the claims of the prior bondholders. Nor did I think that the question of right should be tried in a multiplepoinding raised by all the companies For it appeared to me that this would put the prior bondholders to a disadvantage, inasmuch as it was, to say the least, doubtful whether they could claim the whole fund, seeing that it was to be contributed in part by companies with whom they had no contract. But be that as it may, it is very satisfactory to know that in this case it has not been maintained that our decision was wrong, or that the prior bondholders were not entitled to the sum for which they obtained decree.

In this case I agree with the minority of the consulted Judges and Lord Young.

The Court pronounced the following interlocutor:—

"The Lords of the Second Division of the Court, along with and in presence of all the other Judges of the Court, having considered the minutes of debate for the parties, and heard counsel thereon, and on the whole cause, Find, in conformity with the opinions of the majority of the consulted Judges, that the defenders, the Westminster Fire Insurance Office, are bound, under the policy of insurance libelled, to pay to the pursuers, the Glasgow Provident Investment Company, the amount of loss sustained by the said pursuers by reason of the fire in the premises of the Messrs Hay founded on in the record: Find that the amount of such loss is £350: Find that the Messrs Hay are not entitled in respect of their consent and concurrence in this action to any separate or individual decree in their favour: Ordain the said defenders to make payment to the pursuers of the said sum of £350, with interest thereon from 31st August 1882 till paid: With these alterations, adhere to the interlocutor of the Lord Ordinary of 10th November 1885, and refuse the reclaiming-note for the said defenders: Find the pursuers entitled to additional expenses," &c.

Counsel for Pursuers — Pearson — Ure. Agents—Smith & Mason, W.S.

Counsel for Defenders — Balfour, Q.C.—Graham Murray. Agents—H. B. & F. J. Dewar, W.S.

Saturday, July 16.

SECOND DIVISION.

[Sheriff of Stirlingshire.

STANFORTH *v.* THE BURNBANK FOUNDRY COMPANY.

Reparation — Master and Servant — Defective Machinery—Contributory Negligence.

A workman while engaged in polishing a piece of metal upon a wheel revolving at a great speed was dragged over the wheel and suffered severe injuries. In an action of damages at the instance of the workman, it was proved that the condition of the wheel was defective in some respects, and that this was known to the employers, who had obtained materials to have the defects remedied, but had delayed the carrying out of the work of repair. The workman was a man of experience, who had been for several years accustomed to the work in question. *Held*, in the absence of any direct evidence as to the immediate cause of the accident, that as the wheel was known to be defective, and no negligence was proved on the part of the workman, the presumption was that the accident occurred through a defect in the machinery, and that the defenders were liable in damages.

William Stanforth, residing in Grahamston, raised this action against the Burnbank Foundry Company, to recover damages for personal injuries sustained by him while working in the defenders' employment. The pursuer, who had been thirteen years in the company's employment and was a steady workman, was engaged at his ordinary work on the 25th July 1886 in polishing a railway signal segment upon the left wheel of a machine called a "glazer" in the defenders' works. This segment was a curved plate of metal about 32 inches long and weighing about 22 lbs., the particular piece of the segment which had to be polished being a rectilinear or rectangular projection 11½ inches long, ⅝ of an inch wide, and ¾ of an inch high. In polishing this piece of metal the workman held one end of the segment in his hand, resting it against either of his thighs, and changing it as might be necessary. The following description of the "glazer" is taken from the note of the Sheriff:—"It consists of an iron framework on a stone foundation supporting two wheels on the same axle a few feet apart, which are set in motion by a common driving belt. The wheels are of iron, covered with wood, over which is stretched a strip of walrus hide. Their diameter—iron, wood and leather all included—is about 27 inches, and their width 6 inches, while their greatest height above the stance to which the machine is bolted, is about 3½ feet. The leather made use of in such machines is usually about ⅞ of an inch thick when first laid on. It is fastened to the wood underneath, first with glue, and then with wooden or leather pegs. On the defenders' machine wooden ones are used. Those pegs are inserted in rows of four, placed straight across the face of the wheel, recurring every three or four inches. The surface of the leather is naturally rough, and consequently after being fastened to the wheel, it has to be shaved or pared with a turning instrument so as to remove irregularities and give it the same thickness throughout. After being turned, the leather is coated with glue, and this covered with powdered emery, and the wheel is then ready for use."

While the pursuer was engaged in this operation of polishing, by some means or other the segment caught in the wheel, and the pursuer was dragged over the wheel and sustained severe injuries. The pursuer maintained that the left-hand wheel of the machine was in very bad order and dangerous to work at, that not only was the leather generally worn down to about ⅜ of an inch, but that it was even thinner at the edges, that it was loose upon the tire, that its surface was not smooth and equal, but irregular, that in some places it was soft, and in

others hard, that the pin-holes were enlarged and open; that because of all this the balance of the wheel was untrue, with oscillation as its result, and that these defects arose from the fault of the defenders. The defenders maintained that the wheel was properly balanced and ran true; that though the leather was reduced to ⅜ of an inch over all, and was even thinner at the edges, this did not render it unsafe; that it was not loose from the tire, or irregular on the surface; that as it had been re-coated with glue and emery only the night before the accident happened, it must have been superficially of the same hardness throughout; and that, for the same reason, whatever may have been the case when it was bare of emery, there could have been no open pin-holes at the time of the accident. They maintained that the accident was due entirely to the pursuer's carelessness in allowing the segment to catch in the wheel while polishing it.

There was a great conflict of evidence, but it was proved that the right-hand wheel of the glazer was out of order and dangerous to work at, and that it had not been used for some time; that the leather upon the left-hand wheel was also very much worn, and that the wooden pins that attached it to the wheel were loose, that leather had been procured some little time before for the purpose of putting both wheels in order, and that both the workman himself and his employers knew of this state of things.

On 19th January 1887 the Sheriff-Substitute (Bell) pronounced this interlocutor:—"The Sheriff-Substitute having considered the closed record, proofs, and whole process, finds in point of fact that on 24th July last, while the pursuer was engaged at his ordinary employment of polishing a railway signal segment at a glazer or polishing machine in the defenders' works, a piece of metal which he was polishing was thrown suddenly off the wheel to which the pursuer was holding it, whereby the pursuer along with the segment was carried over the machine, and was thrown violently to the ground, and sustained serious injuries as libelled: Finds that the pursuer was an experienced steady workman, and well accustomed to the kind of work in which he was engaged: Finds that the glazer at which he was working was defective in respect that the walrus hide covering the tire of the left wheel which the pursuer was using had by long use (during twelve years), and by repeated turnings, being reduced to less than one-half of its original thickness: Finds that the attachment of the walrus hide to the tire was insecure, although by renewal of the pegs, and by the application of glue and emery, this defect was in some measure remedied and concealed: Finds that the right wheel was also out of repair to such an extent as to be useless, and being connected by the spindle with the left wheel, was calculated to render the movements of the latter irregular: Finds that from this cause the glazer was dangerous, and its defective condition was known to the defenders, who had provided walrus hide for covering the tires of both wheels, but the re-covering had been unfortunately delayed until after the accident: Finds that in the absence of any direct evidence as to the immediate cause of the accident, the presumption is that it was caused by the defective state of the glazer: Finds that there is no proof of contributory negligence on the part of the pursuer: Finds in law that the defenders were in fault, and responsible for the defective condition of the glazer, and liable in damages to the pursuer for the injuries and loss which he has sustained by the accident; therefore assesses the damages at £60, and finds the pursuer entitled to expenses.

"*Note.*—Although there has been a considerable conflict of opinion among the witnesses, the Sheriff-Substitute is satisfied that the weight of evidence has proved that the glazing machine at which the pursuer was working had been in a defective state for a considerable time, and was at the time of the accident dangerous. The right wheel had been condemned as unfit for use in consequence of the injuries to the leather, and being still attached to the spindle, it was from its imperfect state liable to affect the movements of the left wheel. The leather covering of the left wheel greatly required renewal, but had been carelessly left in a defective state, although it had from time to time been pegged down and its surface covered with glue and emery so as to admit of its being used. But it was liable at any time to give way so as to cause an accident, and was in a dangerous condition at the time of the accident. It is true that the iron parts of the machine had been repaired about two years ago, and that the machine had been examined and reported on by Messrs Blackadder, engineers, shortly before the accident, but no particular attention was paid to the condition of the leather coverings of the wheels as these did not fall within the proper department of these engineers, and the re-covering with walrus hide was further postponed, and after the inspection the machine continued to be used as before. The usual process of applying emery and glue to the surface of the left wheel was adopted by the pursuer on the night before the accident, and he observed nothing wrong next morning while engaged at his usual work, and he went on with his work without anything unusual occurring until he felt a sudden bump, and met with the accident by which he was rendered unconscious. There is no direct evidence as to the immediate cause of the accident, and the inquiry has been rendered more difficult from the circumstance that the leather covering of the left wheel was taken off and destroyed. For this no blame is attributable to the defenders as it appears to have been done without any intention of concealment, and merely in order to remove rubbish out of the way. But it has been shown in the proof that a tear or cut in the walrus hide was found after the accident, such as might have been caused by a projecting part of the end of the segment having come in contact with the wheel while in rapid motion, and it remains to be considered how this accident occurred. It might probably have been through carelessness, or an accidental slip on the part of the pursuer, but there is evidence that he was a steady and experienced workman, and the presumption is that some irregularity in the surface or in the motion of the defective wheel caused the projecting part of the segment to come in contact with and catch upon the wheel—the rapid motion of which (making 1300 revolutions in a minute) would naturally carry over the

segment and the workman along with it with great violence. An inspection of the premises and of the machine was of considerable assistance in forming this opinion. The Sheriff-Substitute thinks that the pursuer under the circumstances is entitled to the benefit of this presumption. Fault has been brought home to the defender in having delayed the repair of his defective machinery, and there is no proof of any contributory negligence on the part of the pursuer either in respect of carelessness at the time of the accident or of his having rashly subjected himself to an obvious and known danger. It is true that the pursuer had misgivings as to the condition of the wheel, but having reported these to his employer or those acting for him, he was entitled to assume that the machine which was still allotted to him might be used with safety. Under the whole circumstances, the Sheriff-Substitute is of opinion that the accident is attributable to the fault of the defender, and that he is in law liable for the consequences. The sum of £60 calculated as his average yearly earnings, under deduction of wages for five weeks paid by the defender, seems a reasonable amount as *solatium* and loss."

The defenders appealed to the Sheriff (MUIRHEAD), and on 16th March he pronounced the following interlocutor:—"Finds in fact (1) that for some years prior to the 24th day of July 1886 the pursuer was in the employment of the defenders at their foundry at Burnbank, and in the course of his employment there was frequently engaged in polishing iron wares on a glazer or polishing machine belonging to the defenders; (2) that on said 24th day of July, while engaged in polishing a railway signal segment on one of the wheels of said machine some sharp or edged part of the segment improperly came in contact with and was caught by the leather with which the wheel was covered, and in consequence thereof the segment was dragged out of the pursuer's hands and he himself fell forward against the revolving wheel and was thrown by it to the ground, thereby sustaining the injuries for which he now claims reparation in damages; (3) that it has not been ascertained what caused the segment to come improperly into contact with and to be caught by the leather on the wheel, and the pursuer to be thrown to the ground as aforesaid, and that the evidence does not disclose reasonable grounds for presuming that the accident was due to defect in the machine, for which the defenders are responsible, rather than to carelessness and fault on the part of the pursuer himself: Therefore finds in law that the defenders are not bound to make reparation to the pursuer: In respect of these findings, recals the interlocutor appealed against, dismisses the action, and decerns: Finds the defenders entitled to expenses."

"*Note.*— . . . . . Of the *causa causans* of the accident there is no conclusive evidence. There can indeed be no reasonable doubt that the injuries to the pursuer and the damage done to the wheel were simultaneous, and that their proximate cause was what may be called collision (as distinguished from contact) between the wheel and some part of the segment. The question is, was that collision due to defect in the wheel, for which the defenders were responsible, or to the fault of the pursuer, of which he himself must bear the consequence? He of course maintains the first of these alternatives. But he must prove it, or at least establish a strong presumption in its favour. In the recent case of *Macfarlane* v. *Thomson*, Dec. 6, 1884, 12 R. 232, the rubric runs —"Where the cause of an accident to a workman is not ascertained, the fact that it has taken place will not raise a presumption that it was caused by a defect in the machinery or plant for which the master is responsible. The pursuer must prove that the cause was some defect for which the master was responsible, although it is not necessary to show the precise nature of that defect." That is to say, as I understand the application of the judgment to such a case as the present, that the workman must prove not only that there was defect in the machinery or plant of which his employer was, or in the exercise of reasonable diligence ought to have been aware, of itself sufficient to have caused the accident without any fault on his, the workman's, part, but also that the accident could not have been caused by his, the workman's, agency unless such defect had existed. It is only then, as it seems to me, that in the absence of proof of the ultimate cause of the mishap there can be said to be reasonable presumption that the accident was due to the defective state of the machinery or plant, and that the employer can be held responsible. . . . . .

"On the whole the evidence tends in my opinion to establish that the accident was owing to carelessness of the pursuer rather than to defect in the wheel for which the defenders are responsible. But it is not necessary to go so far. It is enough for the defenders that in the absence of distinct proof of the cause of the accident the pursuer has failed to show a reasonable presumption that it was due to the defenders' fault. There can be no such presumption in presence of evidence that the accident might have occurred through the pursuer's own carelessness even had the machine been in the most perfect order. The action therefore must be dismissed."

The pursuer appealed to the Court of Session, and argued—The wheel was worn, and was not kept in proper repair. That these defects existed, and that the defenders knew of them, was shown conclusively by the fact that the leather had been ordered, and had in fact arrived, for the purpose of being put upon both wheels. The *onus* was therefore upon the defenders to show that there was carelessness, leading to the accident, on the part of the pursuer, and not on him to show that he was careful. The duty of the employers was to provide a proper wheel. It was proved, and almost admitted, that they did not do so; there was therefore fault on their part, and the presumption was that the accident occurred through the defect in the wheel for which they were responsible—*Macfarlane* v. *Thomson*, Dec. 6, 1884, 12 R. 232; *Walker* v. *Olsen*, June 15, 1882, 9 R. 946.

The respondents argued—There was direct evidence that there was no such defect in the wheel as to cause the accident. If the defenders could show, as they did here, that the wheel was in reasonably good working order, and could be worked by a man taking ordinary care, the *onus* upon them was discharged. The presumption in the whole circumstances was that the accident was occasioned by the pursuer's carelessness.

At advising—

Lord Justice-Clerk—In this case the two Sheriffs before whom the case has already come have differed in their judgments. A very voluminous proof has been taken, and the case rests on that proof.

In my opinion the view of the Sheriff-Substitute is the right one. It seems that in those works there was a machine the object of which was to polish certain pieces of cast-iron used on the railway. This machine had two wheels which moved upon the same axle, and were driven by steam. The way in which these wheels were built up was this—first they were made of wood, then covered with walrus hide, and then flour of emery was put upon them for the purpose of polishing the pieces of iron called railway signal segments. The pursuer was engaged in polishing one of those pieces of cast-iron, which was 3 feet in length and of considerable weight, which had to be held on to the wheel so as to polish part of it. In the course of that process the wheel gave a start, the casting struck the pursuer and knocked him down, and he was severely injured. Evidence was led as to the nature of the injuries, and the Sheriff-Substitute gave his judgment on the facts so proved, and found the pursuer entitled to £60 in name of damages.

The fault alleged by the pursuer is that the condition of the wheel was dangerous, and that it was in an insufficient state to perform the work to which it was put. The defenders say in answer—First, that there is no evidence either of the dangerous state of the wheel or of the insufficiency alleged, and second, that if there was any such insufficiency the pursuer knew of it, and ought not to have worked at the wheel, so that he is barred from claiming damages by contributory negligence. The Sheriff-Substitute's opinion was that neither of these defences had been made out. He held that the machine was insufficient for the work to which it was put, but that the pursuer was not guilty in continuing to do his ordinary work there. The Sheriff, on the other hand, has held that, admitting the machine to be defective, the workman ought to have known of that defect as well as the employer, and that as he continued to work at the machine he is barred from claiming damages. The Sheriff-Substitute says—"Fault has been brought home to the defenders in having delayed the repair of their defective machinery, and there is no proof of contributory negligence on the part of the pursuer, either in respect of carelessness at the time of the accident, or of his having rashly subjected himself to an obvious and known danger." I am of opinion that the evidence bears out that view. The machine was composed of two wheels, and the right-hand one was disused, and had been put out of gear because the walrus-hide which encased it had been worn out, and there was the liability of an accident happening at it, which did in reality happen at the left-hand one. So sure were the employers that the right-hand wheel was bad that they had prohibited the use of it, and had laid in a supply of walrus-hide to repair both it and the left-hand wheel, showing a consciousness that the machine was not to be trusted. It appears, in addition, that the pegs which fastened the walrus-hide on the wheels were loose, and the surmise is that in consequence of that looseness the casting was given a jerk which threw it off and caused the accident. I am inclined to take that view. I am not able to give an opinion as to the precise cause or manner in which the accident happened, but one can easily see that some such inequality in the covering of the wheel, as is stated by the witnesses to have existed here, might cause the accident complained of. I think that we ought to alter the judgment of the Sheriff.

Lord Craighill—I have come to the same conclusion. We have all read the proof taken before the Sheriff-Substitute, and have given it great consideration. I cannot say that I am surprised that there has been a difference of opinion between the Sheriffs, for this is a case in which there is room for a difference of opinion. But the one must be right, and the other wrong, and the conclusion I have come to is more in favour of the judgment of the Sheriff-Substitute than that of the Sheriff. The burden of proof is upon the pursuer; his case is that there was fault on the part of the defenders, and if that fault is not established, then the defenders must be assoilzied. Even if there is a doubt on the matter, still that is not sufficient to maintain the liability of the defenders. What happened appears to me to be no great mystery. The pursuer has shown that the machine was out of repair, and no other cause has been proved to be the cause of the accident—such, for example, as that the pursuer was careless in his handling of the railway signal segment. The pursuer suffered the injuries; if he was in fault, then it is quite impossible for him to recover damages—he must answer for his own fault. There is no dispute about the fact that the pursuer was a workman of steady character, who had been thirteen years in the employment of the defenders, for eight of which he had worked at the machine in question, when there was occasion to use it, during which time no accident had taken place. This leads to an inference that this accident did not take place through any error of his in the way of using the segment so as to get it polished. And this is not left to inference only. The pursuer deponed how he was engaged in polishing the segment, and he says that he did the same thing at this time as he had always done when polishing these segments before. We therefore have this reason for thinking that the accident did not occur through the error of the pursuer, that no accident had ever happened to him before when engaged at the same work performed in the same manner as at this time. We must therefore look elsewhere for the fault. If the machine had had as good a character as the workman is proved to have had it would have been difficult to discover where was the fault. But unfortunately for the defenders the character of the machine was not a good one. This machine had been under observation in the works before this time on account of its imperfections, as although it had been many years in the works, and had been used at intervals during that time, and had in consequence been somewhat injured, nothing had been done to bring it up to its original condition. The leather which covered the wheel had been very much reduced in thickness, and it was not evenly placed upon the wheel, as it was thicker at the centre than at the edges; more than that, several of the witnesses said that the pins which fastened the leather on to the wheel were loosened by the action of the wheel, and in this way the leather was not kept tight down upon the wheel as it ought to have

been. I do not say that there was not a conflict of evidence upon the condition of this wheel, but I think that that evidence is more in favour of the persons who say that the wheel was out of order than of those who say that it was in a state of good repair and fit for use. What I go on is this—no one can say that this wheel was in perfectly good order, as preparations had been made for its repair, but while the employers' witnesses concur that the wheel was out of order, nevertheless they were able to satisfy themselves that it might still be used with safety. Leather, however, had been got for the purpose of putting upon both wheels, and I am satisfied that if that had been done which the defenders intended should have been done when the leather for both wheels was ordered, then the wheel would have been put into perfect repair and the accident would not have happened. The hide had been got for both wheels, but no accident had occurred, and the defenders thought they might save a little time if they allowed the left-hand wheel to be used for a little longer, when both the wheels could be covered at the same time, and so a delay occurred. Now, I say that that shows fault on the part of the defenders. The wheel was out of order, and therefore anyone who had to work at it while out of order must have been liable to an accident at any time, and an accident did occur. These things lead me to the conclusion that in leaving the wheel in the state in which it was at the time of the accident, although the leather had been got for the purpose of repairing it, they incurred a risk of danger to the man who worked at it. I think therefore that is a fault for which they must answer. There are no doubt two sides to the question, but I have explained what seems to me to be the truth of the matter, and agree with your Lordship that we should recal the Sheriff-Principal's interlocutor.

Lord Rutherfurd Clark—If I had had to decide this case myself in the first instance, I think I should have come to the same result as the Sheriff has arrived at. I do not think it can be denied that the machine in question was defective, but I do not see how the defect in the wheel can be connected with the accident if the workman used care in his manipulation of the segment which he was engaged in polishing. Therefore I think I would have returned a verdict of not proven. I daresay my views, however, are not well founded, and as your Lordships seem very clear the other way, I do not take upon myself to differ.

Lord Young was absent.

The Court pronounced this interlocutor:

"Find in fact (1) that on the occasion mentioned in the record, while the pursuer was engaged in the employment of the defenders in polishing a piece of metal at a machine in their works, the said piece of metal was suddenly cast off and carried over the wheel along with the pursuer, who was thrown with violence against the ground, and injured as libelled; (2) that it was known to the defenders at the time, and for sometime before, that the machine was in an imperfect and dangerous condition, the walrus-hide encasing its wheels having become worn, and so caused an inequality in the working of the other wheel; (3) that the pursuer was injured as aforesaid by fault and negligence of the defenders, and did not by fault or negligence on his part contribute to the accident: Find in law that the defenders are liable to the pursuer in damages accordingly: Therefore sustain the appeal; recal the judgment of the Sheriff appealed against, and affirm the judgment of the Sheriff-Substitute; of new assess the damages at £60 sterling: Ordain the defenders to make payment of that sum to the pursuer, with interest thereon at the rate of 5 per centum per annum from the 12th day of January last till paid: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuer—Dickson—Fleming. Agent—R. D. Ker, W.S.

Counsel for the Defenders—D.-F. Mackintosh, Q.C.—Wilson. Agents—J. & A. Peddie & Ivory, W.S.

Saturday, July 16.

OUTER HOUSE.

[Lord Trayner, Ordinary.

SOMERVELL, PETITIONER.

Entail—Disentail—Consent of Minor Heirs—Curator ad litem—*Rutherfurd Act* (11 *and* 12 *Vict. cap.* 36), *sec.* 31—*Entail (Scotland) Act* 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 12

In a petition for disentail where there are two minor heirs, whose consents are required, a separate curator *ad litem* must be appointed to each.

This was an application under sec. 3 of the Rutherfurd Act for authority to disentail. The petitioner was born in 1845, and the tailzie under which he held was dated in 1823.

The three nearest heirs of entail whose consents were required were his brother William Somervell, born in 1849, and his two sons, aged six and three years respectively at the date of the application.

On the motion of the petitioner the Lord Ordinary appointed a curator *ad litem* to act for both the heirs in pupillarity. In the course of the proceedings a question was raised by the reporter, Mr H. B. Dewar, S.S.C., whether one curator *ad litem* conld competently act for two minor heirs whose consents were required.

Argued for the petitioner—Section 12 of the Entail (Scotland) Act 1882 introduced a different rule with regard to the appointment of curators, from that laid down by sec. 31 of the Rutherfurd Act, and that under it the number of curators to be appointed where there were two minor heirs whose consents were required was left entirely to the discretion of the Court.

Lord Trayner—I am of opinion that section 12 of the Act of 1882 is not inconsistent with section 31 of the Rutherfurd Act, and that they must be read together, and consequently where there are two minor heirs whose consents are required, a separate curator *ad litem* must be appointed to each.