on record. The pursuer who desires to attack his employer through his manager must make such averments as to take the case out of the ordinary rule that the manager is a fellow-servant of the workman. But there is no such statement here, and it is therefore plain, on the face of the record, that there is no case of fault at common law against the defenders.

As regards the liability of the defenders under the statute, it has been pointed out that the claim for damages was not intimated within six weeks after the death as is required by the statute. The Act gives power to the Court to determine whether the failure to give notice was excusable, and we have therefore to look at the averments of the pursuer in order to determine whether the failure to give notice was excusable in the circumstances. A case was quoted where a question of this kind arose, and where the decision was left to the Judge at the trial. But that was a case in which the pursuer had admittedly a case at common law, and it had therefore to go to trial in any view. Here there is no case at common law, and there is therefore no reason why the point should not be decided now.

The averments of the pursuers come to this, that those whose duty it was to give notice failed to do so, because they were in such a state of mind through grief that they overlooked the necessity of making an investigation and giving notice within six weeks after the accident. It would be a very serious matter if it was held that that was a sufficient excuse under the statute. It is an excuse which every pursuer could make. It is just the state of mind in which every pursuer of an action of this kind might naturally be, and if this excuse could be good in one case it must be good in all. It is quite impossible to maintain that, and, there being thus neither notice in this case nor an excuse for the want of notice which can be maintained, this action is incompetent under the Employers Liability Act.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against, sustained the first and second pleas-in-law for the defender, and dismissed the action.

Counsel for the Pursuers—W. Campbell. Agent—William Considine, S.S.C.

Counsel for Defender—Comrie Thomson—Wilton. Agent—John Rhind, S.S.C.

Saturday, November 17.

SECOND DIVISION.

SCOTT, PETITIONER.

Trust—Non-Gratuitous Trustee—Petition to Resign.

A trustee under a trust-disposition and settlement, who had accepted office and become entitled on doing so to a legacy of £100 under the trust-deed, petitioned the Court for authority to resign. He stated that he had accepted office under a misapprehension as to the duties involved; that, owing to the magnitude of the estate, the affairs of the trust, if properly attended to by him, were likely to occupy more of his time and attention than, as a man with heavy business cares and responsibilities of his own, he could afford to bestow on them; that he deemed it prudent, and for the best interests of the trust, that he should resign, and that he was willing to renounce his legacy, which had not yet been paid, if he was relieved of his trusteeship.

The Court *refused* the petition, *holding* that the petitioner had stated no sufficient reason to entitle the Court to allow him to resign.

Alison, February 3, 1886, 23 S.L.R. 362, *distinguished.*

Matthew Andrew Muir, ironfounder in Glasgow, died on 27th April 1894, leaving a trust-disposition and settlement by which he conveyed to Colin William Scott and others, as trustees, his whole means and estate for the purposes therein mentioned.

By the third purpose of the trust-deed the truster directed his trustees to make payment of £100 to each of their own number who might accept office.

Four of the trustees nominated, including Colin William Scott, accepted the office conferred on them, and entered on the possession and management of the trust-estate.

Thereafter Scott presented a petition to the Court for authority to resign the office of trustee under the trust-disposition, and to find the expense of the application to form a proper charge against the trust-estate.

The petitioner stated—"The petitioner accepted office along with his co-trustees by minute of acceptance dated 21st and 28th May 1894, but finding that, owing to the magnitude of the trust-estate, the affairs of the trust, if properly attended to by him, were likely to occupy more of his time and attention than as a man with heavy business cares and responsibilities of his own he could afford to bestow on them, he deemed it prudent and to the best interests of the trust that he should resign his trusteeship, and intimated his desire to do so by letter to the trustees' agent dated 25th June 1894. Having accepted office without legal advice and under misapprehension as to the duties involved, and not

having received payment of the legacy provided to him, the petitioner is willing to renounce the same provided he is relieved of his trusteeship. The trust not being gratuitous, the petitioner has no power to resign under the Trusts (Scotland) Act 1861, and the trust-deed does not provide for his resignation. The present application is therefore necessary."

The petitioner's co-trustees, who were called as respondents, lodged answers to the petition, in which they stated that, while they had no desire to prevent the petitioner resigning his office if the Court should hold that the facts of the case rendered such resignation competent and necessary or expedient, they considered that the trust-estate ought to be relieved of all expense arising from proceedings which the petitioner himself had needlessly occasioned.

Authority for petitioner—*Alison*, February 3, 1886, 23 S.L.R. 362.

At advising—

LORD JUSTICE-CLERK—The facts as stated to us in this petition are very simple. The petitioner learned that he was appointed trustee on the estate of the testator and accepted office. He afterwards discovered that the duties were more burdensome than he was willing to undertake, and he says he accepted under a misapprehension of the extent of the duties, and expresses his desire to be allowed to resign.

If the petitioner had been a gratuitous trustee, he would have been entitled under the Trusts Act of 1867 to resign provided he had fulfilled all his duties up to the date of resignation. But the Act expressly declares that a non-gratuitous trustee cannot resign by virtue of it. The petitioner is therefore not entitled to resign by virtue of the Act, as on accepting office he became entitled to £100 in terms of the trust-deed.

The only ground on which the petitioner asks for authority to resign is that which I have stated. He does not say that he is unable to perform the duties required of him. He does not state that the trust will suffer from causes over which he has no control if he is forced to continue in office. He only states that he now finds the duties of the trust will take more time than he is willing to devote to them.

There have been cases in which non-gratuitous trustees have been allowed to resign, but the Court in these cases considered that it was in the interests of the trust that the trustee should be allowed to resign. An example of such cases is that of *Sir Archibald Alison*, quoted by Mr Constable, whose duties in his profession made him necessarily inefficient as a trustee. But there is no such consideration in this case. The testator thought the petitioner a suitable person to administer the trust. We have no reason to doubt that he can fulfil the duties. The only ground on which he wishes to resign is that he thinks the duties too heavy. Such a ground is not sufficient to entitle us to interpone authority to his resignation.

LORD RUTHERFURD CLARK—I concur. I am very sorry that an unwilling trustee should be held bound to perform his duties, but I do not see how we can help it.

LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"In respect that no sufficient reason has been tendered entitling the petitioner to resign the office of trustee under the trust-disposition and settlement of the late Matthew Andrew Muir, Refuse the prayer of the petition, and decern: Find the petitioner liable for the expenses of this application and of the expenses incurred by his co-trustees."

Counsel for the Petitioner—Constable. Agents—Livingston & Dickson, W.S.

Counsel for the Respondents—Dundas. Agents—W. & J. Burness, W.S.

Tuesday, November 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

PEFFERS *v.* THE DOWAGER COUNTESS OF LINDSAY.

Reparation — Wrongous Apprehension — Malice and Want of Probable Cause—Issue.

The pursuer in an action of damages for wrongous apprehension averred that the defender, without accusing him of any crime, had ordered a police constable to apprehend him, that upon this order the constable had apprehended him and taken him to the police office, where he was released as no charge was preferred against him.

Held (1) that the pursuer had stated a relevant case of wrongous apprehension caused by the defender, and (2) that the words "maliciously and without probable cause" need not be inserted in the issue.

In this action Adam Peffers, coachman, residing in Edinburgh, sued Jeanne Marie Eudoxie, Dowager Countess of Lindsay, Kilconquhar, Fifeshire, for £500 in name of damages for wrongous apprehension.

The pursuer made averments to the following effect—He had been coachman to the late Earl of Lindsay at the time of his death, and his engagement did not expire earlier than 12th June 1894. After the Earl's death he was informed that he must leave on that date. Upon 2nd June he went to Wormiston, the residence of the present Earl, and received permission from him to remain in the house which he then occupied. Upon his return constable Pattison met him and threatened to apprehend him. Upon 3rd June the