March 5, 1875, 2 R. 529; *Hamilton* v. *Robertson*, May 31, 1878, 5 R. 839.

Replied for the defender — The cattle were sold and bought as suitable for use in a dairy, and that was "a specified and particular purpose."

At advising—

Lord President—The subject of sale in this case was milk cows for dairy purposes, and the 5th section of the Mercantile Law Amendment Act is applicable to the case according to the view of the evidence taken by the Sheriff-Substitute. Now, according to the provisions of section 5 of this statute the seller, if he is without knowledge of any defect or bad quality of the article sold, is not to be held as giving a warranty except in two cases specially provided for—first, when he gives "an express warranty," and second, when he sells the goods for a "specified and particular purpose." If the goods are sold for the ordinary purposes for which they are commonly used, then it is clear that the exceptions provided for in this clause cannot apply. In order to let in the exceptions the purposes must be in the words of the Act "specified" and "particular." Can it be said that there is anything "particular" in the use to which the cows were to be put? They were sold to the defender to be used by him for the purposes of his dairy, and that use of milk cows cannot in any sense be called a particular purpose, and therefore I am of opinion that the provisions of this statute are not applicable.

Lords Mure, Shand, and Adam concurred.

The Court pronounced the following interlocutor:—

"Find as a matter of fact (1) that the transaction libelled was a bargain for milk cows; (2) That the defender has failed to prove that it was for a specified and particular purpose: Therefore sustain the appeal: Recal the interlocutor of the Sheriff-Substitute of 13th November last: Decern against the defender for payment to the pursuer of the sum of £25, 10s. sterling, with interest as libelled: Grant warrant to the Sheriff-Clerk to pay to the pursuer the sum of £66, 15s. consigned by the defender in the Inferior Court, with all interest accrued thereon, and decern."

Counsel for Pursuer—Comrie Thomson—Ure. Agent—T. Carmichael, S.S.C.

Counsel for Defender—Dickson. Agents—Smith & Mason, S.S.C.

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*Tuesday, June* 15.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

## ALLEN *v.* MILLER AND OTHERS.

*Succession—Division* per capita *or* per stirpes.

A testator disponed his heritage to his children in liferent equally for their liferent allenarly, and to their children also equally in fee (under certain specified preferences for sons over daughters), declaring that in case any of his children should die without lawful issue, the share of such child should "accresce and be equally divided among my surviving children in liferent only, and to their lawful issue equally in fee." *Held*, on a construction of the clauses of the deed, that the intention of the testator was that whatever was liferented by a child should descend *per stirpes* to his children, and not be divisible *per capita* among his (testator's) grandchildren.

The deceased James Ballantine, who died in Glasgow in 1815, by disposition dated 2d September 1807, conveyed and disponed to the parties mentioned in the deed his whole heritable estate, consisting, *inter alia*, of certain plots of building ground in Glasgow. The terms of the conveyance were—"To and in favour of James, John, Margaret, Ann, and Jean Ballantine, my children, and to any other lawful child or children I may have at my death, in liferent equally, during all the days and years of their lifetimes, for their liferent uses allenarly, and to their lawful children also equally, in fee and property, but always under the preferences provided to my sons and their lawful children over my daughters and their lawful issue, as after specified." The conveyance, which was burdened with certain provisions to the testator's widow, provided by its third purpose as follows:—"I ordain that after satisfying and paying the foresaid provisions to my wife, and the expenses of repairing and insuring said subjects against fire, paying feu-duties and all other public burdens thereon, the rents thereof shall be divided at Whitsunday and Martinmas, half-yearly, equally among my children during their respective lives, but each of my sons shall have and be entitled to £10 sterling yearly therefrom more than their equal shares thereof, or than each of my daughters, and which preference of £10 sterling to my sons shall, when the succession to the fee of said heritable subjects takes effect, descend to their children equally, and the same shall be valued accordingly above the shares thereof due to the children of my daughters; and in case any of my said children die unmarried or without leaving lawful issue, the shares or share of such shall accresce and be equally divided among my surviving children in liferent only, and to their lawful issue equally, in fee and property as aforesaid."

After the testator's death his children, who all survived him, were infeft in liferent in the heritable subjects already referred to, and also in another piece of ground acquired by the testator subsequent to the date of the deed, but always in the terms and under the conditions set forth therein.

James and John Ballantine, the testator's sons, both died without issue. Ann married a person named Brown, and died leaving issue.

In 1842 the three heritable subjects were acquired by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company, and the price, amounting to £5050, was consigned in the Royal Bank of Scotland in name of John Wilkie, writer, Glasgow, for behoof of the parties interested, and subject to the orders of the Court of Session.

On 16th July 1842, on an application by the children of the testator's daughter Ann Ballantine or Brown, authority was granted to pay the petitioners, as fiars of one-third of the said three plots

of ground, one-third of the price obtained therefor. The remaining two-thirds was invested by the said John Wilkie, under authority of the Court, in the purchase of heritable subjects in Glasgow. The dispositions were in favour of Mrs Bowman and Mrs Allen (daughters of the testator, and the only surviving children) "in liferent equally . . . for their liferent use allenarly, and to their lawful children also equally in fee and property as specified in the said disposition and deed of settlement."

Mrs Allen died on 31st October 1884, and Mrs Bowman on 20th February 1885. Mrs Allen had five children, of whom the pursuer of this action, John Allen, was the only survivor. Mrs Bowman had twelve children.

The present action of declarator was raised by John Allen to have it declared that he had absolute right to the fee and property of one-half *pro indiviso* of the subjects mentioned in the summons, being the subjects purchased by the said John Wilkie under the approval of the Court, with the balance of the money received from the Glasgow and Ayr Railway Company for the lands acquired by them at one time the property of the testator. He averred that at the death of his mother (Mrs Allen) he became entitled to one *pro indiviso* half of the said subjects, in terms of the disposition of the said James Ballantine (his grandfather) the testator.

The defenders to the action were other children of Mrs Bowman, and the representatives of those who had died. They disputed the pursuer's right to one-half of the said subjects, and maintained that under the disposition of the testator the subjects fell to be divided *per capita* among the pursuer and the children of Mrs Bowman.

The pursuer pleaded that on a sound construction of the settlement of James Ballantine, the testator, he was entitled to one-half *pro indiviso* of the subjects.

The defenders pleaded that the subjects fell to be divided *per capita*, and not *per stirpes*.

On 19th December 1885 the Lord Ordinary found, declared, and decerned in terms of the conclusions of the summons.

"*Opinion.*—This case relates to the construction of a somewhat peculiar family provision of heritable property to the children of the testator in liferent and their children in fee. The pursuer, who is one of the testator's grandchildren, claims one-half of the fee on the assumption that the property is divisible *per stirpes;* the defenders claim that the property shall be divided *per capita* amongst all the testator's grandchildren. The destination begins by disponing the property to the testator's children in liferent equally for their liferent use allenarly, 'and to their lawful children, also equally in fee and property,' but subject to the preferences thereinafter provided in favour of his sons and their lawful children over his daughters and their lawful children. Before proceeding to the construction founded on the clause of preference, it is proper that I should consider what would be the construction of the clause of disposition taken by itself.

"A gift to a class of persons, however described and however connected by relationship, is *prima facie*, a gift divisible *per capita;* and this not in virtue of any arbitrary rule of law, but because according to the conception of the gift, all the members of the class are equally favoured, and because the destination can only receive effect by means of an arithmetical division of the gift amongst the objects of the class.

"But where property is destined by the head of a family to his children in liferent, and their children in fee, many considerations point to a distributive construction of the gift of the fee as the more probable representation or interpretation of the testator's meaning. It is true that it is always in the power of the testator to render this construction clear and certain by the use of the word 'respectively,' or other distributive expressions, and in the present case the defenders rely on the absence of express words denoting family distribution. Yet, even the word 'respectively' is not in itself a complete expression of a scheme of division *per stirpes;* it imports only a logical distribution of the members of the class of the second degree under the several members of the class of the first degree, from whom their descent is derived. Now, the verbal expression of that distribution may very well be dispensed with where the relationship on which it is founded exists in fact, and where that relationship is set forth in the deed of gift, as the descriptive character by which the legatees are to take the benefit intended for them.

"But further, while the language of the gift is itself suggestive of a scheme of division in which a benefit is to flow from parents to children, it is not immaterial to notice that the suggested construction is in harmony with what may be termed the natural order of inheritance, and the order in which interests in moveable estate are derived under the present law of moveable succession. And again it is a convenient and workable scheme of division while the opposite scheme of construction involves the apparent anomaly that as each liferenter dies his share is to be divided amongst all his father's issue, including those whose parents are in the actual enjoyment of the income of other schemes of the fund.

"For these reasons, and notwithstanding the repetition of the word 'equally' in the gift of the fee, I think the distributive construction is the one which ought to be adopted, as the more probable rendering of the testator's will. Some meaning must be given to the word 'equally,' and I think effect is given to it by following the principle of equality in the several parts of the distribution, that is (excepting as afterwards provided in the will), the share of each family is to be equal, and each such share is to be divided equally amongst the members of the family.

"Now, with respect to the clause of preference in favour of the sons, the clause is printed *ad longum* in the condescendence, and the substance of it is this—that in the division of the income each of the sons is to receive £10 per annum out of the first of the income, and the remainder of the income is to be divided equally amongst sons and daughters. The preference of £10 is to be continued to the children of the sons, in the ultimate division of the fee, and the shares of children who may die without leaving issue are to accresce to the surviving children in liferent and their lawful issue in fee.

"It is evident that the testator has here recognised the principle of a devolution of interest from parent to child, to the extent of the *præcipuum* to which the parent, if a son, is entitled.

The defenders are not insensible to the force of the argument which is founded on this clause, but they endeavour to meet it by the suggestion that the testator has here plainly directed a division *per stirpes* in contradistinction to the strictly equal division which they say he has prescribed with reference to the residue of the property. The adverse view is, that in reference to the preferential sums given to sons, it was necessary to particularise in order to avoid confusion, and that in developing his scheme with reference to this particular case, the testator has disclosed that it is a distributive scheme. It is, to say the least, improbable that the testator should have conceived two fundamentally different schemes of division for different parts of this small property, and, on the whole, I think that the clause in question supports the construction which I attribute to the dispositive clause. In any view it does not appear to me to invalidate the reasoning which has led me (following the authority of the nearest decided cases), to a decision in favour of the party founding on the principle of a *per stirpes* division. I accordingly decern in favour of the pursuer."

The defenders (having obtained leave) reclaimed, and argued—On a fair construction of the dispositive clause of this deed it was a conveyance to the grandchildren of the testator equally among them. There was to be equality of division with the exception of the £10 preference. This was to be capitalised, and was to be a present gift to a certain class, which purported an equal division among that class. The mere intervention of a liferent made no difference—what was intended by the testator was a family distribution. The interposed liferent was a mere burden on the fee —*Home's Trustees* v. *Ramsay*, Dec. 11, 1884, 12 R. 314; *Laing's Trustees* v. *Sanson*, Nov. 18, 1879, 7 R. 244; *Bogie's Trustees* v. *Christie*, Jan. 26, 1882, 9 R. 453; *Buchanan's Trustees*, June 13, 1883, 20 Scot. Law Rep. 666; *Ferguson*, July 12, 1872, 10 Macph. 968; *Black* v. *Mason*, Feb. 18, 1881, 8 R. 497.

Replied for respondent—The question was settled by *Home's Trustees*. Here a separate liferent was provided to each daughter, and the fee to their children, *i.e.*, each set of children got what their respective mothers had.

Authorities cited by reclaimers.

At advising—

Lord President—In this case I come to the same conclusion as the Lord Ordinary, but I do so upon a combined view of the various clauses in the deed.

The dispositive clause, which is the only one with which the Lord Ordinary deals, is in these terms—"To and in favour of James, John, Margaret, Ann, and Jean Ballantine, my children, and to any other lawful child or children I may have at my death, in liferent equally, during all the days and years of their lifetimes, for their liferent use allenarly, and to their lawful children also equally, in fee and property, but always under the preferences provided to my sons and their lawful children over my daughters and their lawful issue, as after specified." Now, it is to be observed that the subject which we are here dealing with is entirely heritable, and that there is nothing of the nature of a trust interposed, and that the disposition is to the children of the testator in liferent and to his grandchildren in fee. From what we have been told at the bar it appears that there were no grandchildren alive at the time of the testator's death. In these circumstances the substance of this dispositive clause may be taken to be this—a liferent to the persons named in the deed, and the fee to their children *nascituri*. In the absence of any intervening trust it is difficult to see how this deed could take effect as a settlement of the testator's estate, except on the footing that these children were to be viewed as fiduciary fiars. I am not aware, however, of any case in which so large a number of children have been held to be jointly fiduciary fiars, for the children of all of them as a class. Upon this dispositive clause I do think I need add much more. It is quite intelligible if a testator leaves the residue of his heritable property to a son or a daughter in liferent and to his or her issue in fee, that the son or daughter should become fiduciary fiar for his or her issue, but it becomes a much more difficult matter when it is proposed to make a whole class fiduciary fiars, with the effect thereby of keeping the fee *in pendente*. A great anomaly would no doubt be thus created; but if the idea of fiduciary fiar is put out of sight the result then is that the fee becomes undisposed of, and would accordingly fall into intestacy.

The next clause which it becomes necessary to examine is the third—"I ordain that after satisfying and paying the foresaid provisions to my wife, and the expenses of repairing and insuring said subjects against fire, paying feu-duties and all other public burdens thereon, the rents thereof shall be divided at Whitsunday and Martinmas, half-yearly, equally among my children during their respective lives, but each of my sons shall have and be entitled to £10 sterling yearly therefrom more than their equal shares thereof, or than each of my daughters, and which preference of £10 sterling to my sons shall, when the succession to the fee of said heritable subjects takes effect, descend to their children equally, and the same shall be valued accordingly above the shares thereof due to the children of my daughters; and in case any of my said children die unmarried or without leaving lawful issue, the shares or share of such shall accresce and be equally divided among my surviving children in liferent only, and to their lawful issue equally, in fee and property as aforesaid." Now, the substance of this just is that the rents of the property after meeting certain burdens on it were during the lifetime of the testator's children to be divided equally among them with this proviso, that the sons were to get £10 a-year each more than the daughters, and the clause goes on to provide that this £10 preference to his sons was to be continued to the children of the sons in the ultimate division of the fee—the family of each son to share equally. Now, that is clearly a distribution *per stirpes* as regards the preference. But this clause goes on to say, "and the same shall be valued accordingly above the shares thereof due to the children of my daughter." Now, this sentence is both badly constructed and grammatically wrong, but it is clear that the word "same" refers to the share of the estate and not to the preference, and what the testator means I think is that when the shares of the sons pass from them to their respective families they

are to be valued, and the preference described given effect to, thereby clearly distinguishing between what is to go to the families of the sons and what to the families of the daughters. Now, there could be no share belonging to the families of the sons or daughters to show if the contention of the defenders was to receive effect, and the distribution was to be *per capita*. Whenever a share is spoken of as belonging to a family the language used refers to a division *per stirpes*, and this is made more clear by the clause of accretion, "and in case any of my children die unmarried or without leaving lawful issue, the shares or share of such shall accresce and be equally divided among my surviving children in liferent only, and to their lawful issue equally in fee and property as aforesaid." The testator clearly makes provision for one possible contingency, namely, his children leaving no lawful issue, and at first sight it might look as if the converse case was unprovided for, but there can be no doubt as to the testator's intention expressed by implication. When children die unmarried or without lawful issue no one in that case can under the deed have any interest in the fee, for no one is called except grandchildren, and therefore the provision as to accretion is very natural. But what happens if the son or daughter leaves issue? It must be something totally different. It cannot be that the clause of accretion is to apply, for its application is expressly limited to the case I have mentioned. Nor do I see how there can be a right to a survivorship by implication either as to the liferent or the fee. I cannot see how a surviving child can claim the liferent of a dead child, nor how the child of a surviving child can interfere with the child of a deceased child. The natural conclusion is that the fiduciary fee is necessarily extinct, and that the party for whom the fee was held in trust becomes *ipso facto* vested in his or her parents, and takes the fee of it.

On these grounds I think it is impossible to differ from the result at which the Lord Ordinary has arrived, though I would hardly construe the dispositive claim in exactly the same way, but taking the deed as a whole, and looking on it as one in which we must supply a fiduciary fee vested in the testator's child, I think we must conclude that each has a fee of his or her share, and that it goes to their issue at his or her death.

LORD MURE—On the combined view of the different clauses of the deed I have come to the same conclusion as the Lord Ordinary. I think the case falls substantially within the operation of the rule we applied in the case *Home's Trustees*, to which we were referred, in which it was held that the scheme of the deed was that of a division of his property among the testator's children in liferent, and their children *per stirpes* in fee.

That, I think, is also the clearly declared intention of the testator in the present case, as it was in the case of *Home*, and I am of opinion that the provisions of the deed here in question are so expressed as to be sufficient to carry out that intention. I concur in the construction which your Lordship has given of the different clauses of the deed.

LORD SHAND—I am of the same opinion. The Lord Ordinary deals with the effect of the dispositive clause, and from it alone he gets the results upon which his opinion is based. Had this dispositive clause stood alone I should have considered the question somewhat more difficult, all the more if with it there had been a clause of accretion in ordinary terms.

In such a state of matters the view that the division of his estate intended by the testator was to be *per capita* and not *per stirpes* would have been more likely. But when we take the various clauses of this disposition together, there can, I think, be no difficulty as to the testator's meaning, and I concur in the result arrived at by your Lordships.

LORD ADAM—This is really a question of intention, and the testator's meaning is to be gathered from an examination of the various clauses of the deed. The Lord Ordinary in dealing with the case has construed the dispositive clause alone, and I formed no view adverse to what he has expressed from an examination of that part of the deed. A comparison, however, of the other clauses makes it quite clear that what the testator intended was that the share liferented by each child should go *per stirpes* to his or her family.

The Court adhered.

Counsel for Pursuers—Gloag—Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders—R. V. Campbell—Ure. Agents—W. T. Sutherland, S.S.C.

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*Tuesday, June 15.*

## SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

## BOWIE *v.* ROBERT RANKIN & COMPANY.

*Master and Servant—Reparation—Negligence—Employers Liability Act* 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 1, *sub-sec.* 2—*Defect in Ways.*

A heavy screw propeller-blade which was to be removed from a foundry was placed on a four-wheeled bogie, and for steadiness attached to the joists by a block and tackle. Part of the ground over which the bogie was to be drawn was uneven, but was filled up by slips of wood covered with an iron plate. The foreman in charge of the operations placed a workman behind the bogie to assist in setting it in motion with an iron pinch, and ordered the men to draw away the bogie; the slips of wood gave way and the bogie ran somewhat forward from under the blade, which swung back on the tackle and injured the workman placed behind the bogie. In an action against the injured man's employers, the Court *awarded* damages, holding that the accident was attributable to the foreman's fault in allowing the blade to remain attached to the chain, in placing the workman behind the bogie while the blade so attached was being carried on it, and in not having seen that