25 R. 1160, 35 S.L.R. 897. He maintained that this was a case of common property in an area belonging to several proprietors whose titles flowed from one author, and not merely a case where the objector had only a right of common interest in the area, as in *Johnston* v. *White*, May 18, 1877, 4 R. 721, 14 S.L.R. 472, or *Barclay* v. *M'Ewan*, May 21, 1880, 7 R. 792, 17 S.L.R. 558. A question of heritable right was clearly raised, which could not be disposed of in the Dean of Guild Court.

At advising—

LORD TRAYNER—The Dean of Guild has sisted process in order that a question of heritable right may be determined before he proceeds to consider the merits of the appellants' application. I cannot see that any question has been raised which the Dean of Guild has not jurisdiction to decide. The petitioners are the owners of the ground on which they propose to build—at all events, no other person claims to be owner, and certainly the respondent makes no such claim. There are therefore no competing titles to the ownership of this ground. What the respondent says is that he has right to part of the ground in question as a pertinent of what is admitted to be his. But he does not aver or pretend to exclusive possession of the sunk area during the years of prescription. He has not therefore averred grounds relevant to infer ownership of the sunk area as a pertinent of his property. What he really claims is a right of use or passage over the sunk area to the cellars belonging to him, which he says he has had for the prescriptive period, for "free space, light and air" in connection with his property, and which he says the appellants' proposed buildings will interfere with. The Dean of Guild can determine whether the proposed buildings will have this effect, and give such regard to the respondent's right as he thinks just. The respondent's contention that the back court or area mentioned in the titles includes the sunk area is in my opinion erroneous. I therefore think that the case should be sent back to the Dean of Guild with instructions to him to recal the sist and proceed with the case.

LORD MONCREIFF—I am of the same opinion. All that we decide at present is that the Dean of Guild has jurisdiction to deal with the matter. I do not think that any question of heritable right is raised in the case sufficient to exclude the jurisdiction of the Dean of Guild. The objector's titles give him the first and second flats in the east division of the tenement, with the cellars Nos. 1 and 3 at the back of the tenement, and the whole parts, privileges, and pertinents of the subjects so conveyed, with free ish and entry to the cellars by the common stair and area to the south of the tenement. In his fifth objection he states that the area has been used and enjoyed by him for more than forty years, but only (he adds) for the purpose of providing free space, light, and air in connection with his property, and right of access to the cellars. I do not think that the question of property arises in the case at all. The Dean of Guild is able to dispose of questions relating to common interest and servitude, and if he finds that the proposed operations will interfere with the free space or light or air so as to prejudice the use which the objector may make of his property, he will be able to give effect to his views notwithstanding our judgment.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court sustained the appeal and recalled the interlocutor appealed against, repelled the first plea-in-law for the objector, and remitted to the Dean of Guild to proceed in the cause.

Counsel for the Petitioners and Appellants — C. N. Johnston, K.C. — Gloag. Agents—MacRitchie, Bayley, & Henderson, W.S.

Counsel for the Objector and Respondent —Cooper—T. B. Morison. Agents—Webster, Will, & Co., S.S.C.

Saturday, July 11.

SECOND DIVISION.

[Sheriff Court at Greenock.

GILLIES *v.* SCOTT & COMPANY.

Process—Proof—Jury Trial—Proof or Jury Trial — Appeal for Jury Trial — Action for Death of Son against Son's Employers —Remit to Sheriff Court—Case Turning on Nice Distinctions — Reparation — Negligence—Master and Servant—Defective Appliances—Pure Accident.

In an action of damages by the mother of a deceased workman against his employers, the pursuer averred that her son in the course of his employment while caulking the bottom of a steamship was using a lighted lamp; that an unlighted naphtha lamp, stoppered with a wooden plug in place of the screw cap which it had when new, fell down from a higher part of the vessel where it had been in use by another workman; that this lamp in falling struck an obstacle, and the wooden plug coming out the naphtha poured over her son and burnt him so severely that he died; that these lamps were according to usual custom furnished with screw caps, but that the defenders, when the screw caps wore out, were in use to substitute wooden plugs, which rendered the lamps insecure and extremely dangerous; and that the accident was attributable to the fault or negligence of the defenders, or of their manager or storekeeper, for whom they were responsible, in failing to keep the naphtha lamps in proper and safe condition.

The Sheriff allowed a proof before answer, and the pursuer appealed for jury trial.

The Court *dismissed* the appeal and sent the case back to the Sheriff for proof before answer, on the ground that the case turned upon extremely fine distinctions between pure accident or fault on the part of a fellow workman on the one hand, and fault on the part of the employers or those for whom they were responsible on the other, and that there was risk of a jury not giving effect to these fine distinctions.

Mrs Ellen M'Gee or Gillies, a widow, raised an action against Scott & Company, shipbuilders, Greenock, for £500 as damages at common law, or alternatively for £312 under the Employers Liability Act, for the death of her son Robert Gillies, an apprentice caulker in the employment of the defenders.

The pursuer averred—"(Cond. 3) On 9th September 1902 the said Robert Gillies was engaged in the course of his employment in what is known as a coffer-dam, caulking the bottom of an oil-tank steamship, then under construction by the defenders in their East Yard, Greenock. To enable him to see to the proper execution of his work Gillies had in use a lighted naphtha lamp, supplied to him by the defenders for the purpose. Shortly after 11 a.m. on said day an unlighted naphtha lamp, which had been in use by another workman in the employment of the defenders, fell down from a higher part of said vessel above where Gillies was working. In its descent it struck an intervening lamp hanging immediately above him, and remained suspended there. The lamp which fell, instead of being furnished as it should have been with a screw-cap or other effective contrivance for preventing its contents from escaping, was merely furnished with a wooden stop or plug. The result was that when the lamp in its descent came in contact with the intervening lamp, the wooden stopper or plug was knocked out by the impact. The naphtha poured over Gillies, caught fire from the flare of the lamp he was using, and enveloped him in flames. Gillies succeeded in making his way out of the coffer-dam by a man-hole, but before the flames could be extinguished by those present he was severely burned. He was immediately conveyed to the Greenock Infirmary, but died on 11th September, two days after being admitted, and after suffering great pain. (Cond. 4) The foresaid accident to the said Robert Gillies was caused through the fault or negligence of the defenders, and they are liable to the pursuer in compensation at common law. The accident was due to the defective condition of the naphtha lamps supplied by the defenders to the workmen employed by them, and in particular to the defective condition of the naphtha lamp which fell, and the contents of which descended on the said Robert Gillies, with the result above condescended on. The naphtha lamps supplied by the defenders to their employees when new are furnished with a screw-cap, which is a safe and effective means of preventing the naptha from escaping, *and such lamps are according to usual custom furnished with such screw-caps.** When the screw-caps become worn or inefficient, the defenders, in place of having the same properly repaired and put in a safe condition, are in use to substitute wooden stoppers or plugs. Naphtha lamps supplied with these wooden stoppers or plugs are, considering the uses to which the lamps are put, and the conditions under which they are used, insecure and extremely dangerous, as the wooden stoppers or plugs are not only liable to fall out, but if the lamp be subjected to any knock or impact are almost certain to be knocked out. Had the lamp in question which fell been supplied with a screw-cap or other effective contrivance for preventing the naphtha from escaping the accident to the said Robert Gillies could not have happened. At the date of said accident the majority, or at least a large number of the naphtha lamps supplied by the defenders to their employees were, as the defenders knew or ought to have known, supplied with wooden stoppers or plugs. The defenders have recognised the danger attaching to these wooden stoppers or plugs, and since the accident all the naphtha lamps in use in their yard are fitted with screw-caps. (Cond. 5) Alternatively, the defenders are liable to compensate the pursuer under the Employers Liability Act 1880, in respect that the defective condition of the naphtha lamp to which the foresaid accident was attributable arose from the negligence of the defenders or of Laurence Harvey, who was manager of the yard in which the accident occurred, and Robert Watt, who was employed by the defenders as storekeeper in said yard, who were entrusted by the defenders with the duty of seeing that the naphtha lamps used in said yard were in proper and safe condition for use by the defenders' workmen."

The pursuer pleaded—"(1) The death of the said Robert Gillies having been caused through the fault or negligence of the defenders or of those for whom they are responsible, the pursuer is entitled to compensation at common law and to decree in terms of the first conclusion of the petition. (2) Alternatively, the death of the said Robert Gillies having been caused by the fault or negligence of the defenders, or of those for whom they are responsible, the pursuer is entitled to compensation under the Employers Liability Act 1880, and to decree in terms of the alternative conclusion of the petition."

The defenders pleaded—"(1) Irrelevant. (2) The defenders should be assoilzied with costs, in respect (*a*) that the accident was not caused by any fault or negligence for which they are responsible; (*b*) that the accident was not caused by any defect in the condition of their plant."

On 4th March 1903 the Sheriff-Substitute (GLEGG) repelled the first plea-in-law for the defenders and allowed to the parties a proof of their respective averments, and to the pursuer a conjunct probation,

The defenders appealed to the Sheriff

*The words in italics were added by way of amendment during the discussion before the Division.

(CHEYNE). The Sheriff on 21st March 1903 recalled the interlocutor of the Sheriff-Substitute and allowed a proof before answer.

The pursuer appealed to the Court of Session for jury trial.

Argued for the defenders and respondents —The action was irrelevant. There was no averment that the lamp which was knocked down might not have been safely used by the employees. What had occurred here was really an accident. It was not the duty of an employer to provide for improbable contingencies. His only duty was to provide appliances which would be safe when used in the ordinary way and with ordinary care. There was no evidence of any defect implying negligence on the part of the employer—*Walsh* v. *Whiteley*, 1888, 21 Q.B.D. 371, opinion of Lopes, L.J., 378. In any event, there was no relevant case at common law. There was no personal duty on the part of the employer to go round and see that the lamps, which were quite safe when new, were kept in a proper and safe condition for use. It was enough if, as here, he appointed a storekeeper, whose duty it was to look after these lamps and keep them in proper condition. If the case was held to be relevant it should be sent back to the Sheriff Court for proof. It involved fine points, and it was also a case in which the feelings of the jury might be worked upon on account of the fearful death of the employee.

Counsel for the pursuer was asked if he would consent to the case going back to the Sheriff Court for proof, but he refused, on the ground that it was a typical case for a jury. He was not called on to reply on relevancy.

LORD TRAYNER—I think this is a very peculiar case. On the pursuer's record it looks not unlike a case of sheer accident, but still the pursuer has in my opinion averred quite enough to entitle her to inquiry. The case is based on alternative grounds—liability at common law and liability under the Employers Liability Act. The ground on which the case is based at common law is that the defenders did not supply proper working materials and appliances. It was their duty to do this, and if they supplied their workman with inefficient or insufficient appliances which resulted in injury to their workman, they would be responsible for such injury. The second ground is the alternative plea that, if the master is not liable at common law, he is liable under the Employers Liability Act for the failure to perform their duty of those to whom he entrusted the superintendence of the work. From the mere fact that these two grounds are stated here alternatively and that the case as described is obviously very narrow on either ground, I am strongly of opinion that it is not a case to be sent to a jury. I think the pursuer would get perfect justice in taking the course the Sheriffs have pointed out, and if she is allowed a proof before answer there is no reason to suppose she will not have as fair a trial before the Sheriff as before a jury. It is no doubt the right of a pursuer in a case such as this to select the tribunal to which she will submit her claim, but it is in the discretion of the Court to refuse the right to exercise that choice if they think there is a chance of a miscarriage of justice in adopting it, and if there is at the same time another course open not liable to miscarriage whereby the pursuer can get the case tried with equal justice. Now, I think this is a case that should be tried before the Sheriff. There is an additional reason which is not conclusive, but still a reason, that the accident happened at Greenock and all the witnesses are there, and there is no reason why they should be brought into Edinburgh to give evidence when they could do it as well in the Sheriff Court. The record having been amended, I am not prepared to say that the case is not relevant for inquiry, but I think we should remit the case back to the Sheriff with instructions to proceed. I think the expenses of this appeal ought to be reserved and disposed of as expenses of the cause by the Sheriff when he decides the case.

LORD MONCREIFF—I am of the same opinion. This is a very peculiar case. The line between a case of pure accident or of fault of a fellow-workman on the one hand, and a case involving liability on the part of the master on the other, is extremely fine, and I think there would be some risk of the jury going wrong if the case were sent to a jury. For instance, if in this case it were proved that if these plugs are put in properly no accident can happen, and the accident must have occurred through the workman who last used the lamp having put the plug in improperly, that would be a case in which the master would not be responsible. But it might be very difficult to get a jury to see the difference between these fine distinctions, and therefore I think the proper course is to send the case back to the Sheriff for proof before answer.

LORD STORMONTH DARLING concurred.

The LORD JUSTICE-CLERK and LORD YOUNG were absent.

The Court dismissed the appeal and remitted the cause to the Sheriff-Substitute to allow parties a proof before answer of their averments.

Counsel for the Pursuer and Appellant—Guthrie, K.C.—Macmillan. Agent—W. B. Rainnie, S.S.C.

Counsel for the Defenders and Respondents —Salvesen, K.C.—C. D. Murray Agents—Morton, Smart, Macdonald, & Prosser, W.S.