

best for the estate. But the law is clear. The estate has been lost by unauthorised investments of a trustee, and he and his representatives must make good the loss."

Counsel for Pursuers—J. P. B. Robertson—Jameson. Agents—Stuart & Stuart, W. S.

Counsel for Defenders—Mackintosh—W. Campbell. Agents—J. & A. F. Adam, W. S.

Wednesday, October 18, 1882.

SECOND DIVISION.

[Lord Fraser, Ordinary.

NIXON V. ROGERSON'S EXECUTOR.

Succession—Legacy—Specialia generalibus derogant.

A testator directed that the funds constituting a succession which had opened to him at the time of his death, but of which he had not up to the time of his death become entitled to the possession, should be paid over to R., whom he nominated his executor, and to whom he "bequeathed, assigned, and conveyed" the same. By another purpose of his will he bequeathed to N. the whole stock belonging to him at his death in two railway companies named. The only railway stock he had was part of the succession conveyed to R.

Held that the special conveyance of the stock to N. derogated from the general conveyance of the funds constituting the succession bequeathed to R., and that R., as executor of the deceased, was bound to convey the stock to N.

In this action the pursuer Mary Jane Nixon sought to have the defender William Rogerson, executor of the deceased Samuel David Rogerson, ordained to execute and deliver to her a conveyance of certain railway stocks with the dividends accrued thereon, and also sought an accounting by the defender of his intromissions with certain farm stocks and implements on the farm of Wamphraygate, and with other moveable estate of the deceased Samuel David Rogerson.

The facts of the case, so far as relating to the question decided by the Court at this stage, were as follows, as related in the opinion of the Lord Ordinary:—"The deceased Samuel David Rogerson executed a will on the 11th of January 1880, by which he instructed his executors as follows:—'*Fifth* And with regard to the succession to the estate of my deceased father John Rogerson, which has already opened to me, but the funds of which I am not entitled to receive until I have reached the age of thirty years, I direct that the same shall be paid over to the said William Rogerson, to whom I bequeathe the same; and I do hereby assign, convey, and make over the same to him: '*Sixth* I direct my said trustees to convey and transfer to the said Mary Jane Nixon the whole of the shares of stock of the Caledonian and North British Railway Companies belonging to me at the time of my death.'

"The testator was the owner at the time of his death of £300 Lockerbie guaranteed stock of the Caledonian Railway Company, and of £290 stock of the North British Railway Company.

These stocks had been the property of the testator's father John Rogerson, and by judgment of the Court [*in an action of multiplepounding to which the defender as executor of Samuel David Rogerson was a party—reported 29th June 1881, ante, vol. 18, p. 621*] were held to have vested in and become the property of Samuel Rogerson at his father's death. The father John Rogerson had executed a deed of settlement whereby he conveyed his whole property to trustees, with directions to distribute it in a way which it is unnecessary to recite, farther than that he directed the interest and dividends derivable therefrom to be paid to his son Samuel till he arrived at the age of thirty, and the capital to be conveyed over to him on his reaching that age. Samuel did obtain the dividends on the above stocks from the trustees of his father, but he died before reaching the appointed age.

"The defender in the present action is executor of Samuel Rogerson; and he is the legatee to whom the 'funds' of John Rogerson, to which his son Samuel succeeded, are bequeathed under the fifth direction of the will of Samuel."

The Lord Ordinary ordained the defender to execute and deliver to the pursuer a valid conveyance and transfer in her favour of the stocks in question, and found him bound to account to her for all dividends accrued on them and paid to him since 15th January 1880, the date of Samuel David Rogerson's death, and granted leave to reclaim.

He added this note:—[*After the narrative of facts above given*]—"If that clause" ("the fifth purpose of Samuel David Rogerson's will") "had stood alone, without being followed by the sixth direction, it would have been sufficient to have carried the stocks in question to the defender. The word 'funds' is comprehensive enough to include stock of a railway company. But the sixth direction takes the case of these stocks entirely out of the fifth, because it deals *specially* with them. Apparently the testator had forgotten that he had taken the stocks as part of his father's succession, or perhaps he did not mean when he conveyed 'funds' to the defender under the fifth direction to include therein railway stocks. At all events, the sixth direction must be looked upon as not included in or as an exception to the general legacy in the fifth direction, and must be given effect to by sustaining the claim of the pursuer."

The defender reclaimed, and argued that the testator could not mean by the gift to the pursuer contained in the sixth purpose to deal with anything falling under the succession which he had just given to the defender by the fifth.

The respondent's counsel was not called upon.

At advising—

LORD JUSTICE-CLERK—I think two things are quite clear on the face of this deed—*first*, that the testator did not intend the defender to have these railway stocks; and *secondly*, that he did intend that the pursuer should have them, and notwithstanding the ingenious argument of the reclaimer's counsel, I am for affirming the judgment of the Lord Ordinary.

LOrds Young and CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I am of the same opinion. I do not think the case is arguable at all.

The Court adhered.

Counsel for Pursuer (Respondent)—J. Burnet.
Agent—Knight Watson, Solicitor.

Counsel for Defender (Reclaimer)—Trayner—
Guthrie. Agents—Paterson, Cameron, & Co.,
S.S.C.

Wednesday, October 18.

SECOND DIVISION.

[Sheriff-Substitute of Fifeshire.

SEELEY V. JACKSON & SONS.

*Master and Servant—Reparation—Negligence—
Risk incidental to Employment—Implied Con-
tract by Workmen to take such Risks—Em-
ployers Liability Act 1880 (43 and 44 Vict. c.
42), sec. 1, sub-secs. 1 and 2.*

Circumstances in which the Court held that an accident which occurred to a workman, without fault of his own, and while he was engaged in the service of his employer, was a pure misadventure, which had not been caused by any *culpa* for which the employers were responsible at common law or under the Employers Liability Act 1880, and the risk of which was one of the risks incident to the employment.

Observations per Lord Young on the law applicable to such cases.

This was an action of damages for bodily injury by a labourer against his employers, in which the pursuer claimed damages alternatively at common law and under the Employers Liability Act 1880. From the proof led the following facts appeared—A number of workmen, one of whom was the pursuer, were engaged in the defenders' iron foundry in removing from the moulding-room to the courtyard outside a large iron casting weighing between two and three tons, and measuring about four feet in length and eighteen inches in diameter. The operation was conducted under the personal supervision of one of the partners of the defenders' firm. The floor over which the casting required 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 two feet broad, and at the deepest part was three or four inches in depth. The nature of the bogie and the manner in which the accident happened were thus described in the interlocutor of the Sheriff-Substitute, by which he found—“(2) That the casting was placed on a bogie which has four wheels, two being placed on an axle in the centre, and one being placed at each end, fastened by a bracket so placed that when the frame of the bogie is parallel with the ground, the two end wheels are somewhat removed from the ground, and the bogie is balanced on the two centre wheels. (3) That in the course of the operation the bogie stuck fast, and the hind wheel came in contact with the ground; that the bracket attaching the wheel to the body of the

bogie broke, and the end of the bogie being thus left without support, dropped to the ground, and the casting slipped back and ultimately toppled over and fell upon the pursuer's leg, which was so severely crushed that it had to be amputated.” It was proved that the bogie which was used on the occasion in question had been frequently used in the conveyance of castings of not less weight than that which was upon it when it broke down, and was regarded as the best bogie in the defenders' works. It was also proved that some years before the accident the bracket at the end of it had broken down in a similar manner to that in which it broke down in the accident in question, and that it had been replaced by a new one of a somewhat heavier description.

The pursuer pleaded, that having been injured through the fault of the defenders in not providing a bogie of sufficient strength to bear the weight placed upon it, he was entitled to damages at common law. He also pleaded, that having while in the employment of the defenders been injured by a defect in their ways, works, machinery, or plant, he was entitled to damages under sec. 1, sub-sec. 1, of the Employers Liability Act 1880, which provides that “where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman. . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman, nor in the service of the employer, nor engaged in his work.”

The defence was a denial of fault in providing insufficient machinery or otherwise.

The Sheriff-Substitute (GILLESPIE), on the ground that the bogie was suitable and apparently sufficient for its purpose, and that the defenders had no reason to suspect any flaw in the bracket, assolized the defenders.

The pursuer appealed to the Court of Session. The Court being of opinion, in point of fact, that the accident was a pure misadventure, and was not caused by any negligence in the conduct of the operation of removing the casting, and that no insufficiency was established in the defenders' plant or works, refused the appeal and affirmed the interlocutor of the Sheriff.

At advising the following observations on the law applicable to such cases were made by

LORD YOUNG—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*. If the *culpa* be on the part of the master, then the claim lies against him; if on the part of a fellow-workman, he has also a claim against the latter; and under the recent statute, in certain circumstances against the employer, where it formerly existed only against a fellow-workman. Agreeing as I do with your Lordships that this was just one of these accidents where there was not present that which the law esteems fault, I must concur in the conclusion that the risk was one of which the workman undertook by his contract of service to bear the consequences, and that he has in the circumstances no claim for compensation.