circumstances responsible irrespective of any statutory provisions? There is American authority for the proposition that if a person is not using a lift by affirmative permission, but by mere sufferance, the owner of the lift owes no duty to such licensee, except to refrain from acts of active negligence. (*Muench* v. *Heineman*, quoted in notes to *Davis* v. *Ohio Valley Banking and Trust Co.*, L.R.A. Vol. 15 N.S. at p. 402.) It is there stated that this rule is generally recognised, and it appears to me that it is as applicable to our law as to the law prevailing in America. If I invite a man to use my motor car, I must exercise ordinary care towards the person I invite, and I must tell him of any defect in the car I am aware of; but if without any invitation a person enters my car, then, merely because I raise no objection, I cannot be held responsible for any defect in the car of which I had no knowledge. Imputed knowledge in such a case is not sufficient. The fact therefore that the directors knew that some of the employees were using the lift, is not sufficient to make them responsible to the plaintiff, unless they actually knew that the lift was dangerous. Does the fact that Dormehl knew of the defect bind the company? I think not. Dormehl did not know that the lift was dangerous, nor was it so in fact; all he knew was that it sometimes did not stop when the finger was lifted off the button, but this was of no

moment if the operator used the switch, or simply allowed the lift to descend. Nor do I think that Dormehl's knowledge of the slight defect can, under the circumstances, be imputed to the directors. But even if the directors knew of this particular defect I do not think the company would be liable. Thus in *Farris* v. *Hoberg*, another American case (39 Am. St. Rep. 201), it was held that "one who entered the rear door of a building, with the permission of the merchant, to search for a drayman, was a licensee, and could not recover for an injury caused by falling down an elevator shaft, neither of the openings to which was guarded or protected by barriers; and it was proper, upon these facts appearing, to direct a verdict for the defendant."

Mr. *Barry* has also advanced the argument that, in breach of the Mines and Machinery Regulations, both by a notice in the lift, and by the acts of its servant Dormehl, the defendant invited the public and amongst others the plaintiff, to work the lift without the operator; that the defendant through the knowledge of its servant Dormehl, was aware of the defect in the lift; that she owing to this defect, whilst operating the lift, injured herself, and that therefore she is entitled to damages. As I have said before, there was no direct invitation, and the so-called notice in the lift was not a notice to the public inviting them to use the lift. All that we can say is that the company through its servants knew that persons were using the lift and took no adequate steps to prevent them; that, according to the Mines and Machinery Regulations, it should have prevented them and that therefore it was guilty of the breach of a statutory duty in not preventing the public and *inter alios* the plaintiff, from working the lift; and that owing to this neglect of duty the plaintiff was enabled to work it herself, and in so doing, through a defect, she suffered an injury.

Mr. *Tindall* contended that the Court should not allow this case to be made on the pleadings as they stand, but upon reflection I think the pleadings will cover the above case.

Mr. *Barry* contends that even if Dormehl did not actually invite the plaintiff to work the lift, he was aware of the fact that she and the other employees of the dentist were working it, and therefore he was guilty of a breach of article 221 of the Mines and Machinery Regulations. As it was his duty to observe these regulations, his employer is bound by his negligent omission. This raises a very important question.

Mr. *Barry* argues that inasmuch as there is a statutory prohibi-

tion against allowing the lift to be used without an operator, the knowledge of Dormehl that he had shown the plaintiff how to use it, and that she had used it, must be regarded as the knoweldge of the company, because it was one of the duties of Dormehl not to break the regulations, and if he did so the company is responsible. In other words, if the servant's statutory duties are both positive and negative, everything he does in breach of them is within the scope of his authority. For this proposition he quotes *Watkins* v. *Naval Colliery Co.* (1912, A.C. 693; 81 L.J.K.B. 1056). The rule of law which I extract from this case is, that where there is an absolute statutory obligation imposed upon an owner, and there is a breach of this obligation by himself or his servant, he is liable for the consequences flowing from this breach.

The mere demonstration by Dormehl to the ladies of the working of the button system was not a breach of any regulation for which the company could be held liable. If he did break a regulation it was not on account of any positive act, but on account of his passive attitude towards the plaintiff in not preventing her from working the lift when he knew that it was being run by the dentist's employees. The elevator is put in charge of the operator, and if he even passively allows another to work the lift, he seems to me to be guilty of a breach of Regulation No. 221; and if through this an accident occurs to any person other than the licensee who uses the lift, it is possible that the owner might be liable, but is the owner liable if the licensee injures herself whilst operating the lift? The same regulation prohibits every person other than the operator from working the lift, and prohibits every person from entering the lift unless the operator is first inside. Every person therefore who enters a lift for the purpose of working it himself is doing an unlawful act—is, like the operator, committing a breach of the regulation.

It would be a harsh rule of law that imposed a liability on the owner for an injury sustained by a person who wilfully breaks the regulation with the connivance of the operator.

It seems to me therefore that if the operator Dormehl can in law be held to blame for the injury, the same blame attaches to the plaintiff, and therefore the operator's employer ought not to be the sufferer. The plaintiff knew or ought to have known that she was prohibited from working the lift, and she cannot shield herself behind the fact that Dormehl did not prohibit her from working the lift. It seems to me a case where the maxim *in pari delicto*

potior est conditio defendentis applies. Any other view would impose a greater burden upon the owner of a lift, than on a person who deliberately transgresses his instructions and surreptitiously enters the lift when the operator is not looking. A person who like the plaintiff voluntarily and unnecessarily exposes herself to a danger by entering a lift without the operator assumes all the risks which reasonably attend such user, and has no right to complain if through her ignorance in working the lift she loses her presence of mind and in consequence injures herself. On this ground alone I think the plaintiff should lose her action. There ought therefore to be judgment for the defendants with costs.

CURLEWIS, J., concurred.

Plaintiff's Attorney: *W. R. Kennerley;* Defendants' Attorney: *F. Kleyn.*

[G. v. P.]

COMMISSIONER OF TAXES v. MESSINA (TRANSVAAL) DEVELOPMENT CO., LTD.

1915. *August* 20, *November* 22. WESSELS and CURLEWIS, JJ.

Income Tax.—Foreign company.—Loss outside the Union.—Deduction.—Taxable income.—Act 28 *of* 1914, *sec.* 14 (1).

In terms of sec. 14 (1) of Act 18 of 1914, a taxpayer is entitled to deduct from the gross amount of his income "losses, outgoings, including interest and expenses actually incurred in the Union" in producing his taxable income. In the return of taxable income of an English company carrying on business in the Transvaal, the public officer of the company deducted a certain amount being proportion of loss in respect of money lent abroad and of money deposited abroad with bankers, who had failed. *Held*, that as the loss was incurred outside the Union it could not be deducted. *Held*, further, (*per* WESSELS, J.), that the loss was *prima facie* a loss of capital and not of income, and could not, therefore, be deducted.

Stated case under sec. 28 of the Income Tax Act, 1914.

The respondent company was incorporated with limited liability under the Company laws of England, had its Head Office in London and was registered in the Transvaal as a foreign company under