

burgh and Glasgow (via Bathgate), was killed in consequence of his head coming in contact with the side of the arch of a bridge called the "Red Bridge," near Sunnyside Station.

The pursuers stated that the engine deceased was driving was not his ordinary engine, which had a Westinghouse brake, but one of an obsolete type, fitted with hand brakes; that the wooden blocks of these brakes had shortly before the accident been worn out and renewed, making it the more necessary for the driver to take care to see that the brakes worked properly. "(Cond. 4) The train was descending an incline near Sunnyside Station aforesaid, and it was in accordance with his duty and imperative by the rules of the defenders' service that he should see that the brakes were acting properly. While the deceased was leaning over the side of his engine in the performance of his duty, as above set forth, for the said purpose, and having his face necessarily turned from the direction in which he was going, his head came into violent contact with the stone-work of the said bridge, and injuries were inflicted which then or soon thereafter caused the death of the said Andrew M'Ghie. The death of the said Andrew M'Ghie was caused by the fault of the defenders in having the said bridge dangerously and unusually narrow. Had it been of the ordinary width the accident would not have happened. Further, the defenders were to blame in not warning their servants, and among others the said Andrew M'Ghie, of the undue and unusual narrowness of the said bridge. It was quite easy for them to have given such warning, and since the accident they have in fact done so. By their rules it is provided that engine-drivers before commencing their day's work must ascertain from the notices posted for their guidance if there be anything requiring their special attention on those parts of the line over which they have to work. Had a notice of the dangerous condition of the said bridge been posted as indicated in the said rule, it would have been seen by the said Andrew M'Ghie, and the accident would have been avoided." They also stated (Cond. 5) that the space between the outside rail and the stone-work of the bridge was only three feet and one half-inch, and after deducting the space which the engine overlapped it, there were only two feet between the engine and the bridge, and this space was over four inches too narrow for the limits of safety as defined in the schedule of Important Requirements issued as a memorandum by the Board of Trade in December 1885.

The defenders stated in answer that there was no necessity for M'Ghie projecting his head further beyond the engine than he could do with safety, and in doing so he had acted recklessly. The bridge was safe, and M'Ghie was perfectly familiar with it, and the requirements of the Board of Trade founded on did have force when the bridge was constructed under statutory authority.

The defenders pleaded—" (1) The statements of the pursuer are irrelevant and insufficient in law to support the prayer of the petition. (2) There having been no fault on the part of the defenders, they should be absolved. (3) The deceased having by his own carelessness and want of caution induced, or at least materially contributed to the cause of the accident, the defenders are entitled to absolvitor."

The Sheriff-Substitute (HAMILTON) allowed a proof.

The pursuer appealed for jury trial.

The defenders argued that there was no relevant case whereon an issue could be allowed.

At advising—

LORD-JUSTICE CLERK—With all sympathy for this unfortunate man, I fear that there has been no relevant case stated against the railway company. The bridge may have been narrow and dangerous, but apparently he was aware of its condition, and it cannot be imputed as fault to the railway company that in this knowledge he projected his head further than the bridge admitted of his doing. They were not bound to pull down the bridge. We must disallow the issue.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The Court found that there was no relevant allegation to support the issue.

Counsel for Pursuer—Rhind. Agents—Begg & Bruce Low, S.S.C.

Counsel for Defenders—Graham Murray. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, March 1.

FIRST DIVISION.

BARR (FRASER'S TRUSTEE) v. STRONACH  
(WILSON'S TRUSTEE).

(Ante, December 17, 1886, p. 205).

*Bankruptcy—Duty of Trustee—Judicial Sale—Expenses of Sale.*

Pending a litigation between two bankrupt estates as to the right of property in certain goods, the trustee on one of them stored the goods, which were bulky in nature. Eventually the trustee on the other estate was found entitled to the goods. *Held* that in accounting for the goods or their price the trustee who stored them was not entitled to deduct the expense of storing them, as he ought not to have incurred storage rent, the proper course having been to apply, if necessary, to have them judicially sold.

Before the discussion in the appeal previously reported (to which report reference is made), Stronach (Wilson's trustee) presented a note in which he stated that he had been, since Whitsunday 1885, paying storage rent for the articles in dispute between him, as Wilson's trustee, and Barr, as Fraser's trustee, and craved the Court to grant warrant to him to sell the articles in dispute, "the proceeds of sale, under deduction of the expenses thereof, to be consigned in the hands of the Clerk of Court."

On the 2d June 1886 the Court granted warrant as craved. The goods were sold, and the nett proceeds of the sale amounted to £262, 12s. 6d., according to a statement put in process by Stronach. He consigned £114, 18s. 9d. After the interlocutor of 17th December 1886

had been pronounced, in which the plea of *res judicata* was sustained, with the result that the articles were held to belong to Fraser's estate, Barr (Fraser's trustee) examined the statement of account of sale, and the relative vouchers, and being of opinion that Stronach had in that statement deducted sums which were not expenses of sale, thereupon lodged a note to the Court, stating that the whole free proceeds of sale had not been consigned. After discussion on this note the Court on 6th January 1887 ordered Stronach to consign with the Clerk of Court £115, 11s. 5d., with interest at five per cent. from the 15th June 1886, the time of sale. Thereupon Stronach lodged with the Clerk of Court a deposit-receipt for the sum of £118, 16s. 3d., being principal and interest.

Thereafter Barr, as Fraser's trustee, lodged this note to the Court, craving the Court to grant him warrant to uplift the contents of the deposit-receipt. Stronach lodged answers, which brought out that the sum in the receipt was (excluding the interest) the amount of the rent for storing the articles, and the expense of removing them to the store and making inventory of them. He averred that, owing to the difficulty of ascertaining who was the true owner of the articles in dispute, and to the protraction and uncertainty of the litigation, he was placed in a position of great difficulty. The goods in question consisted of "a quantity of building material and fittings (a great portion of it being ironmongery), that were lying partly around and within the unfinished buildings, and partly in some outhouses about the bakery. It had all been supplied by those creditors for whom he [Stronach] was acting, and it was being wasted through exposure and damp, and some of it was also being stolen. There were no locked doors on the new buildings; the ground was not even securely barricaded; and the police made a call upon the respondent, as the only person known to them as concerning himself with the property, to secure the goods in a more effectual manner. The rest of the goods lying in the bakery outhouses had to be removed because the trustee's right of possession of these premises had come to an end. On various dates he had the barricades repaired at his own expense. No one else took any charge of the goods. The bondholder who was advertising the property for sale also called upon the respondent to remove the material at once if it was to be removed at all.

"Accordingly at Whitsunday 1885 he, in the best faith, and as he conceived for the interests of all concerned, contracted with a firm of builders in Aberdeen (Garvie & Sons) to have these building fittings and materials removed to premises of theirs where they would be under cover and lock and key. The materials were very bulky and numerous. The trustee made as economical an arrangement with Messrs Garvie as he could. At that time he relied upon the value of the material as increasing the amount of the estate under his charge, and it was his interest and concern to store them as cheaply as possible. He personally undertook to pay Messrs Garvie a rent of £4 a month for the space the materials occupied in their premises situated in Thistle Lane. These premises were 86 feet long and 30 feet broad. They had just been vacated by James Laing and Company, coachbuilders, and the rent they had paid was £4 per month. These pre-

mises are built of stone and slated, and are thoroughly water-tight, and all the ironmongery and other perishable goods were stored in them. When the goods were being removed it was found that the said space was not sufficient. There was a large quantity of flooring, and the respondent was obliged to lease from Messrs Garvie a covered shed in the same place, but entering from Rose Street, at a rent of £3 a month. Both places were required."

He further explained that he deducted this sum of £115, 10s. 10d. paid as storage rent and cost of removal when he consigned the proceeds of sale, but that having been ordained by the Court, as above narrated, he consigned it as well as the £114 already consigned; that he had done so from his own funds. He maintained that he ought not, having acted on the best faith in difficult circumstances, to have to pay this money, and that it should be returned to him.

Barr argued—The expense of storage could not form a legitimate deduction. Stronach ought not to have removed and stored the goods. If he was in difficulty he should have sold them.

Stronach argued—Wilson being owner, *ex facie* he was entitled to deal with the goods as belonging to Wilson's estate. He had, in the peculiarity of the circumstances, no other alternative than to treat the goods as Wilson's property, and he was in *bona fide* in so doing.

At advising—

LORD PRESIDENT—The goods in question were sold in the process recently before us, and it has now been conclusively settled that the proper owner of these goods is Barr. In consequence he has applied for payment of the consigned price subject to deduction of the expenses. Mr Stronach contends that he is entitled to deduct not only the expenses of sale but the amount of storage rent, and the expense of removing the goods from the premises into which they had been delivered. These sums amount together to £115, 10s. This is rather an unusual element of deduction, and the way in which Mr Stronach justifies it is by saying that at Whitsunday he found himself in a great difficulty, and had no alternative but to remove and store the goods at a very high storage rent. I am not disposed to impugn his *bona fides* as trustee, but it is necessary to see the position in which he was placed in order to see if he had any justification. He represented the creditors of Wilson, they being the persons who really supplied the goods. He was quite aware that there was doubt as to who the party was who had ordered the goods, and upon whose credit they had been purchased. He knew that it was probable that the arrangement between Wilson and Fraser was truly fraudulent. He had that amount of knowledge. He also knew that there was great doubt as to the ownership. There was then a litigation pending before Lord M'Laren, a suspension of the decree in absence having been instituted in January, and he could have applied for a judicial sale. Surely if he were confident that these goods belonged to Wilson's estate, the proper course was to sell them and apply the price among the creditors on the estate. If there was doubt, nothing but a judicial sale was a suitable course. But to store goods of such a kind, and of such a bulk, and

for an indefinite time, was, of all courses, the worst that could have been followed. He says the premises in which the goods were "were 86 feet long and 30 feet broad. They had just been vacated by James Laing & Company, coach-builders, and the rent they had paid was £4 per month. The premises are built of stone and slated, and are thoroughly water-tight, and all the ironmongery and other perishable goods were stored in them. When the goods were being removed it was found that the said space was not sufficient. There was a large quantity of flooring, and the respondent was obliged to lease from Messrs Garvie a covered shed in the same place, but entering from Rose Street, at a rent of £3 per month. Both places were required." For those premises he thus undertook to pay £7 a month for an indefinite period—that is to say, until the issue of a litigation which it was evident would be protracted and expensive. I cannot see any justification for the course he adopted. It was evidently the worst course. Whoever was eventually to be found entitled to these goods, plainly the worst course was to heap up expense upon them. I do not think the person entitled to these goods should be required to admit this deduction.

LORDS MURE, SHAND, and ADAM concurred.

The Court granted warrant to Barr to uplift the sum in dispute.

Counsel for Barr — Gloag — Shaw. Agent — Andrew Newlands, S.S.C.

Counsel for Stronach — Comrie Thomson — Kennedy. Agents — Macpherson & Mackay, W.S.

Friday, March 4.

## SECOND DIVISION.

[Lord M'Laren, Ordinary.

M'CAIG (INSPECTOR OF POOR OF KILMORE AND KILBRIDE) v. SINCLAIR (INSPECTOR OF POOR OF ARDCHATTAN AND MUCKAIRN).

Poor—Relief—Dismissal from Poorhouse—Poor Law Act 1845 (8 and 9 Vict. c. 83), sec. 70.

A pauper having no settlement in Scotland was, at the expense of the parish in which he was found destitute, relieved by being admitted into a combination poorhouse to which the parish was a contributor. After being there two months he demanded his own clothes, insisted on leaving the poorhouse for a temporary purpose, received them and left, but returned the same day. He was refused admittance without a fresh order, but the following day, having obtained such from another parish which contributed to the poorhouse, he was again received into it. He subsequently became insane and was sent to an asylum. In a question between the parishes as to the expense of his removal to the asylum and subsequent maintenance, held (rev. judgment of Lord M'Laren) that the circumstance of his temporary absence did not interrupt his chargeability to the first

parish, and therefore that it remained liable for that expense.

On 25th November 1884 Mark Power, a vagrant Irishman having no settlement in Scotland, was found in the parish of Ardochattan in a state of destitution, and was, upon his application, admitted to the Lorne Combination Poorhouse in Oban, to which Ardochattan was a contributor. There he remained, at the expense of Ardochattan, until the 19th January 1885. On the 19th of January he applied to the governor for leave of absence for a night, but was told this was impossible, though he might receive leave of absence for a reasonable period during the day. He then stated that he wished to leave the poorhouse, as he was desirous of attending a wedding, and he at the same time asked for his clothes. The governor then gave him his clothes, and he left the poorhouse that day. Being desirous of being re-admitted, he came back to the poorhouse along with a priest who took an interest in him, but was refused readmittance unless he had an order. On the 20th application was made to the inspector of Ardochattan for an order by the priest who was taking an interest in Power. And on the 21st a reply was sent that it was for the parish in which Power was to deal with the case—Power's only claim on Ardochattan having been that he was found destitute in it. Coincidentally with this application, however, Power went on the 20th to the office in Oban of the inspector of Kilmore, which was also a parish which contributed to the Lorne Combination Poorhouse, and applied for admission there. The assistant inspector of poor sent him to be examined by a medical-officer, and having got the medical-officer's report that he was not in good health or able to work, he did not return to the assistant inspector, but went direct to the Combination Poorhouse and was admitted. His name remained on the books of the poorhouse as an Ardochattan pauper, no fresh entry being made. The governor did not make such, because he considered him still chargeable to Ardochattan. On 12th February 1885 he was certified to be insane, and was on the 13th sent to the County Lunatic Asylum at Lochgilphead.

On said 12th February Kilmore and Kilbride intimated to Ardochattan that Power had been removed to the asylum, and that Kilmore and Kilbride claimed from Ardochattan repayment of the expense of his removal to and maintenance in the asylum.

The Inspector of Poor for Kilmore and Kilbride raised this action against the Inspector of Poor for Ardochattan for declarator that the defender was liable to pay to the pursuer the sum advanced for Power, a pauper entitled to relief from the defender, since 12th February 1885, and to be advanced, and for decree for the sum already spent on him, deducting the Parliamentary grant to be received, conform to account beginning at 12th February 1885.

The defender in answer stated—"In allowing the pauper to leave the poorhouse as aforesaid the governor was acting within his powers. By the 40th section of the rules and regulations for the management of poorhouses, prepared and sanctioned by the Board of Supervision, it is provided—"Twenty-four hours after having intimated to the house-governor a desire to be dismissed from the poorhouse, or sooner, if the house-