same class, so that both these substitutes and the heir of entail in possession come under the first branch of the destination in the entail.

The clause upon which this question arises is in these terms:—"Declaring always, as it is hereby expressly provided and declared, that notwithstanding of the above destination and order of succession, and clauses irritant and resolutive before prescribed, the foresaid lands and estates hereby disponed shall, upon the expiry of the term and period of sixty-eight years from and after the date hereof, and the lifetime of the person then in possession, become a fee-simple in the person of the next heir or substitute who shall succeed in virtue hereof."

The heir of entail in possession maintains that the period of sixty-eight years having expired, and as on his death the estates would devolve in fee-simple on the next heir, he is therefore now entitled to hold them in fee-simple.

I am very clearly of opinion, and on the grounds stated by the Lord Ordinary, that the heir of entail in possession does not hold, and that he is not entitled to hold, the estate in fee-simple, because upon a true construction of this deed, and of this clause, he is fettered for the benefit of the heir of entail next entitled to succeed, and who for the first time will be entitled to hold the estates in fee-simple. The ground of judgment is thus stated by the Lord Ordinary in his note:—"But the respondents are not in the position of heirs whatsoever, but are all of them in the class of proper substitutes called by special destination. If either of them succeeds, he will take as heir of tailzie and provision, and in no other character. The petitioner is the last fettered heir; but that is not because of his being the last person whom the entailer specially desired to favour, but because that will be the position of the heir coming after him, and for whose benefit the entailer intended that he should still be subjected to the fetters." That is the ground of judgment, and I think it is too clear to require further illustration.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am of the same opinion. The petitioner's case is of such a nature that he can only succeed if he is able to satisfy the Court that he is the only heir of entail in existence for the time. If that is so, he is entitled to succeed; if not, the petition must be refused.

Now here the next heir called will succeed, not under a general destination to heirs whatsoever, or to the entailer's own heirs and assignees, but under a special destination, and that being so it is quite apparent that the next heir is to all intents and purposes an heir of entail, although the entailer has not thought fit to apply the fetters to him. The petitioner is fettered, not for the benefit of heirs whatsoever, but for the benefit of an heir specified in the destination. I think that the explanation of the principle laid down in several cases, that when the destination in an entail opens under a clause to heirs whatsoever the estate is held in fee-simple, is that the object of inserting such a clause is to exclude the claim of the Crown. The true ground of the decisions in cases of that class is given by Lord Fullerton in the judgment referred to by the Lord Ordinary, and that principle has no application to a case like the present, where the heir is entitled to take under a special destination. In my opinion, therefore, the heir of entail in possession is not the only heir of entail in existence, and therefore is not entitled to succeed.

The Court adhered.

Counsel for Petitioner — Solicitor - General (Asher, Q.C.) — Mackay. Agents — Lindsay, Howe, & Co., W.S.

Counsel for Respondents—Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, November 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'INTYRE *v.* GALLACHER.

Reparation—Defective Work by Tradesman.

A landlord who had been found liable in the amount of damage done to his tenant's premises by an overflow of water, brought an action for the amount he had to pay, and for his expenses in resisting the claim, against a plumber, on the ground that he had occasioned the damage by defective and insufficient work executed on the premises four years previous to the overflow. The Court *awarded* the damages sued for, being satisfied that the landlord had in point of fact established his averment.

Mrs Roche, who was tenant of a shop at No. 475 Gallowgate Street, Glasgow, sued her landlord, Patrick M'Intyre, in the Sheriff Court of Lanarkshire at Glasgow, for the sum of £30 as damages occasioned by an overflow of water which occurred on 29th May 1882, and by which her shop was flooded and the goods therein injured. She obtained decree in her favour, and M'Intyre was found liable in £20 of damages and £16, 5s. 1d. of expenses. Thereupon M'Intyre, having paid these sums, raised this action in the same Court against John Gallacher, a plumber whom he had employed in April and May 1878 to put in new supply pipes throughout the said property, and to do all necessary repairs for making the plumber work of the tenement secure. The ground of action was that the defender had at that time cut a pipe leading from the main pipe supplying the water-closet cistern to the kitchen jawbox, and that he had culpably failed to solder it securely, and that in consequence it burst and caused the overflow for which the pursuer had been found liable to his tenant.

The pursuer pleaded—"The pursuer having sustained loss and damage to the extent sued through the fault and negligence of the defender, is entitled to decree as craved, with expenses."

The defender pleaded—"(1) In respect the alleged claim against defender has not been made *tempestive*, but after a period of nearly five years from the date when said work was said to be executed, the pursuer is chargeable with *mora*, and the action is inept and falls to be dismissed with costs. (2) In respect the alleged work

which is said to have proven defective is in any case the result of ordinary tear and wear, or of an accident or circumstances over which defender had no control, no action is competent against defender."

The facts disclosed by the proof sufficiently appear from the following interlocutor of the Sheriff-Substitute (GUTHRIE), who found "that on the 28th of May 1882 a water-pipe in the pursuer's property in Gallowgate burst, and the water overflowed into the shop below, causing serious loss and damage to the goods therein: that the pursuer being convened in an action of damages in this Court at the instance of the tenant of the shop, was found liable in damages, and has paid under the decree the sum of £20 of damages and £16, 5s. 1d. of expenses: that the leak in the said pipe took place at or near the joint of a disused pipe leading from the main pipe supplying the water-closet cistern to the kitchen jawbox: that the said disused pipe was cut in 1878 by the defender or his workmen when he was employed by the pursuer to alter the mode of supply to the kitchen, and that he or his workmen then failed properly and securely to stop and solder it, in consequence whereof it burst and caused the said overflow: that the defender is therefore liable to make good the loss which the pursuer so sustains: And assesses the damages at thirty-six pounds five shillings and one penny sterling, for which decerns.

"*Note.*—This is a narrow jury question; and the difficulty arises, in my opinion, not from any doubt suggested by the defender's contention that he did not stop up the stumps where the leak occurred, but from the age and general condition of the pipes, which, according to some of the evidence, made a burst not unlikely. It is further remarkable, and favourable to the defender, that there seem to have been overflows into the same shop on previous occasions, though in this case there is little evidence on that point. I should not have therefore been inclined to hold the defender responsible but for the distinct evidence of Cunningham, Wallace, Brown (defender's witness), and Shields (also a witness friendly to the defender), that it is untradesmanlike to close a pipe permanently by merely putting it together without using solder, and the preponderating evidence that this pipe was not soldered, but only hammered together.

"It is apparently hard that the defender should be made liable for a flaw which was attended by no bad effects for more than four years; but if it be proved that it was a flaw, and that it caused this damage, the lapse of time is no defence. In many cases it may be impossible to convict plumbers of defective workmanship—to prove that overflows arise from negligence or want of skill and not from accident or ordinary tear and wear; but when the evidence is sufficient, there is no hardship, but plain justice and expediency, in making a tradesman who stands to his employer, as a plumber generally does, in a peculiarly confidential relation, pay for the loss which his negligence has caused. I think that the balance of evidence is distinctly in favour of the pursuer."

The above findings in fact sufficiently show the import of the proof.

The defender appealed, and argued—In order to succeed here it was necessary that the pursuer must establish connection between the flooding in 1882 and the alleged previous defective plumber work by the very clearest evidence. It was just as likely that the leakage had been the result of four years' wear and tear as of defective work. In point of fact, the evidence showed that the defender had done all he possibly could to execute his work in a tradesmanlike manner.

Argued for pursuer—No doubt it was difficult to establish the connection between the flooding of Mrs Roche's shop and the defender's defective plumber work of four years previous; but by the proof that had been done, and in point of law the ground of action for the amount of damage suffered by the pursuer through the insufficiency of that work was perfectly sound.

At advising—

LORD YOUNG—The action is one at the instance of a customer against a plumber for defective plumber work executed in 1878—the customer, who is the pursuer, alleging that the defender was employed to execute the work in the house in Gallowgate, in particular to close up an old pipe, and that he did so in an insufficient and defective manner.

Now, undoubtedly it is a good ground of action against a tradesman that he has executed the work for which he has been employed in an insufficient and defective manner. If his customer has suffered thereby, he is entitled to be released from the consequences. Circumstances no doubt may be infinitely various, and in each case there may be a good answer to the demand, but as a general rule a tradesman is answerable to his customer for insufficient work. Here these consequences, according to the pursuer's case, did not show till 1882, when the pipe alleged to have been treated in a defective manner gave way, and the flooding took place in the adjoining premises. Well, if the fact be as stated, it seems to me that the ground of action is good in law. It may be difficult or even impossible to prove that what occurred four years after is attributable to the insufficiency of the work executed. It is a question of fact on the evidence. But if it be satisfactorily proved, then there seems no legal difficulty in allowing action against the tradesman for relief against ill consequences.

The Sheriff has decided that the injuries for which the pursuer has had to pay have arisen from the defective manner in which the defender executed his work in 1878, and on that question I have only to say, that having listened with attention to Mr Thomson, I do not see any reason to differ, and therefore I consider the case on that assumption. The pursuer has overcome, in the opinion of the Sheriff, and rightly so in my opinion, the difficult task which met him at the outset, of establishing connection between the flooding in 1882 and the defective work in 1878. The flooding then has been shown to be the result of the defender's failure to solder the pipe in 1878. There only remains, then, the amount of damages to be awarded. The pursuer has satisfactorily proved the amount, and there is no evidence to the contrary, for the owner of the premises swears that she suffered damage to the extent of £20. She brought an action against the pursuer as proprietor of the premises. He put her to prove her case, and she proved that

the flooding was attributable to the defective work of the defender in 1878. In these circumstances I see no satisfactory reason for refusing to award, as the Sheriff has done, as damages to the customer, the actual amount of damages he had to pay out of his pocket, viz., £20 and £16 expenses.

I should therefore suggest that the appeal be dismissed.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

"Find that the loss sustained by the pursuer, as libelled, was attributable to the insufficiency of the work specified in the record, done by the defender on the employment of the pursuer: Therefore dismiss the appeal and affirm the judgment."

Counsel for Appellant—Comrie Thomson. Agent—William Officer, S.S.C.

Counsel for Respondent—Keir—G. Wardlaw Burnet. Agent—George Andrew, S.S.C.

Tuesday, November 6.

OUTER HOUSE.

[Lord M'Laren.

ARCHIBALD *v.* THE NORTH BRITISH RAILWAY COMPANY.

Reparation—Railway—Accident to Trespasser—Child Run Over on Railway—Obligation to Fence.

The father of a boy two and a half years old, who had wandered on to a line of railway, the fencing of which was broken down, and been killed by a passing engine, raised an action against the railway company for damages for the child's death, on the grounds (1) that the line ought to have been securely fenced; and (2) that the driver of the engine had seen the child, but had negligently failed to take sufficient means to stop the engine, and prevent the accident which happened. *Held (per* Lord M'Laren, Ordinary) that the first ground of action was irrelevant, since the company were not bound to fence the line, but that the pursuer was entitled to an issue on the second. Form of issue *adjusted.*

This was an action brought by Richard Archibald, a miner residing at Deantown, Inveresk, near Musselburgh, against the North British Railway Company, to recover damages for the loss of his son, a child of two and a half years old, who was killed on the defenders' railway on 26th June 1883. The line of rails at Deantown is laid along an embankment, and a wire fence had been put along it as a guard. The pursuer averred (Cond. 3) that for several months prior to the accident to his child this fencing had been in a state of disrepair, and in part entirely knocked down; that this was, or should have been, well known to the defenders, and was dangerous to the residents in the neighbourhood. He also averred that his child, while under the care of his mother, had left the garden, climbed up the embankment, and as there was not a proper fence, strayed on to the rails, and was knocked down and killed by one of the company's engines. He also averred that the driver or person in charge of the engine saw the child on the line of railway, and had ample time to stop his engine before it struck the child, but did not do so, and had thus culpably failed in the performance of his duty, and caused the injury complained of.

The company denied that the engine-driver had failed in his duty, and averred that if the child had been properly looked after and taken care of he would not have strayed on the line, and so would have escaped.

Pleaded for the pursuer—"(1) The pursuer's said child having been killed through the fault of the defenders, they are liable to the pursuer in reparation and damages."

Pleaded for the defenders—"(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons. (2) There being no obligation on the defenders, as in a question with the pursuer or his deceased son, to fence their line, the pursuer's averments as regards defective fencing are irrelevant. (3) The pursuer's said child having met with the accident which caused his death while trespassing on the defenders' line of railway, the pursuer is not entitled to reparation. (4) The defenders are entitled to absolvitor in respect—1st, That the death of the pursuer's son was not caused by their fault; 2d, that it was caused, or materially contributed to, by the pursuer's or his son's own fault or the fault of those in charge of the pursuer's son, and for whom the pursuer is responsible."

At adjustment of issues, argued for the defenders—I. No issue should be allowed at all. (1) There was no necessity for the railway company to fence their line—*Matson* v. *Baird and Others*, November 9, 1877, 5 R. 87. (2) The child here was trespassing on the line, and that fact was a bar to the recovery of damages—*Lumsden* v. *Russel*, February 1, 1856, 18 D. 468; *Balfour* v. *Baird & Brown*, December 5, 1857, 20 D. 238. There was on the face of the condescendence contributory negligence on the part of the parents, and they could not recover damages for an accident that would not have happened if they had looked carefully after their child. II. If an issue were allowed, there ought to be inserted in it the words, "while lawfully upon the defenders' line of railway," and also, "was struck by an engine and killed"—*Little* v. *Neilson*, January 27, 1855, 17 D. 310; *Hamilton* v. *The Caledonian Railway Company*, June 10, 1856, 18 D. 999.

The pursuer's counsel was not called upon.

The Lord Ordinary allowed the issue quoted below.

"*Opinion.*—If the grounds of action in this case had been solely what are set forth in article 3 of the condescendence, I think a strong case has been shown by the defenders for not sending an issue to trial. If there is no obligation on the defenders to fence their line, it would certainly