

tion," which is the most recent publication on the subject, the law is distinctly stated to the same effect.

We have had no argument as to what was the effect of the Union of the two kingdoms in 1707, but it seems to me that the legislation that then took place almost necessarily resulted in this, that the position of the Crown in such matters must be the same on both sides of the Border. Accordingly, although few questions have arisen, the English decisions have been accepted as correctly expressing the law of Scotland. Mr Glegg in his book, in the chapter headed "Liability to be Called as Defender," says—"The general rule that every wrongdoer is liable to answer in an action of damages, requires no explanation, and only apparent exceptions call for notice." "The chief of these," he continues, "is the case of the Crown. The maxim that the King can do no wrong takes away the ground of an action of damages, and leaves the injured party without a remedy in a court of law." Then he goes on to say—"This protection extends to public departments, to officers of public departments when their action has been instructed by the State, and to British subjects carrying out the orders of a foreign sovereign in his territory."

I confess I never had any doubt that the view to which the Lord Ordinary has given effect is sound, and I have no doubt now. Mr King Murray put before us all the cases he has discovered which bear upon the matter, and I am satisfied he has made an exhaustive investigation. Of these the only ones in the Court of Session which appear to touch the question of the liability of the Crown for negligence are the two cases I have referred to, and they are both against the contention.

On these grounds I see no reason for interfering with the Lord Ordinary's interlocutor, and I think we ought to refuse the reclaiming note.

LORD DUNDAS—I am of the same opinion. I think the interlocutor reclaimed against is clearly right. "It is," as Lord Kyllachy observed in the case of *Wilson* (7 F. 168), "an accepted doctrine that the Crown cannot be liable or sued for damages in respect of 'torts'—the wrongful act of its officers." His Lordship, as Lord Ordinary, decided another branch of the case against the Crown, for in *Wilson* the Crown had in fact intervened to conduct the defence for the regiment and its colonel, Colonel Mackay, but while the Crown successfully reclaimed on that point, the pursuer did not even take advantage of the reclaiming note to raise any challenge of the doctrine laid down by the Lord Ordinary upon the important point that concerns us here. I have no doubt the law laid down by Lord Kyllachy there is correct. I think the matter is concluded by authority so far as the Court of Session is concerned, and I am for adhering.

LORD SALVESEN—If this question were open the argument for the claimer would be almost irresistible. No reason has been suggested why a department of State should

not be answerable like a municipal corporation or any ordinary employer for the proper conduct of its business. The present state of the law as it has been settled, in England does not appear to me to be satisfactory, because it leaves it in the option of a department to accept liability where it pleases, and to repudiate liability where pressure is not brought upon it, possibly from political sources, to accept liability. I do not think it is desirable, from the point of view of public policy, that a department should be in that position, and it may well be that the present state of matters ought to be the subject of legislative amendment.

Treating this as a pure question of the common law of Scotland, however, I think it is settled by authority. The law of England seems to have been settled for a long period, and it is substantially to the effect that while the Crown may after certain procedure be sued for breach of contract, it cannot be sued for the negligence of a servant of the Crown. Authoritative pronouncements in Scotland are extremely meagre, but such as they are they seem to have followed the English rule, that rule being originally derived from a doctrine that is no longer accepted, viz., the doctrine that the King can do no wrong. But as your Lordship in the chair has pointed out, it would be anomalous if the liability of a Crown Department in Scotland differed from the liability of a Crown Department in England, and as the law has been long fixed in England and has been adopted, as I think, by our judges, it seems to me that we must simply follow the decisions which have been pronounced and adhere to the interlocutor of the Lord Ordinary.

LORD ORMDALE did not hear the case.

The Court adhered.

Counsel for the Pursuer—Morton, K.C.  
—King Murray. Agent—Allan M'Neill, S.S.C.

Counsel for the Lord Advocate—Solicitor-General (C. D. Murray, K.C.)—J. B. Young. Agent—Campbell Smith, S.S.C.

Counsel for the Defender Robert Macfarlane—Keith. Agent—Herbert Mellor, S.S.C.

Saturday, July 2.

#### FIRST DIVISION.

#### ROBERTSON'S TRUSTEES v. HORNE AND OTHERS.

*Succession—Will—Construction—Division per Stirpes or per Capita.*

A testator who had six sisters and one brother directed his trustees to divide his estate into seven shares, and to divide one-seventh equally between B, C, and D (the children of my deceased sister A) and the children of E, the deceased daughter of the said A. *Held*, on the evidence derived from the deed as a whole, that the portion of the estate in question was divisible *per stirpes*

into four equal parts, of which B, C, and D took three parts equally among them, and the children of E took the remaining part equally among them.

A Special Case was presented for the opinion and judgment of the Court by Joseph Young, physician, Slamannan, and others, the trustees acting under the last will and testament of the late John Chisholm Robertson of Slamannan, *first parties*; Robert Horne, Jessie Horne, and Mrs Mary Horne or Lloyd, Alberta, Canada, *second parties*; and Margaret Forrester and others, the children of and residing with James H. Forrester, Stenhousemuir, *third parties*.

The Case stated—“1. The late John Chisholm Robertson, a domiciled Scotsman, hereinafter referred to as the testator, died at Singapore on 19th June 1917 leaving a last will and testament dated 16th January 1917. . . . 2. By the said last will and testament the testator gave and bequeathed all his estate and effects to his trustees upon trust that they should convert the same into money or such part thereof as should not consist of money, and after payment thereof of his funeral and testamentary expenses, debts, and duties, he directed his trustees to ‘divide the same in the following manner, namely—One seventh part thereof to be paid to my sister Mary Moore, widow; one seventh part thereof to be divided equally between Robert Horne, Jessie Horne, Mary the wife of Mr Lloyd (the children of my deceased sister Margaret Horne) and the children of Lucinda Forrester, the deceased daughter of the said Margaret Horne, on their attaining the age of twenty-one years; one seventh part thereof to the children of my deceased sister Lucinda Dalrymple in equal shares on their attaining the respective ages of twenty-one years; one seventh part thereof to my sister Jeannie Gillespie, the wife of William Gillespie; one seventh part thereof to my sister Annie Robertson; one seventh part thereof to my sister Jessie Roden, wife of James Roden; and as to the remaining one seventh part thereof equally between my brother Robert Robertson, his wife Agnes, and his daughter Moira.’ 3. The testator died survived by a widow, Agnes Robertson, who accepted one-eighth of the residue of the trust estate in full settlement of her legal rights in the testator’s estate. . . . 4. The said Robert Horne, Jessie Horne, and Mary Horne or Lloyd, wife of Lloyd, all survived the testator. They have all attained majority and are the second parties hereto. The said deceased Lucinda Forrester was the wife of James Honeyman Forrester, and left the following seven children, who all survived the testator, viz., Margaret Forrester and Janet Forrester, who have both attained majority, William Forrester, Jessie Eccles Horne Forrester, and Euphemia Forrester, who are all in minority, and James Horne Forrester and Alexander Honeyman Forrester, who are in pupilarity. These children are the third parties hereto. The said James Honeyman Forrester is the guardian-at-law of the said children, who are in minority and pupilarity. 5. A question has arisen with regard to the true effect of the

bequest of the share of the trust estate destined to the second and third parties under the above-recited clause of the said last will and testament. The first parties are desirous of distributing the estate in accordance with the determination of the Court on the questions raised by the other parties, and submit no contentions.”

The second parties maintained that on a sound construction of the said last will and testament they were entitled equally among them to three-quarters of the said one-seventh share of residue, and that the third parties were only entitled to the remaining one-quarter equally among them.

The third parties maintained that the share of the estate therein directed to be divided between them and the second parties fell to be divided among them *per capita*, and that accordingly each of the third parties having acquired a vested interest at the death of the testator in one-tenth portion of the said share, they were or would become upon attaining majority entitled to payment thereof from the first parties.

The *questions of law* were—“(1) Is the said share of the trust estate divisible into four equal parts, of which the second parties are entitled to three parts equally among them, and the third parties to the remaining one part equally among them? or (2) Is the said share divisible into ten equal shares, of which each of the second and third parties take one?”

Argued for the second parties—The legal presumption in favour of division *per capita* might be readily displaced by evidence of a different intention. Here there was such evidence. The general character of the will was stirpital, and it was clear from the terms used that the testator intended this division to be *per stirpes*, the children of Mrs Forrester being called in place of their mother—*Galloway's Trustees v. Galloway*, 25 R. 28, 35 S.L.R. 23; *Laing's Trustees v. Sanson*, 7 R. 244, 17 S.L.R. 128; *Inglis v. McNeils*, 19 R. 924, 29 S.L.R. 795; *Campbell's Trustee v. Dick*, 1915 S.C. 100, 52 S.L.R. 78.

Argued for the third parties—There were no words in the deed which favoured one construction more than the other. This being the case, the legal presumption in favour of distribution *per capita* should be given effect to—*McLaren on Wills*, 3rd ed. p. 780; *Candlish Henderson on Vesting*, p. 191; *McCourtie v. Blackie's Children* (1812), *Hume's Decs.* 270; *MacDougall v. MacDougall*, 1866, 4 Macph. 372; *Bogie's Trustees v. Christie*, 9 R. 453, 19 S.L.R. 363; *Renny v. Crosbie*, 1822, 2 S. 60.

At advising—

LORD PRESIDENT—In the simple case of a legacy given to a number of persons it is an obvious inference that the division is *per capita*, and the inference has been held to apply (in the absence of evidence to the contrary) to the case of a legacy given among a number of persons of whom some are named and some designated only as belonging to a class. But the question remains a *quæstio voluntatis*, and the decision in any particular case must depend on

the nature of the bequest and on the part it plays in carrying out the general scheme of the settlement—in short, on the evidence derived from the deed as a whole. The testator had six sisters and one brother, so he broke up his estate into seven shares of one-seventh each. Two of his sisters had predeceased him, and he gave their two one-seventh shares to the families they had left behind them. Of the children of his sister Margaret three survived, but one had died leaving children. So he directed the division of his sister Margaret's share to be among her surviving children and the children of the predeceaser. He did not in terms make the division stirpital, but he did what appears to me to be—so far as evidence of intention goes—the same thing—that is to say, he indicated in a parenthesis the reason for including the three survivors (viz., because they were the surviving children of his sister), and went on to include the children of the predeceasing child—again indicating his reason (viz., because their mother was also a child of his sister). I think that in these circumstances if the testator had had any intention of giving the family of grandchildren more than he gave to each surviving child he would have said so. In my opinion he meant to give the grandchildren just what he gave to their uncle and aunts. The case is not unlike *Galloway's Trustees v. Galloway*, (1897) 25 R. 28.

LORD MACKENZIE—I am entirely of the same opinion. The natural reading of this will would lead one to the conclusion which your Lordship has reached, but it was pressed upon us that there were difficulties created in consequence of certain decisions which were quoted. I have read those cases since the argument, and I am glad to find that they do not prevent us reaching this conclusion. I think that the opinions of Lord Adam and Lord McLaren in the case of *Galloway's Trustees* ((1897) 25 R. 28) afford ample authority—if authority were needed—for saying that the intention of the testator—which seems to me to shine with clearness through the general scheme of this deed—should prevail. It appears to me to be clear that the objects of his bounty, in the clause under consideration, were the children of his deceased sister Margaret Horne. He calls three by name, and, one being dead, he says that the children of the deceased daughter of Margaret are to stand in place of their parent. That results in one-seventh being divided among them *per stirpes*.

LORD CULLEN—I agree. I think the general character of the scheme of distribution affords a sufficient indication of the testator's intention that the division here should be *per stirpes* in accordance with the contention of the second parties.

LORD SKERRINGTON did not hear the case.

The Court answered the first question of law in the affirmative and the second question in the negative.

Counsel for the First Parties—Gilchrist. Agents—Cunningham & Lawson, Solicitors.

Counsel for the Second Parties—W. T. Watson. Agents—Wallace & Begg, W.S.  
Counsel for the Third Parties—Mac-  
onochie. Agents—H. & H. Tod, W.S.

Wednesday, July 6.

SECOND DIVISION.

(Before Seven Judges.)

RAMSAY (CRICHTON-STUART'S  
TUTRIX), PETITIONER.

*Fee and Liferent—Liferent Interest—Party Born after Post-1848 Deed—Application by Tutrix of Pupil Beneficiary for Declaration that Property was Held in Fee-simple—Nobile Officium—Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), sec. 48.*

Under a trust settlement dated subsequent to 1848, certain heritable estate was conveyed to a liferenter with power to settle it by *mortis causa* deed upon any one of the heirs of his body under such conditions as he should see fit. The liferenter died leaving a pupil son born in 1915, upon whom in 1907, in accordance with the said power, he had settled the estate in liferent. Thereafter, upon the narrative that it was desirable in the interests of the holder of the settled estate that certain parts thereof should be sold, a petition was presented to the Court by the widow of the liferenter, as tutrix for her pupil son, for declarator that in virtue of section 48 of the Entail Amendment Act 1848 her son was fee-simple proprietor. Held that the power conferred upon liferenters by section 48 of the Entail Amendment Act 1848 to apply to the Court to be deemed to be fee-simple proprietors was confined to persons of full age; that the *nobile officium* of the Court could not be invoked to contravene an express statutory condition; and petition *refused*.

The Entail Amendment Act 1848 (11 and 12 Vict. cap. 36) enacts—Section 48—“And be it enacted that from and after the passing of this Act it shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant; and where any land or estate in Scotland shall, by virtue of any deed dated on or after the said first day of August One thousand eight hundred and forty-eight, be held in liferent by a party of full age, born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deed or by which the same or the interest of such party therein may bear to be qualified, and such party shall be deemed and taken to be the fee-simple proprietor of such estate, and it shall be lawful to such party to obtain and record an act and decree of the Court of Session in the like form and manner, and in the like terms, and with the like operation and effect as is hereinbefore provided with reference to an