

are to be valued, and the preference described given effect to, thereby clearly distinguishing between what is to go to the families of the sons and what to the families of the daughters. Now, there could be no share belonging to the families of the sons or daughters to show if the contention of the defenders was to receive effect, and the distribution was to be *per capita*. Whenever a share is spoken of as belonging to a family the language used refers to a division *per stirpes*, and this is made more clear by the clause of accretion, "and in case any of my children die unmarried or without leaving lawful issue, the shares or share of such shall accresce and be equally divided among my surviving children in liferent only, and to their lawful issue equally in fee and property as aforesaid." The testator clearly makes provision for one possible contingency, namely, his children leaving no lawful issue, and at first sight it might look as if the converse case was unprovided for, but there can be no doubt as to the testator's intention expressed by implication. When children die unmarried or without lawful issue no one in that case can under the deed have any interest in the fee, for no one is called except grandchildren, and therefore the provision as to accretion is very natural. But what happens if the son or daughter leaves issue? It must be something totally different. It cannot be that the clause of accretion is to apply, for its application is expressly limited to the case I have mentioned. Nor do I see how there can be a right to a survivorship by implication either as to the liferent or the fee. I cannot see how a surviving child can claim the liferent of a dead child, nor how the child of a surviving child can interfere with the child of a deceased child. The natural conclusion is that the fiduciary fee is necessarily extinct, and that the party for whom the fee was held in trust becomes *ipso facto* vested in his or her parents, and takes the fee of it.

On these grounds I think it is impossible to differ from the result at which the Lord Ordinary has arrived, though I would hardly construe the dispositive claim in exactly the same way, but taking the deed as a whole, and looking on it as one in which we must supply a fiduciary fee vested in the testator's child, I think we must conclude that each has a fee of his or her share, and that it goes to their issue at his or her death.

LORD MURE—On the combined view of the different clauses of the deed I have come to the same conclusion as the Lord Ordinary. I think the case falls substantially within the operation of the rule we applied in the case *Home's Trustees*, to which we were referred, in which it was held that the scheme of the deed was that of a division of his property among the testator's children in liferent, and their children *per stirpes* in fee.

That, I think, is also the clearly declared intention of the testator in the present case, as it was in the case of *Home*, and I am of opinion that the provisions of the deed here in question are so expressed as to be sufficient to carry out that intention. I concur in the construction which your Lordship has given of the different clauses of the deed.

LORD SHAND—I am of the same opinion. The Lord Ordinary deals with the effect of the dispositive clause, and from it alone he gets the results upon which his opinion is based. Had this dispositive clause stood alone I should have considered the question somewhat more difficult, all the more if with it there had been a clause of accretion in ordinary terms.

In such a state of matters the view that the division of his estate intended by the testator was to be *per capita* and not *per stirpes* would have been more likely. But when we take the various clauses of this disposition together, there can, I think, be no difficulty as to the testator's meaning, and I concur in the result arrived at by your Lordships.

LORD ADAM—This is really a question of intention, and the testator's meaning is to be gathered from an examination of the various clauses of the deed. The Lord Ordinary in dealing with the case has construed the dispositive clause alone, and I formed no view adverse to what he has expressed from an examination of that part of the deed. A comparison, however, of the other clauses makes it quite clear that what the testator intended was that the share liferented by each child should go *per stirpes* to his or her family.

The Court adhered.

Counsel for Pursuers—Gloag—Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders—R. V. Campbell—Ure. Agents—W. T. Sutherland, S.S.C.

Tuesday, June 15.

## SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.]

BOWIE v. ROBERT RANKIN & COMPANY.

*Master and Servant—Reparation—Negligence—Employers Liability Act 1880 (43 and 44 Vict. c. 42), sec. 1, sub-sec. 2—Defect in Ways.*

A heavy screw propeller-blade which was to be removed from a foundry was placed on a four-wheeled bogie, and for steadiness attached to the joists by a block and tackle. Part of the ground over which the bogie was to be drawn was uneven, but was filled up by slips of wood covered with an iron plate. The foreman in charge of the operations placed a workman behind the bogie to assist in setting it in motion with an iron pinch, and ordered the men to draw away the bogie; the slips of wood gave way and the bogie ran somewhat forward from under the blade, which swung back on the tackle and injured the workman placed behind the bogie. In an action against the injured man's employers, the Court awarded damages, holding that the accident was attributable to the foreman's fault in allowing the blade to remain attached to the chain, in placing the workman behind the bogie while the blade so attached was being carried on it, and in not having seen that

the uneven ground was properly filled up before the operations were performed.

This was an action raised at common law and alternatively under the Employers Liability Act 1880 by James Bowie against Robert Rankin & Company, millwrights and engineers, Glasgow, for the sum of £500, or under the alternative conclusion £234, in respect of severe injuries which he alleged he had sustained while in their employment. The facts of the case were as follows—The pursuer, who was a skilled workman, had been employed all the night of 29th April 1885 in boring holes in a screw propeller-blade which was to be removed from the foundry next day on a four-wheeled bogie; over a portion of the floor of the premises over which the bogie was to travel there was an uneven depression, which, however, was filled in with slips of wood covered by a thin covering of iron. The bogie was to be drawn forward by a number of men. The operations of removing the blade were conducted under the superintendence of the foreman William Hornal. The weight of the blade was 2 tons, and the bogie measured 5 feet by 2 feet 3 inches. Owing to the unevenness of the ground Hornal thought it advisable to keep the chain of the block and tackle whereby it had been removed from the boring machine on to the bogie still round the propeller until the bogie should have travelled over the iron covering plate, and the chain from above therefore remained, being kept, however, somewhat slack. He ordered the pursuer to go behind the bogie and to take an iron pinch to pinch the wheels of the bogie over the plate from behind. He then called to the men to heave away; when, however, the bogie reached over the edge of the iron plate, the slips of wood under it gave way under the weight of the blade, with the result that the bogie ran forward somewhat. The propeller-blade, being attached to the joists, swung back in consequence and jammed the pursuer's leg against the cog-wheels of the boring machine, inflicting a compound comminuted fracture.

The pursuer stated two grounds of action:—First—“(Cond. 8) The said injuries were caused by reason of the said William Hornal's fault and negligence in ordering the men at the rope to pull away the bogie before the block and tackle had been detached from the propeller-blade, and while the pursuer was, in obedience to the foreman's orders, standing behind the bogie. The foreman could easily have seen that the result of causing the bogie to be pulled would be to remove it from beneath the blade, and make the latter swing back on the chain against the pursuer.” Second—“(Cond. 9) The accident was also caused, or materially contributed to, by reason of the said defect in the floor of the workshop, which defect arose from, or had not been discovered or remedied owing to the negligence of the defenders, or of those for whom they are responsible. Had the floor been in a proper condition it would have been unnecessary for the pursuer, in obedience to the foreman's orders, to place himself in a position of danger between the propeller-blade and the boring machine in order to ease the wheels of the bogie.”

In defence it was stated that Hornal was careful and experienced, and his conduct usual and proper, and that the injury to the pursuer was accidental.

The proof disclosed the facts above stated.

The Sheriff-Substitute (SPENS) pronounced this interlocutor:—“Finds that the pursuer was, on 30th April 1885, in the employment of defenders: Finds that on that day he was injured by a certain propeller-blade, which at the time had been placed upon a bogie for the purpose of being removed from the defenders' premises, and thereafter being raised by means of a certain block and tackle in such a way as to leave the support of the said bogie, coming in contact with his right leg and jamming it against the wheel of a certain boring machine: Finds the operation referred to was being conducted under the personal superintendence of the defenders' foreman William Hornal: Finds, under reference to note, that while the accident in question was partly at least attributable to an error in judgment or miscalculation on the part of the said William Hornal, negligence or *culpa* is not proved against him: Finds, *separatim*, and under reference to note, that defenders are not responsible under the first sub-section of the first section of the Employers Liability Act: Therefore finds, as matter of law, that defenders are not liable under the Employers Liability Act; as also that there is no valid ground of action at common law; sustains accordingly the defences, and assoilzies the defenders.”

“Note.—The way in which I understand the accident to have come about was as follows:—There was a certain unevenness in the vicinity of the boring machine at which the pursuer was working. Between six and seven in the morning of 30th April the pursuer, who had been working all night boring holes in the propeller-blade, had completed the job, and the propeller-blade was ready to be removed from the premises. A bogie was accordingly brought alongside the machine, and under directions of the defenders' foreman the blade was swung off the machine on to the bogie by a block and tackle. Over the unevenness or hollow in the floor to which I have referred an iron plate was put, and in consequence of this, so far as I can understand, Hornal thought it prudent to keep a chain connected with the block and tackle round the propeller-blade until the bogie was safely over this iron plate. He ordered the pursuer to take an iron pinch to pinch the wheels of the bogie, and in order to do this I think the pursuer had necessarily to get on the top of the boring machine. The place, which I myself inspected, where the boring machine is situated, is a somewhat contracted one, and the top of the boring machine is not far from the ground. The theory of the foreman was, I believe, to support the propeller-blade over the uneven place with the block and tackle, and at the same time to pinch on the wheels of the bogie over this same place. He cried to the men to heave away, his idea being that it would to a certain extent rest on the bogie, and then, whenever the bogie was past the uneven place, to remove the connection between the block and tackle and the blade. What, however, appears to have happened, was that the weight on the bogie being removed by the block and tackle, the bogie was shot on by the pinching, and the propeller-blade swinging in the air jammed the pursuer's right leg in the way detailed in the above interlocutor.

“Now, as I understand, there are two arguments on which liability is alleged—(1) that the

accident happened through the fault of Hornal; (2), or otherwise, that it happened through a defect in the ways, &c., for which defenders are said to be responsible under the first sub-section of section one of the Employers Liability Act, if not at common law. I think it will be convenient to take the second of these points first. Now, the proof goes to show very much the same state of matters as to the floors of iron foundries of the kind, which was brought out in the case of *Seeley v. Jackson*, Oct. 18, 1882, 20 S. L. R., 11. (It is curious, I may note here, that the case referred to, which is one of general importance in connection with questions of employers' liability, does not appear in the official report.) The circumstances of that case were very analogous to those of the present case, but the operation whereby injury had resulted was under the superintendence of one of the partners. In the report it is stated that a number of workmen were engaged in conveying a large iron casting from the moulding-room of the defender's iron foundry to the courtyard. 'The floor over which the casting had to be conveyed to the yard was somewhat rough and uneven, but not more so than is common in moulding shops of the kind. The principal depression was one near the door, and on it iron plates had been laid to facilitate the passage of the bogie upon which the casting was being removed. This depression was about 2 feet broad, and at the deepest part was 3 or 4 inches in depth.' The report is not very full, but I gather from the statement of facts and the argument that it was in consequence of the depression that the bogie stuck fast, and ultimately broke down, causing injury to one of the workmen engaged. In that case the Court held that there was no fault on the part of defenders in connection with the ways so as to infer liability, and I take it that equally this ruling must be held to apply here, either under the first sub-section of the first section of the Employers Liability Act or at common law. At common law I imagine that any risk caused by the known unevenness of the floor was one which must be held to have been accepted as incident to the employment. In this case, however, I do not think the accident can be said to have happened in consequence of the depression in the floor. The accident, in point of fact, happened through Hornal taking certain precautions, as he considered them, to obviate any risk or difficulty in the removal of the blade, in consequence of the unevenness in the floor. (2) This accordingly brings me to the second point, Was Hornal guilty of negligence? If guilty of negligence, there is no doubt that Hornal is a person for whom defenders are responsible in the sense of the Employers Liability Act. I think there was a miscalculation or error of judgment in putting the pursuer in such close proximity to the propeller-blade when the order was given to hoist it with the block and tackle. Hornal miscalculated either the effect of his orders, or made a mistake as to the amount of force which his men would put forth, while at the same time the effect of pursuer's pinching was not sufficiently considered. It appears to me, however, having regard to the principles given effect to, and the observations made in *M. Manus v. Hay*, 17th Jan. 1882, 9 R. 425, as well as the case of *Seeley v. Jackson* above referred to, that his error of judgment or

miscalculation is not such as to make the defenders legally responsible. In the first-named case Lord Young said—'But still there must be negligence, and such negligence as would infer legal responsibility for the consequences,' and it was held that there was no such legal responsibility. In this case the pursuer *M. Manus* had been injured through what was plainly at all events an error of judgment on the part of the foreman, who had elected, at the time the accident happened, to work as one of the labourers. So also in the case of *Seeley v. Jackson* Lord Young said—'Our law undoubtedly is that in every contract between employer and workman there is an implied term that the workman takes the risk of all ordinary accidents attending a more or less risky trade, leaving a claim for compensation only in circumstances where the accident is attributable to *culpa*.' Now, the evidence not only goes to show that Hornal was a competent and careful foreman, but that he was devoting his full attention to the job in hand to the best of his ability, and, in point of fact, I think it may be said that the accident really came about through over-carefulness. While, however, I arrive at the conclusion that liability has not been established, I certainly think that it is not a case for awarding expenses."

The pursuer appealed, and argued—He had succeeded in establishing negligence in two particulars—1st, Hornal should never have allowed the bogie to go beyond the length to which the propeller-blade while attached to the joists by a cable could reach, and that was admittedly ten inches. It should either have been wedged before the bogie was set in motion, or if it was set in motion, it should only have been as far as the block and tackle could reach. In any event the tackle should have been loosened out as the bogie advanced. The case relied on by the Sheriff-Substitute as favourable to the defenders—*Seeley v. Jackson*, October 18, 1882, 20 Scot. Law Rep. 11—was of quite a different character from this. In it one of the brackets of the wheel of the bogie gave way owing to latent defect, which it was held the employers could not discover. In the present case the foreman admitted that he knew that the operations were likely to be dangerous when the bogie reached the uneven ground; second, the depression in the floor ought to have been filled in before the dangerous operation was undertaken.

The defenders replied—1st, It was an impossibility to pay out cable while the bogie was moving as the machine was too heavy; second, the evidence showed that the operations were those usually adopted in the foundry, and were just those very operations which had been conducted in *Seeley's* case. There was, then, no negligence proved.

At advising—

LORD JUSTICE-CLERK—The class of cases to which this one belongs is often attended with a good deal of technical perplexity, and is governed by certain general rules. I need not go into these, for the question here truly is, whether the pursuer has made out that the injury which he suffered was owing to the fault of the defenders, or of those for whom they are responsible? Now, without going into the details of the facts, I am of opinion that as far as the management

of the tackle was concerned there is no ground for saying that the foreman was guilty of negligence or carelessness. I imagine that he was put for the moment in a very perilous emergency whichever way of meeting the danger be adopted. What happened was briefly this—The bogie was intended to be used for carrying out of the foundry a screw-blade propeller, and the pursuer, who was a trusty workman, had been employed in executing operations on it the whole of the previous night. Its weight was two tons. The bogie was 5 feet in length and  $2\frac{1}{2}$  in breadth, and its duty, as I have said, was to carry the blade out into the open air. It was placed on the bogie to be so carried out, but the course of the bogie was interrupted by a depression of the floor, which was well known to all concerned, and which had been to a certain extent repaired by slips of wood over which a thin covering of iron was placed as a cover. The blade was attached by a crane and tackle to the roof. Unhappily the filling up of wood gave way under, I suppose, the unusual weight of the blade, and the bogie, when it got beyond the edge of the iron covering, was, owing to this, travelling down an inclined plane, with the result that it travelled from under the blade, which swung back as it was hanging from the roof by the tackle and jammed against the pursuer and injured him severely. Now, the foreman ought, before he ordered the men to heave away, and when he had to exercise his judgment on the matter in hand, to have foreseen two things—first, that the blade might fall off the bogie, and that appeared the most imminent danger; and second, that the bogie might run beyond the swing of the tackle. The question is, whether his employers are liable for his failure in the latter respect? I am of opinion that they are. It is plain that the depression should have been filled up before further operations were carried out, and it seems certain that if the hole had not been there the bogie would have run quite easily and safely. I forbear to go into the general question of the risks which are undertaken in such circumstances by servants in entering on an employment. It is a question about which there is a good deal of controversy. This case in my opinion raises none. If there was fault in not having the depression filled up, I think the reparation asked should be given.

LORD YOUNG—I am of the same opinion.

LORD CRAIGHILL—I also concur, but I have reached my decision with great difficulty.

LORD RUTHERFURD CLARK—I am of the same opinion. The blade was placed on the bogie for removal from the workshop. In order to prevent it from falling the foreman attached it to the chain of the crane with a certain quantity of "slack" to allow the bogie to run forward. But while it might have been a good enough precaution in itself, the foreman ought easily to have seen that another consequence might also happen, that is, that if the accident of the bogie slipping from under the blade did occur, the somewhat slight "slack" of the chain would cause it to swing back on the perpendicular. I think he should have seen both. Therefore I think he should never have placed the pursuer in

the position which he ordered him to take behind the bogie, for it was obvious that if an accident did take place, the pursuer must necessarily be injured. If the bogie was to be drawn forward while the chain was attached to the blade, it should have been drawn by strength applied from the front only and not from behind.

The Court pronounced this interlocutor:—

"Find that the pursuer, then in the employment of the defenders, completed the boring of the flange of a propeller-blade, which blade immediately thereafter was, by means of a block and chain tackle, put on a four-wheeled bogie to be conveyed from the defenders' works: Find that the pursuer was placed behind the bogie to assist in setting it in motion with an iron pinch, while several other workmen pulled it forward with a rope: Find that on the ground over which the bogie was thus moved there was a hole or depression which had been filled up with pieces of wood and covered with an iron plate, and that the wood yielded to the pressure of the bogie and so caused the iron plate and the bogie to deflect, in consequence of which the blade which had not been detached from the chain lost the support of the bogie, swung back, and struck the pursuer and injured him severely: Find that all these operations were conducted by order and under the superintendence of William Hornal, the defenders' foreman, and that the injury sustained by the pursuer is attributable to his fault in failing to take sufficient measures to ensure the stability of the iron plate, in allowing the blade to remain attached to the chain, and in placing the pursuer behind the bogie while the blade so attached was being carried thereon; Find in law that the defenders are responsible for the fault of their said foreman, and are liable to the pursuer in damages for the injury sustained by him: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute appealed against; assess the damages at £200 sterling; and ordain the defenders to make payment of same."

Counsel for Pursuer—Guthrie Smith—Shaw.  
Agents—Gill & Pringle, W.S.

Counsel for Defenders—Graham Murray.  
Agent—Gregor M'Gregor, S.S.C.

Wednesday, June 16.

## SECOND DIVISION.

[Sheriff Court of Lanarkshire  
at Glasgow.

MURPHY v. SMITH.

*Reparation—Negligent Use of Property—Yard-Gate Falling on to Public Street—Trespasser.*

A trespasser on a building yard being desirous to open a sliding gate of ordinary construction, the groove of which was somewhat clogged, used force to it without clearing out the groove, and in consequence the gate fell into the street and injured a person