upon him and his heirs and successors, and that the personal obligations contained in the said bonds and dispositions in security should subsist and be effectual."

Charles Welch died in 1894, leaving a disposition and settlement in the following terms:—"I, Charles Welch Tennent, of Rumgally and Pool, dispone and assign to my brother, Ralph Dalyell Welch, merchant in Liverpool, my whole estate, real and personal, wheresoever situated, and I appoint him my sole executor and universal legatee. . . . I recall all former wills and settlements, and declare this to be my last will and testament."

Ralph Dalyell Welch gave up an inventory of the moveable estate of his brother, and completed titles to the heritable estate by expeding notarial instruments in his favour in terms of the Titles to Land Consolidation Act 1868. He continued to pay the interest due to the company in respect of the two bonds on Rumgally.

Ralph Dalyell Welch died in 1895, leaving a will in English form.

An action was then raised against his executors by the company for payment of the bonds.

The plaintiffs in the said action contended that, under the circumstances stated, the said Ralph Dalyell Welch came under a personal obligation to pay to them the said sums of £10,000 and £10,000, and interest thereon, and that the defendants in the said action, as executors of the said Ralph Dalyell Welch, were liable to pay the said sums out of the estate of the said Ralph Dalyell Welch. The defendants in the said action, on the other hand, contended that the said Ralph Dalyell Welch did not come under any personal obligation to pay to the plaintiffs the said sums of £10,000 and £10,000, or any part thereof.

The question submitted for the Court of Session's opinion was:—"Whether, in the events which have happened, as hereinbefore stated, the said Ralph Dalyell Welch, became subject to the personal obligation to pay the principal moneys and interest secured by the said two bonds and dispositions in security, each for the sum of £10,000, or either of them, or any part thereof.

The executors presented a petition to the First Division craving their opinion upon this question.

Argued for petitioners—(1) The disposition to their author was a "conveyance" in the sense of the statute. Where a disponee did not require to make up his title derivatively through trustees, but did so directly from the testator, the bequest to him was a conveyance, and accordingly any personal obligation of his author, in accordance with the terms of the 47th section, transmitted only to a limited degree, *i.e.*, if there was an agreement to that effect *in gremio* of the conveyance. The statute embraced not only onerous conveyances but a conveyance such as this. Accordingly, the personal obligation did not transmit. (2) The limitation in the first part of the section covered all the cases of "succession, gift, or bequest," and was not confined to the case of an heir of line. Accordingly, under the 12th section the petitioners were not liable beyond the value of the estate to which they had succeeded.

Argued for respondent—(1) The petitioners were liable beyond the value of the succession for the full amount of the bonds. The bequest was of the whole estate, and was taken by their author on a lucrative title. If they considered the estate would not fulfil this call, their remedy was to refuse to take up the succession. The case was ruled absolutely by the decision in *Wright's Trustees* v. *M'Laren*, May 23, 1891, 18 R. 841. The limitation in sec. 12 applied strictly to "heirs," and the use of the word was in its most technical sense, and it could not be held to include persons taking a universal gift under a gratuitous disposition—Bell's Prins. sec. 1695. Accordingly, a person taking such a bequest must know that he does so subject to the whole burdens of his author. (2) In any event the petitioners were liable for the whole benefit of the estate to which they had succeeded, heritable and moveable.

The Court returned the following answer—"By the law of Scotland, under the provisions of 37 and 38 Vict. cap. 94, secs. 12 and 47, the said Ralph Dalyell Welch became subject to the personal obligation to pay the principal moneys and interest secured by the said two bonds and dispositions in security each for the sum of £10,000, subject always to this limitation, that the said Ralph Dalyell Welch could not be made liable for the debts of the deceased Charles Welch Tennent (including the sums secured by the said bonds and dispositions in security) beyond the value of the estate to which he succeeded by virtue of the disposition and settlement of the said Charles Welch Tennent."

Counsel for the Petitioners—H. Johnston—Cullen. Agents—Kinmont & Maxwell, W.S.

Counsel for the Respondent—C. S. Dickson—Macfarlane. Agents—Mackenzie & Kermack, W.S.

Friday, May 29.

FIRST DIVISION.

[Sheriff Court of Linlithgow.

M'KILLOP *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Master and Servant—Defective Plant—Liability of Railway Company Employing Competent Managers.

The employment of a competent staff of workmen and managers to whom the necessary authority is delegated, does not, *ipso facto*, relieve a railway company from all common law liability to its servants for injuries received by reason of defects in its system of working or in its plant.

In an action at common law for damages by the representatives of a

railway servant against the company, the pursuers averred that the accident by which the deceased had met his death had been caused by the dangerous position of a water-tank which interrupted the view of engine-drivers when approaching the spot where the accident happened, and maintained that this was a fault of the company for which they were liable. The defenders pleaded that having appointed competent workmen to erect the tank, and supplied them with proper materials, they were free from responsibility.

Held that the pursuers were entitled to an issue.

This was an action at the instance of Henry M'Killop, surfaceman, Linlithgow, against the North British Railway Company, concluding for damages for the death of his son, who was run over and killed while in the service of the company. The action was laid at common law and under the Employers Liability Act, the pursuer claiming £500 and £109 alternatively.

The pursuer averred that on 19th September 1895 the deceased, while engaged in the service of the defenders as flag-boy, was so severely injured by being run over by a train at a level-crossing near the east end of Bo'ness Dock that he died the same day. "(Cond. 2) On the date of the accident, and at or about the time said accident occurred, a train of 29 waggons, or thereby, of iron ore was being pushed from the east side of said level-crossing on the Bridgeness line to be sent into the line of rails immediately behind and on the north side of a wooden paling which separates the railway, at the point of the accident, from the public highway, and which line of rails branches of from the main line about 56 feet or thereby to the east of the said level-crossing, and runs past the same to the west thereof. Where said line of rails so branches off there are points worked by means of a hand-lever. About 55 feet or thereby from the said points, and to the east thereof, there is an erection belonging to defenders, known as the water-tank, round which the said Bridgeness line, on which the said train of waggons was being pushed, forms a curve. The said water-tank is a great source of danger to those whose duty necessitates their being upon the said line of rails at or about this point. (Cond. 3) At the time of the accident there was standing on the second line of rails from said wooden paling, and about 11 yards or thereby from the spot of the accident, and to the west thereof, an engine (with a train of empty waggons behind, and with the tender of the engine in front) which was in course of proceeding eastward and to cross the before-mentioned points and thereafter travel on the line on which the said loaded train was coming. The said William John M'Killop was standing so that this empty train could not proceed until his train loaded with the iron ore was clear of the said points." The pursuer further averred that it was the duty of the flag-boy to stand there and watch the level-crossing to prevent anyone crossing while a train was being run, such as the loaded train above described; that while he was doing this the loaded train was pushed by the engine at the rear of it suddenly and without notice over him. "(Cond. 8) Owing to the erection of said water-tank it was utterly impossible for the engineman or fireman in charge of said loaded train to see if the line was clear, or to receive signals from anyone in front of their train, or to discover that their train was proceeding on a wrong line of rails. Looking to the dangerous character of this part of the line the defenders were at fault in having such an erection which is so much calculated to increase the dangers of this dangerous place. The defenders were aware, previous to the accident to the pursuer's son, that said water-tank was a source of danger, and it is believed and averred that previous to the accident, as also subsequent thereto, they were requested by the Board of Trade to have it removed from its present position, or recommended to do so. Such request or recommendation they have so far failed to comply with. Had the defenders or those for whom they are responsible exercised reasonable care the said accident could not have happened."

The defenders pleaded—"(4) The faults alleged by the pursuer being those of his deceased son's fellow-servants the action is incompetent at common law."

The Sheriff-Substitute (MELVILLE) on 31st January 1896 allowed a proof.

The pursuer appealed to the Court of Session for a jury trial, and proposed an issue in common form.

Argued for respondent—The action as raised at common law was irrelevant. There was no averment to the effect that the company had employed an incompetent person to erect the tank, and accordingly it must be assumed that it was done by efficient and competent workmen to whom the company had delegated the duty. Nor were there averments that they had not been supplied with proper materials for the work. That being so, the company were not responsible for the fault of these workmen, and could only be liable if they were personally connected with a fault in their system causing the accident, in accordance with the general rules laid down in *Wilson* v. *Merry & Cuninghame*, May 31st, 1867, 5 Macph. 809, May 29th, 1868, 6 Macph. H. of L. p. 84 at 89; *Sneddon* v. *Mossend Iron Company*, June 23rd, 1876, 3 R. 868. Sec. 1 of the Employers Liability Act 1880 (43 and 44 Vict. cap. 42), provided the remedy for defective machinery, &c., and this showed that there was no common law liability on the part of the master with regard to that. A master was only bound to have properly qualified employees. The cases cited by the appellant did not show that this point had been decided, but merely that the objection might have been taken, and was not.

Argued for appellant—The case of a railway company was not different from that of any other employer. They were responsible for any defect or danger in their permanent system, and the fact that the duty of preparing and superintending that

system was delegated to an engineer, however efficient, did not free them from this responsibility. If the fault alleged had been a temporary and transitory one, due to some momentary breach of duty on the part of one of the company's servants, the case might have been different, but the pursuer's averments amounted to an attack upon their permanent system, and to a breach of duty by them. In such a case the responsibility of the company to one of their servants, was the same as towards a member of the public—*Bartonhill Coal Company* v. *Reid & M'Guire*, June 1858, 3 Macq. 266, at 307, 310-11, and there was nothing said to displace the view that a master was responsible, although it was impossible to bring home to him an actual obligation to do the work himself. The opinions in *Merry & Cuninghame* were to the effect that a master was liable for the efficiency of the machinery and apparatus supplied, and that it was no defence for him to say that he had done his best to supply efficient machinery, &c. The same rule was laid down in the case of *Wallace* v. *Culter Paper Mills Company*, June 23, 1892, 19 R. 915; and *Henderson* v. *John Watson, Limited*, July 2, 1892, 19 R. 954. There were numerous cases in which a company had been held liable to their servants at common law for a defect in their system. In the case of *Cairns* v. *Caledonian Railway Company*, March 19, 1889, 16 R. 619, a railway company had been found liable, and also in *MacLeod* v. *Caledonian Railway Company*, October 31, 1885, 23 S.L.R. 63, where an issue at common law had been allowed—*Gibson* v. *Nimmo & Company*, March 15, 1895, 22 R. 491, and cases therein cited—*Macdonald* v. *Udston Coal Company*, February 8, 1896, 33 S.L.R. 351.

At advising—

LORD M'LAREN—This is an action at the instance of the father of a railway servant who lost his life while engaged in the service of the company, and as the pursuer says, through the company's fault. The defenders say that no relevant ground of liability is stated against them, and more generally they maintain the proposition that a railway company incorporated by Act of Parliament is indemnified against all responsibility under the common law for injury done to its servants by the mere fact of appointing a competent staff of officers and workmen, and giving them the necessary authority. I think that a very moderate study of the decisions might have sufficed to satisfy counsel of the unsoundness of the proposed criterion of responsibility. It was pointed out by Lord Chelmsford in one of the earliest cases that came before the House of Lords—the case of *The Bartonshill Coal Company* v. *M'Guire*—that the general rule is that employers are responsible for injuries done to their servants through fault or negligence in the same degree as they would be responsible to outside persons, and that the only exception to this rule is the case where the fault is attributable to a fellow-servant. Where the injury is attributable to defective machinery or apparatus the liability to an employee and the liability to one of the public are identical. This ground of liability is recognised in the two *Bartonshill* cases by the Lord Chancellor and Lord Chelmsford, who indeed treat the principle as incontestible, and make use of it to explain and vindicate previous decisions of their Lordships' House and of the Court of Session.

In *Wilson* v. *Merry & Cuninghame*, which was a case of injury to a miner due to defective construction of scaffolding in the shaft of a coal mine, Lord President Inglis states as his opinion that because the scaffolding was constructed by the defenders' servants under the direction of the manager, and there being no question of the sufficiency of the timber, the fault was the fault of fellow-servants; but his Lordship is careful to distinguish this from the case of machinery or apparatus purchased by the master and which is of faulty construction, because if injury results, this he says is the fault of the master whose business it is to provide the apparatus. It would be easy to multiply citations on this subject, but I will only add that the liability of the master to provide fit and sufficient machinery and apparatus constituted the sole ground of judgment in the case of *Wallace* v. *Culter Paper Mill, Limited*, where this Court held an employer responsible for injury resulting from the unfenced condition of a paper machine, rejecting the defence that the workman must be held to have taken the risk because he knew that the machine was not properly fenced.

Again, I must dissent entirely from the notion that railway companies enjoy any special immunity from claims of this kind, because they delegate the greater part of the work of an employer of labour to managers and engineers. We should not hold that a private company or partnership was able to displace the responsibility for providing sufficient machinery and plant by delegating the duty of selection to a manager. In this question I conceive that the directors of a railway company are in the same position as managing partners, and that they cannot relieve themselves of the responsibility which rests on the employer or his institor by leaving everything to the judgment of a salaried officer. The provisions of the Employers Liability Act relating to this kind of liability are no doubt to be considered in all such cases; but I do not read these provisions as if they were intended to come in place of the rule of liability of the common law, but rather as supplementary to it. They may be very useful in ambiguous cases, but only, as I think, by way of obviating a defence which might be otherwise available under the principle of common employment.

In the present case one of the grounds of action is that near a railway station where there are sidings and a level-crossing and a dockyard, and where the sources of personal danger are such that it is necessary that the trains of waggons should be pre-

ceeded by a flagman, a water-tank was placed in the bend of a curve so as to interrupt the view of the line by the guard and driver of the waggons. By this arrangement it is said the flagman was exposed to unnecessary, that is, to avoidable danger, in consequence whereof he, that is, the pursuer's son, lost his life.

We are not at present concerned with the truth of these allegations; it may be that having regard to the requirements of the service at the station in question, no better position for the water-tank could be found. If this be so, a jury may justifiably come to the conclusion that the water-tank constituted an unavoidable danger; and that, as in other cases of hazardous employment, the risk was accepted by the company's servants. But if the allegations be true, I see no distinction in principle between the case alleged and the case of unfenced machinery. The water-tank is part of the permanent equipment of the station, and in the laying out of a station, just as in the construction and placing of stationary machinery, due regard must be had to the safety of those who are to be employed there on the business of the company, so that their lives may not be exposed to unnecessary and avoidable hazard. This, I think, is a duty incumbent on the employer whether he be an individual or a company acting through directors, and while the employer would of course be morally right in relying to a large extent on the judgment of engineers or practical men, he is not in my opinion relieved of his responsibility by the mere fact that he had appointed competent engineers and managers to whose judgment he trusts. I therefore think that the issue should be allowed.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court approved of the proposed issue.

Counsel for the Appellant—Ure—Dewar. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Asher, Q.C.—Grierson. Agent—James Watson, S.S.C.

Tuesday, June 2.

OUTER HOUSE.

[Lord Pearson.

BAILLIE'S TRUSTEES, PETITIONERS.

Trust—Administration of Trust—Advances out of Capital—Vesting—Destination-over—Trusts Act 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 7.

Where a truster directs his trustees to pay the income of his estate to the widow in liferent, and at her death to divide the estate equally among his children and the survivors or survivor of them, and in the event of all the children predeceasing the widow to divide the estate among certain other parties, vesting is postponed until the date of payment, and the Court has no power, either at common law or under section 7 of the Trusts Act 1867, to authorise the trustees to make advances to the children out of capital during the lifetime of the widow.

Parent and Child—Aliment—Trust—Right of Child to Aliment out of Father's Trust-Estate—Authority to Trustees.

Where a truster leaves his estate to his widow in liferent and his children in fee, subject to provisions by which the vesting of the estate in the children is suspended, the children, if unable to support themselves, may have a claim for aliment against their father's estate, but this claim must be dealt with by the trustees on their own responsibility, and the Court will not grant a petition for authority to make advances out of capital in name of aliment.

By his trust-disposition and settlement the late John Baillie, wholesale provision merchant, Edinburgh, who died on 4th February 1888, conveyed his whole estate to trustees, who were directed to pay the income of the estate to his widow Mrs Agnes Ainslie Tillie or Baillie, subject to the burden of the maintenance and upbringing of the children of the marriage. By the fifth and sixth purposes the trustees were directed as follows:—"(*Fifth*) At and immediately after the decease or second marriage of the said Agnes Ainslie Tillie or Baillie, or after my own death, in the event of her having predeceased me, my trustees shall pay, assign, and dispone the residue of my estate to and in favour of my children equally among them, share and share alike, on their respectively attaining majority, if sons, or attaining majority or being married, whichever of these events shall first happen, if daughters, and in the event of the death of any of my children occurring before the period hereby fixed for payment of his or her share, then the share of residue which would otherwise have fallen to such predeceasing child shall accrue to his or her child or children or issue equally among them *per stirpes*, and failing child, children, or issue, then to such of his or her surviving brothers and sisters, and the child, children, or issue of deceased brothers and sisters as may themselves take a share of my estate, and that equally among them *per stirpes*; and (*Sixth*) in the event of all my children predeceasing the period of division among them hereinbefore fixed without leaving issue, then my trustees shall realise and divide the residue of my whole heritable and moveable means and estate above conveyed, or proceeds thereof, and pay, assign, and dispone the same as follows, viz., one-third thereof to the said Agnes Ainslie Tillie or Baillie, in the event of her being alive when my children and issue of them fail, and, in the event of her being then dead, to her heirs and assignees whomsoever, and the remaining two-thirds thereof to such of my brothers and sisters as may be alive when my children and issue of them fail and their respective heirs and assignees whom-