as under the Act. Further, the authority of that case had been questioned by the Second Division—*Kane* v. *Singer Manufacturing Co.*, May 21, 1904, 6 F. 658, 41 S.L.R. 571—and the point should be referred for decision to a larger Court. The decision was of moment in connection with the question of expenses. The Legislature had intended all actions under the Employers Liability Act to be Sheriff Court actions and inexpensive, and the object of providing for removals being under the Sheriff Courts Act was to get the benefit of the restrictions and the provisions as to expenses in that Act. It had now been decided that whenever in an action raised in the Sheriff Court and removed under the Judicature Act to the Court of Session £25 or any larger sum was recovered, the Court would not limit to the Sheriff Court scale the award of expenses—*Casey* v. *Magistrates of Govan*, May 24, 1902, 4 F. 811, 39 S.L.R. 635—(*M'Avoy* v. *Young's Paraffin Co., Limited*, November 5, 1881, 9 R. 100, 19 S.L.R. 61, 137, was also referred to).

Counsel for the pursuer and appellant were not called on.

LORD PRESIDENT—In this case I think we have no alternative except to follow *Patons*, (January 14, 1885, 12 R. 538, 22 S.L.R. 435). That case is not distinguishable from the present. Although there was this difference, that the action there was laid at common law as well as under the Employers' Liability Act 1880 (43 and 44 Vict. c. 42), the only objection taken was because the case had been removed to the Court of Session under the Judicature Act (6 Geo. IV, c. 120, under sec. 40) instead of the Employers' Liability Act 1880 (43 and 44 Vict. c. 42), sec. 6 (3), and to that point only the opinions of the Judges were directed. That decision is absolutely binding upon us. I do not say whether it was right or wrong, but I see no reason to doubt that it was right.

It has been brought to our notice that doubts as to the soundness of the decision in *Patons* have been expressed in the Second Division. But although such doubts were expressed, the Judges said they were bound to follow it. If the question is to be sent to a larger Court it must come from the Division where doubts as to *Patons'* case have arisen, and not from that in which no doubt has yet been felt as to the soundness of that decision.

LORD KINNEAR—I quite agree with your Lordship. We have no choice but to follow *Patons*. I have not as yet seen reason to doubt the soundness of that decision. But at all events it is a decision binding upon us.

LORD PEARSON—I agree for the reasons which your Lordship has assigned.

LORD ADAM and LORD M'LAREN were absent.

The Court repelled the defenders' objection to the competency of the appeal and approved of the issue proposed.

Counsel for the Pursuer and Appellant — Crabb Watt, K.C.—A. M. Anderson Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Respondents — The Solicitor-General (Salvesen, K.C.)—Constable. Agents—Simpson & Marwick, W.S.

Saturday, March 11.

SECOND DIVISION.

STEWART'S TRUSTEES *v.* WALKER.

Succession—Trust—Construction—Destination to Children in Liferent and their Issue in Fee—Claim by Issue of Child Dead at Date of Settlement.

A testator died predeceased by his wife and by one daughter, whom he knew to be dead at the date of his settlement, and survived by a son and two daughters, all having children, and a granddaughter, the child of his predeceasing daughter. By his trust-disposition and settlement, after making certain provisions in favour of this granddaughter, he conveyed his remaining estate to trustees to "hold and apply . . . for behoof of all my lawful children equally in liferent, . . . and for behoof of their respective issue equally *per stirpes* in fee." *Held* that the provisions in favour of children and their issue applied only to children existing at the date of the settlement, and the issue of such children, and not to the daughter who had died prior to that date or her issue.

John Stewart, contractor, Paisley, died on 11th May 1903, leaving a trust-disposition and settlement whereby he conveyed his whole means and estate to his son William Stewart and others as trustees.

The testator was predeceased by his wife and one daughter, whom he knew to be dead at the date of his settlement. He was survived by a son William Stewart, and two daughters, Mrs Christina Stewart or Gillespie and Mrs Margaret Stewart or Walker, all three of whom had children, and by a granddaughter, Christina Walker, the only child of his predeceased daughter Mrs Mary Stewart or Walker. The testator was on affectionate terms with all his grandchildren, and frequently visited them.

By the fourth purpose of his trust-disposition and settlement the testator provided as follows:—"My trustees shall hold Beechwood Cottage, Houston, to and for behoof of my granddaughter Miss Christina Walker, residing in Beith, and after paying for the management, repairs, taxes, insurance, and all other expenses in connection with said property, accumulate the rents thereof, and pay therefrom to William Walker, hotel-keeper, Beith, her father, or other legal guardian for her behoof during her pupilarity, and herself or them during her minority, such sums therefrom and at such times as my trustees consider proper, and on her arrival at majority convey and pay said property and such accumulations as may remain in my trustee's hands to her, whom failing, her lawful issue equally on their attaining twenty-one years

of age, or to their legal guardians when under that age, and failing issue said property to merge into and form part of my estate."

By the fifth purpose of his trust-disposition and settlement the testator provided as follows:—"My trustees shall, after paying for the management, repairs, taxes, insurance, and all other expenses in connection with my remaining estate, hold and apply the same, including the interest or other annual produce thereof, and shares original and that may accrue, to and for behoof of all my lawful children equally in liferent during all the days and years of their respective lives, and for behoof of their respective issue equally *per stirpes* in fee, and in case of the death of any of my children without issue who shall survive and obtain a vested interest as after mentioned, the share destined to him or her and his or her issue shall accrue to the survivors equally in liferent, or the survivor in liferent, and their, his, or her respective issue equally *per stirpes* in fee: And I declare that in case any of my children shall die leaving issue, such issue while under age shall be entitled to the annual proceeds of the provisions destined to them in fee, and the fee or capital of such provisions shall vest in and be paid or conveyed to such issue on their respectively attaining twenty-one years of age, or to their respective legal guardians when under that age, and on the death of their respective father or mother, whichever event shall happen last, and not sooner, and such issue while under twenty-one years of age being entitled to have the annual income paid to their respective father or other legal guardians while in minority, or applied by my trustees for their support, education, or benefit."

The value of the Beechwood Cottage subjects referred to in the fourth purpose was £425 or thereby. The net income therefrom for the year ending Whitsunday 1904 was £22, 14s. 1d. The value of the residue divisible under the fifth purpose was estimated at £6450, and the net income for the year ending Whitsunday 1904, exclusive of the foresaid income derived from Beechwood Cottage, amounted to £240. From this sum fell to be paid certain annuities bequeathed by the third purpose of the settlement, amounting to £20, making the net free income available for division £220.

A question having arisen as to the true meaning of the testator's settlement, a special case was presented for the opinion and judgment of the Court.

The parties to the case were—(1) The trustees acting under the trust-disposition and settlement; (2) William Walker, as tutor to his daughter Christina Walker; and (3) the children and grandchildren of the testator with the exception of his granddaughter the said Christina Walker.

The questions of law for the opinion and judgment of the Court were—"(1) Has Christina Walker an interest along with the testator's other grandchildren *per stirpes* in the residue of his estate disposed of under the fifth purpose of his said trust-disposition and settlement? Or (2) Is her interest in his succession confined to the interest in Beechwood Cottage provided in her favour by the fourth purpose of said trust-disposition and settlement?"

The second party maintained and argued that, in addition to her interest in Beechwood Cottage, Christina Walker was entitled to an equal one-fourth share of the residue divisible under the fifth purpose of the settlement. The taking the fee by children did not depend on their parent being alive to take the liferent; the gift to the children was a substantive gift independent of the liferent of the parent—*Sturrock* v. *Binny*, Nov. 29, 1843, 6 D. 117.

The third parties maintained and argued that Christina Walker's rights were confined to her interest in Beechwood Cottage. The children for whom the testator made provision in the fifth purpose of his settlement were children alive at the date of his settlement, and did not include a predeceasing child, for whose issue he had made a separate provision in the fourth purpose of his settlement.

LORD KYLLACHY—I am of opinion that the first question must be answered in the negative; and I think that in so doing we give effect both to the intention of the testator and to the words of the settlement. On ordinary principles of construction the provisions of the settlement in favour of children and their issue are conceived in favour only of children existing at the date of the settlement and the issue of such children; and, as might be expected in that view, the destinations or devolutions, and instructions as to management which followed have all reference to deaths which may occur in the future, and not to deaths which the testator knew to have already occurred. It is admitted that the testator knew when he made his settlement, that one of his daughters—the daughter in question—was already dead; and this removes any difficulty which might have existed if he had not so known, or if it had been uncertain whether or not he knew of her death. If he had not known, I do not profess to say how that might have affected the construction of the settlement; but it being admitted that he did know, I think any difficulty is removed.

LORD KINCAIRNEY—I am of the same opinion. The whole question turns upon the interpretation of the fifth clause of the settlement. By that clause the truster gives a liferent to all his children, and it is pointed out that that phrase could not be meant to include the mother of the second party, because at the date of the settlement she was dead. The argument further is that the gift of the fee to "their respective issue" must mean to the issue of the children to whom the liferent had been given, and that therefore the second party, as the issue of one of the children to whom a liferent was not given, can have no claim. She is already expressly provided for by

the fourth clause of the settlement, and therefore there is no room for the argument that it may have been the intention of the truster to include her in the gift of the fee. I therefore agree that the first question should be answered in the negative.

LORD PEARSON—I agree in the judgment proposed. It appears to me that as all the provisions of the fifth purpose which refer to the death of the testator's children are *de futuro*, it is impossible to hold that the provisions include the case of a child known to the testator to be dead at the date of the will. I also think it clear that in the expression "their respective issue," occurring in the gift of the fee, the word "their" relates back to the children on whom a liferent had just been conferred; and it is certain that these cannot have been intended to include a child then already dead within the knowledge of the testator.

The LORD JUSTICE-CLERK and LORD YOUNG were absent.

The Court answered the first question in the negative.

Counsel for the First Parties—Macmillan. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Second Party — Chree. Agent—J. M. Pole, Solicitor.

Counsel for the Third Parties—Cullen. Agent—W. Kinniburgh Morton, S.S.C.

Saturday, March 11.

FIRST DIVISION.

ANDERSON *v.* MORRISON.

Process—Proof—Jury Trial—Commission to Take Evidence — Action of Damages for Slander—Examination of Pursuer on Commission.

An action of damages for slanderous statements alleged to have been made in June 1903 was put down for jury trial at the Summer Sittings of 1904. The trial was postponed at the instance of the defender, who opposed a motion to have the pursuer's evidence taken on commission. The cause being put down for jury trial at the Spring Sittings of 1905, the pursuer again moved that his evidence should be taken on commission, on the ground that, as certified by a doctor, he would not be able to attend the Court for at least a year, and his evidence was essential. The defender again opposed the motion, and asked that the trial should be postponed. The Court *granted* the pursuer's motion.

On 14th July 1903 James Anderson, carpenter and contractor, Eastgate, Inverness, raised an action against Donald Morrison, tea merchant and dealer, Balblair Road, Nairn, in which he sought to recover £500 as damages for slander. His averments were to the effect that in Messrs Macdonald, Fraser, & Company's mart at Inverness on the 16th June 1903, in the hearing of certain witnesses, the defender, after putting out his tongue at the pursuer, had said to him—"You are a damned fraud, a cheat, and a swindler, and your father before you, and the whole lot of you," and had accused the pursuer of having used in executing certain contracts only two-fifths of the nails and one-half of the screw-nails which an honest contractor would have used.

Issues were adjusted, and the cause was put down for trial at the Summer Sittings of 1904. In July 1904, prior to the rising of the Court, counsel moved on behalf of the pursuer that his evidence should be taken on commission as the trial could not proceed without it, and the pursuer was unable to attend owing to a nervous breakdown, the effect of meningitis. A doctor's certificate was produced. The defender opposed this motion on the ground that the pursuer's personal attendance was necessary, and moved that the trial should be postponed. The latter motion was granted.

The cause was put down for trial at the Spring Sittings of 1905, when the motion was again made on behalf of the pursuer that his evidence should be taken on commission. His doctor certified that he could not attend the trial, and would not be able to do so for at least a year, and his counsel intimated that his evidence was essential. The defender again opposed the motion on the ground that for his case it was necessary that the pursuer should attend so that he should be able to cross-examine him before the jury.

LORD PRESIDENT—There is a peculiar situation disclosed here, and I think it is clearly a case to allow the motion; indeed, to do otherwise would be tantamount to saying that the pursuer should have no action for the injury alleged to have been done him simply because he has never since been in a sufficiently good state of health to appear in the witness-box. It seems to me that any prejudice arising from his not being here will have to be borne by himself. It might be very desirable to postpone the trial so as to have the pursuer in the witness-box if there were some prospect of his being able to attend; but seeing the date when the act complained of was done, and that the pursuer has been ill ever since, it does not seem to me that there should be any further delay.

LORD JUSTICE-CLERK—I concur.

LORD KINNEAR—I quite agree. I take it to be practically conceded that the pursuer cannot be compelled to appear for examination at the trial, for the defender's motion is, not that the action should be dismissed, but only that the trial should be postponed. I do not think that a proper course, considering the length of time for which the action has been already in Court, and if it is not to be thrown out at once, which is not suggested, the only alternative is that the trial should be allowed to proceed, leaving the pursuer's evidence, if he desires to tender himself as a witness, to be