sion made for their safety, and to have given them the opportunity of availing themselves of it. They negligently failed to do this in the pursuer's case, and left her in a position of extreme danger. They did this although the guard of the train, who had seen the pursuer enter the carriage at Dolphinton, and had conversed with her regarding her approaching journey, knew that she was still a passenger in the train. It was the duty of the said guard to have ascertained whether the pursuer had been attended to, and to have made reasonable provision for her safety. This he negligently failed to do. Had the defenders and their servants discharged their duty aforesaid, the pursuer would have escaped injury. Her present condition of ill health is the natural result of the defenders' negligence."

The defenders pleaded—"(1) The pursuer's averments being irrelevant, the action should be dismissed."

On 2nd December 1902 the Lord Ordinary (KINCAIRNEY) approved of an issue for the trial of the cause.

The defenders reclaimed, and argued—No definite breach of duty on the part of the defenders was averred. The case was irrelevant.

Argued for the pursuer—The measure of the defenders' duty depended upon circumstances. The pursuer should have had an opportunity of going on to Carstairs along with the other passengers.

LORD JUSTICE-CLERK—I think there is here no relevant case. Every traveller in winter has to take certain risks, and here the risk was aggravated by a snowstorm. But the drift was cleared away after about an hour's delay. I do not see that there was any duty on the Railway Company on account of the short detention to treat the passengers exceptionally from what they would have done if they had been in the train and it had continued running. It was no colder than in running between the stations, and the efforts of the officials were directed to getting the line cleared so that passengers might get on as quickly as possible. In the course of an hour they got the line cleared, and the train was able to go on its journey. The circumstances here were really exceptional, because the mere fact that there was a snowdrift would not make it any colder—possibly might make it less cold. It was from the coldness of the air, no doubt, that the pursuer received any harm that she suffered, and it is an unfortunate thing that she was kept for an hour longer exposed to that cold than she would have been had there been no drift. But I cannot see any fault averred against the Railway Company through its servants, and I am therefore of opinion that we ought not to allow the case to go to a jury.

LORD YOUNG—I am very clearly of opinion that upon the facts here averred by the pursuer no fault whatever is imputed to the Railway Company, and that therefore the objection to relevancy ought to be sustained and the action dismissed.

LORD TRAYNER—I have seen a good many actions against railway companies, the motives for raising which have not been difficult to discover, but I never saw an action which had so little substance and was so plainly without foundation as the present case. The idea that a railway company are bound under a contract of safe carriage—for that is their contract with their passengers—to carry, as this summons implies, restoratives or medical assistance that may be needed by passengers in the course of a journey, is really too absurd to be listened to. But that is what the present case comes to. Following a suggestion which Lord Young has made more than once, I would be only too glad if in this case I was able to visit the expenses not on the pursuer but on the person who advised the action to be brought.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—Munro. Agent—J. Stuart Macdonald, Solicitor.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—M'Clure. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, February 25.

SECOND DIVISION.

JOHNSON'S TRUSTEES *v.* SANDILANDS.

Succession—Power of Appointment—Part of Fund only Appointed—Right of Appointee to Share in Remainder Unappointed.

A testator destined a legacy and a share of residue to his daughter A in liferent and her five children in fee in such proportions as she might appoint, and failing such appointment "equally among them." A executed a deed of appointment whereby, in contemplation of the marriage of her daughter M, she appointed "one equal one-fifth part or share" of the funds to her. A died without having made any further appointment. *Held* (*diss.* Lord Young) that the remaining four-fifths of the fund having been left unappointed, M was entitled, in terms of the original testator's settlement, to an equal share along with the other children of the four-fifths unappointed, in addition to the one-fifth appointed to her by her mother.

Edward Johnson of Tweedbank, Kelso, died on 6th March 1879, survived by two sons and two daughters, and leaving a trust-disposition and settlement.

The last purpose of his settlement was in the following terms:—"I direct and appoint my said trustees, as soon as

conveniently may be after my decease, and after the youngest of my surviving children shall have attained majority as aforesaid, whichever of these events shall last happen, to sell and convert the whole rest residue and remainder of said means and estate, heritable and moveable, into money, and to hold, apply, and pay the same, with the interest and other annual produce thereof, to and for behoof of and equally among all my lawful children . . . providing and declaring, as is hereby provided and declared, that the equalising legacies and shares of residue, which in terms of the provisions before written shall devolve upon my said daughters, shall be held in trust by my said trustees for behoof of my said daughters respectively in liferent during all the days of her life for her liferent use allenarly, and for her lawful children who shall attain the age of twenty-one years, in such shares and proportions and under such conditions as she and her husband jointly or the survivor of them solely may direct and appoint by any writing under their, her, or his hand, to take effect after her death, and failing thereof equally among them."

The "equalising legacies" referred to were legacies bequeathed under the third purpose of the settlement, whereby the testator bequeathed to each of his children who should survive him, "but in trust as aftermentioned in so far as my daughters' interests are concerned, such a sum of money free of legacy-duty as, with the advances previously made to them respectively as aforesaid, . . . shall equalise them all."

On 22nd December 1894 one of Mr Johnson's daughters, Annie Matilda Johnson or Sandilands, whose husband had predeceased her, and who had five children, executed a deed of appointment on the narrative that the power of appointment conferred upon her and her husband, or the survivor of them, in terms of the last purpose of her father's trust-disposition and settlement, had not been exercised, and that her daughter Maud Mary Sandilands, afterwards Mrs Simpson, was about to be married. Mrs Sandilands' appointment was in the following terms:—"And now seeing that I have determined to exercise the power given or reserved to me by the said trust-disposition and settlement in the manner therein appearing, therefore in exercise of the power so given or reserved to me as aforesaid, and of every or any other power in anywise enabling me, I do hereby appoint that if the said intended marriage shall be solemnised before the expiration of twelve calendar months from the date of these presents, the trustees of the said trust-disposition and settlement shall from and after my decease stand possessed of one equal one-fifth part or share of and in the said equalising legacy and share of residue by the said trust-disposition and settlement respectively bequeathed by my said late father, and the investments representing the same and the income thereof respectively, in trust for my daughter the said Maud Mary Sandilands, and the same shall belong to and be vested in her, her heirs, executors, administrators, and assigns for her and their own use absolutely."

Mrs Sandilands died on 15th October 1902 without having made any further appointment.

On her marriage Mrs Simpson, by her marriage settlement dated 24th December 1894, assigned to the trustees thereunder the share of the fund held under Mr Johnson's settlement which her mother had appointed to her.

On the death of Mrs Sandilands, survived by her five children, a special case was presented for the opinion and judgment of the Court with regard to the division of the fund liferented by Mrs Sandilands under her father's trust-disposition and settlement.

The parties to the special case were (1) the trustees under Mr Johnson's trust-disposition and settlement; (2) the children of Mrs Sandilands other than Mrs Simpson; and (3) the trustees under Mrs Simpson's marriage-settlement.

The second parties maintained that on a sound construction of the said trust-disposition and settlement and deed of appointment the whole funds fell to be equally divided among the five children of Mrs Sandilands, the "one equal one-fifth part or share" appointed to Mrs Simpson being in full of her interest in the said funds.

The third parties maintained that they were entitled to receive one-fifth of the fund in virtue of the deed of appointment of 1894, together with one-fifth of the remaining and unapportioned four-fifth parts of the fund.

The following was the question for the opinion and judgment of the Court:—"Are the third parties entitled to an equal share along with the second parties of the remaining four-fifths of the funds in addition to the one-fifth share appointed to them by Mrs Sandilands?"

Argued for the second parties—The language of the deed of appointment made it clear that Mrs Sandilands intended merely to secure to Mrs Simpson the share which Mr Johnson had destined to her, and by the use of the word "equal" in effecting her purpose she had clearly expressed an intention that the appointment should be restrictive. The case was therefore distinguished from *Smith Cuninghame* v. *Anstruther's Trustees*, April 25, 1872, 10 Macph. (H.L.) 39, 9 S.L.R. 431, and *Murray's Trustees* v. *Murray*, June 8, 1872, 10 Macph. 778, 9 S.L.R. 497. The unapportioned fund fell to be divided equally among Mrs Sandilands' children excluding Mrs Simpson—*Bowie's Trustees* v. *Paterson*, July 16, 1889, 16 R. 983, 26 S.L.R. 676.

Argued for the third parties—The language of the deed did not support the second parties' contention. The unapportioned fund fell to be divided according to the destination in Mr Johnson's trust-disposition and settlement—*Smith Cuninghame* v. *Anstruther's Trustees, cit. sup.*

LORD JUSTICE-CLERK—We have had an able argument from Mr Watson which really covered the whole case. I am of opinion, in view of the decisions already pronounced in this Court and in the House of Lords, that Mrs Simpson is not excluded from a share in the unapportioned fund after payment to her marriage-contract trustees of the one-fifth apportioned to her by her mother in view of her marriage to enable her to make a provision. It appears to me that that apportionment is practically the same as in the cases referred to, in which it was held that such apportionment did not exclude the party in whose favour it was made from a share of such part of the fund as had not been apportioned. The decisions seem to me to rule this case, and therefore I think the question should be answered in the affirmative.

LORD YOUNG—Notwithstanding the decisions, I cannot assent to the conclusion at which your Lordship has arrived upon the construction and import of the deed of apportionment. A power of apportionment, such as exists here, is a power to make a will, with respect to the fund to which the power applies, as to its division amongst those to whom it is destined. A deed of apportionment is to be construed as a will, taking the language used by the maker of it in the exercise of the power as expressing the maker's will. It is different from a testament in this respect, no doubt, that it must be within the power which is given—limited to the estate and to the beneficiaries mentioned in the deed which gives the power. Now, reading the deed of apportionment here as an expression of will by the party having the power to apportion, I should have no difficulty in arriving at the intention of the testator or apportioner.

In contemplation of the marriage of a daughter Mrs Sandilands directs the trustees of her father's trust-disposition and settlement to stand possessed of one-fifth of the fund over which she had a power of apportionment in trust for that daughter. Now, the words of the deed are important, as indicating, I think irresistibly, the intention of the testator or apportioner to apportion one-fifth of the fund in question to her daughter who was about to be married. Her father intended, unless this lady should think otherwise, that her children should have equal shares in the division of the fund. She had five children. On the marriage of a daughter she exercises her power of apportionment by enabling that daughter to convey her one-fifth of the fund to her marriage-contract trustees. I should have read that as expressing her will that this daughter should have one-fifth, and no more, and that the other four children, if she did not otherwise determine with respect to them, should have the other four-fifths of this equalising legacy. The contest is between that view and the view that this particular daughter should have more than twice as much as any of the other children—that is to say, one-fifth under the apportionment and another fifth of the remaining four-fifths. I cannot attribute the latter intention to the party to whom the power was given, whatever may have been decided in other cases as to the intention of the maker of the deeds before the Court in those cases. I am judicially satisfied that the meaning of the language of the maker of this deed was not that this daughter should have more than any of the other children, but was that she should have her equal one-fifth share, the other children having each of them their equal one-fifth shares, unless there was subsequent provision to the contrary.

My opinion therefore is, notwithstanding the decisions, that upon a construction of the deed before us the intention of the apportioner in this case should have effect according to the views which I have expressed.

LORD TRAYNER—I think the question before us is concluded by authority. The late Mr Johnson by his settlement directed his trustees to hold a certain part of his estate for behoof of his daughter Mrs Sandilands for her liferent use allenarly, and for her children in fee, in such proportions as she might direct and appoint, and failing such appointment equally among them. In exercise of this power Mrs Sandilands by the deed before us appointed "one equal one-fifth part or share" of the fund to be paid to her daughter Mrs Simpson. No further appointment was made by Mrs Sandilands. It appears to me that the remaining four-fifths of the fund not having been appointed by Mrs Sandilands, must, according to the direction of Mr Johnson's settlement, be now divided equally among Mrs Sandilands' children. Much stress was placed upon the fact that in the deed of appointment the part of the fund there given to Mrs Simpson was described as "an *equal* one-fifth" part of the fund, as indicating that all the children were to have *equal* fifths. Probably that was Mrs Sandilands' intention, but if so it was never carried out. But I cannot say I attribute any particular significance to the word "equal." The sentence would be precisely the same in effect if that word were omitted and the share given to Mrs Simpson simply described as one-fifth. The material fact is that four-fifths were not apportioned, and failing such apportionment the fund must go according to Mr Johnson's settlement—that is, equally among all Mrs Sandilands' children. This, as I have said, is settled by authority.

LORD MONCREIFF was absent.

The Court answered the question in the affirmative.

Counsel for the First and Second Parties—Clyde, K.C.—Watson. Agents—Dundas & Wilson, C.S.

Counsel for the Third Parties—M'Clure—R. B. Pearson. Agents—Adam & Sang, W.S.