M'Callum v. *North British Railway Company*, 20 R. 385; *Wylie* v. *Caledonian Railway Company*, 9 Macph. 463; Glegg on Reparation, pp. 42, 334, 382, and 393."

The pursuer appealed to the Sheriff (LEES), who, after allowing an amendment of the record, recalled the Sheriff-Substitute's interlocutor and allowed to the parties, before answer and reserving all pleas, a proof of their respective averments.

Note.—"The pursuer has made considerable alterations on the record to meet the criticism passed on it by the Sheriff-Substitute, and I doubt if the cause can now be safely disposed of without a proof. That being so, it is probably preferable to refrain from expressing any opinion at this stage on the aspects of the case presented by the respective parties."

The pursuer appealed for jury trial, and the case was sent to the Summar Roll.

Argued for the defenders and respondents—The case was irrelevant, for there was no averment made which disclosed fault. It was not said that the crane was worked while the pursuer's horse was within its sweep, or that there was anything unusual. It was merely said that the horse took fright at the working of the crane, but that was one of the usual operations at a quarry, and the risk of a horse being frightened by it was one which a carter going to a quarry must take and must be presumed to have had in contemplation and to have provided against. The pursuer saw the crane and knew what it is for.

Argued for the pursuer and appellant—This was a case where trial should be allowed. It was averred that notice of the working of the crane should have been given and that no notice was given, and that the failure to give notice was owing to a defective system of working for which the defenders were responsible.

LORD PRESIDENT—In this case I agree with the Sheriff-Substitute. I do not think there is a relevant averment of fault. The pursuer is a carter, the ordinary course of whose business was to take a bogie to the defenders' quarries for the precise purpose of conveying stones from them to the railway. It must be presumed that he was perfectly conversant with the class of noises he would meet with at the quarry. There is nothing said against the defenders, who were strangers to the pursuer, but that the defenders' servants ought to have warned pursuer of the craneman's intention to work the crane, which they did not do. That is not an averment of fault at all. A very sensible view of the case is taken by the Sheriff-Substitute in his note, and although from the Sheriff's note we see that further averments were made by way of amendment to meet the criticisms passed on the record by the Sheriff-Substitute I do not think they have been successful in doing so. If this case were allowed to go to trial I do not see what case would not. Any person who was standing at a shop with a horse which was alarmed by a sudden noise from the shop would, in the pursuer's view, have a good action against the shopkeeper. It seems to me that this was just one of those risks which a person looking after a horse was bound to provide against for himself. I think there is here no relevant case and that the action should be dismissed.

LORD KINNEAR—I also agree with your Lordship and with the result at which the Sheriff-Substitute has arrived and the general grounds of his opinion, although I do not agree with all that he has said. We have nothing to do here with common employment or the responsibility of a master to his servants for the safety of his system of working. This is not an action at the instance of a workman in the service of the defenders, but of a stranger. For the reasons which your Lordship has given I think this case is irrelevant, and should be dismissed.

LORD PEARSON concurred.

LORD ADAM and LORD M'LAREN were absent.

The Court sustained the appeal and dismissed the action.

Counsel for the Pursuer and Appellant—G. Watt, K.C.—Burt. Agents—M'Nab & MacHardy, S.S.C.

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

Friday, March 10.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KELLY *v.* JAMES FRASER & COMPANY.

Process—Appeal—Removal of Cause—Competency—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 6—*Judicature Act* 1825 (6 *Geo. IV, cap.* 120), *sec.* 40.

Held that section 6 of the Employers' Liability Act 1880, which allows any action under that Act to be removed to the Court of Session at the instance of either party in the manner provided by, and subject to the conditions prescribed by, the Sheriff Courts Act 1877, section 9, does not by implication exclude the right of either party, under section 40 of the Judicature Act 1825, to have the cause removed to the Court of Session, with a view to jury trial, after an order for proof has been pronounced. *Patons* v. *Niddrie and Benhar Coal Company, Limited*, January 14, 1885, 12 R. 538, 22 S.L.R. 345, *followed.*

On the 17th August 1904 Mrs Mary M'Cabe or Kelly, widow, residing at 82 Main Street, Bridgeton, Glasgow, presented a petition in the Sheriff Court at Glasgow in which she sought to recover from James Fraser

& Company, builders, 6 Union Street, Glasgow, £500 damages at common law, or £180, 1s. under the Employers' Liability Act 1880, for the death of her son Henry Kelly.

She averred that her son was, on 13th May 1904, in the employment of the defenders, who were in the course of erecting a number of tenements, four storeys in height, in Mount Stuart Street, Crossmyloof, Glasgow; that in order to complete the gable of one of the tenements it had been necessary to put up a scaffolding for workmen by placing three trestles on the joists alongside the gable with planks on them; that when the gable had been finished the planks had been removed and the trestles had been left standing above the level of the walls, exposed to the wind and with no support; and that, no precaution having been taken by the defenders, one of the trestles was blown over and fell on to her son as he was leaving his work and caused injuries from which he died some hours after the accident.

On 17th November 1904 the Sheriff-Substitute (FYFE), as to the claim at common law, sustained defenders' plea to the relevancy, but as to the claim under the Employers' Liability Act, before answer allowed a proof.

On 14th January 1905 the Sheriff (GUTHRIE) adhered to the interlocutor of the Sheriff-Substitute.

Note.—"The pursuer's agent withdrew the claim as laid at common law. There may be a question whether the case averred falls within the clause of the Act relating to the conditions of plant. I think, however, if there is really a doubt about this, that it will be better dealt with on ascertained facts."

On 24th January the pursuer appealed to the First Division of the Court of Session for jury trial under section 40 of the Judicature Act (6 Geo. IV, cap. 120), and the case was sent to the Summar Roll. When it appeared in the roll the defenders objected to the competency.

The Judicature Act (6 Geo. IV, cap. 120), sec. 40, *inter alia*, enacts—"In all cases originating in the inferior courts in which, the claim is in amount above £40, as soon as an order or interlocutor has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof to lie *in retentis* or granting diligence for the recovery and production of papers) it shall be competent to either of the parties who may conceive that the same ought to be tried by jury to remove the process into the Court of Session by bill of advocation, which shall be passed at once without discussion and without caution."

The Court of Session Act 1868 (30 and 31 Vict. cap. 100) abolished the process of advocation and enacted that all causes originating in the inferior courts in which the claim was in amount above £40 might be removed to the Court of Session by note of appeal at the time and for the purpose and subject to the conditions specified in the 40th section of the Judicature Act.

The Employers' Liability Act 1880 (43 and 44 Vict. c. 42), sec. 6, enacts—"(1) Every action for recovery of compensation under this Act shall be brought in a County Court, but may upon the application of either plaintiff or defendant be removed into a superior court in like manner and upon the same conditions as an action commenced in a County Court may by law be removed. (3) . . . County Court shall with respect to Scotland mean the Sheriff's Court. In Scotland any action under this Act may be removed to the Court of Session at the instance of either party in the manner provided by and subject to the conditions prescribed by section 9 of the Sheriff Courts (Scotland) Act 1877."

The Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. c. 50), sec. 9, enacts—"In regard to every action brought under the preceding section in the Sheriff Court the following provisions shall have effect, that is to say—(1) If a defender shall at any time before an interlocutor closing the record is pronounced in the action, or within six days after such interlocutor shall have been pronounced, lodge a note in the process in the following or similar terms:—. . . It shall be the duty of the sheriff-clerk forthwith to transmit the process, . . . and the process having been so transmitted shall thereafter proceed before the Court of Session as nearly as may be as if it had been raised in that Court. (2) The Court of Session, or either Division thereof, or any Lord Ordinary therein, may, if of opinion that the action might have been properly tried in the Sheriff Court, allow the defender who removed the action to the Court of Session, in the event of his being successful therein, such expenses only as they may consider that he would have been entitled to if successful in the action in the Sheriff Court. (3) The provisions of any Act of Parliament excluding appeal to the Court of Session in respect of the value of a cause depending in the Sheriff Court shall not apply to actions brought therein under the preceding section."

Argued for the defenders and respondents—The claim at common law having now been withdrawn the action was under the Employers' Liability Act only, and the competent mode of removal to the Court of Session of such an action was as provided by the Sheriff Courts Act 1877, section 9. The proceedings in this case were therefore incompetent. Of the two modes competent for the removal of cases from the Sheriff Court, that under the Sheriff Courts Act 1877 and that under the Judicature Act, the Employers' Liability Act had declared the former available for actions brought under its provisions. By this selection it had by implication excluded the other mode. This appeared to have been recognised at first, for all removals of actions under the Employers' Liability Act were under the Sheriff Courts Act till the case of *Patons* v. *Niddrie and Benhar Coal Co., Limited*, January 14, 1885, 12 R. 538, 22 S.L.R. 345. It was only since the date of that case that there was any practice to the contrary. But that case differed from this in that it was at common law as well

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