because even supposing there were an inquiry about notice, and the notice were held to be bad, there would still require to be inquiry upon the common law liability of this defender. And therefore I think that this matter of notice must remain part of the case to be tried with a jury. There will of course be upon the judge a duty of considerable responsibility, as the case may turn out upon the facts, in regard to his directions to the jury, but we are not in a position to anticipate the relative duties of the judge and the jury upon the matter.

I imagine there might be cases where it would be convenient to have a separate inquiry as to notice—as, for example, in a case where the claim was entirely under the Employers Liability Act, and where by the examination of a very few witnesses there might be the possibility of saving a very heavy trial. That is not the case here, and accordingly, without saying anything adverse to the competency of determining first of all the question of fact regarding notice by a separate inquiry, I think we are not called upon to make any such separation in this case, and that we should approve of the issue for the trial of the whole case.

LORD ADAM—Agreeing with your Lordship that there is a case to go to the jury at common law, I also agree that the whole case should be kept together, and that the facts with regard to the sufficiency of the notice under the Employers Liability Act should be proved along with the rest of the facts in the case. At the same time, I think the question of the sufficiency of the notice is not to be left to the jury, but that it will be for the judge at the trial to make up his mind as to the facts bearing on that question, and to direct the jury, if he should hold it not proved that sufficient notice was given, that the pursuer has no case under the Employers Liability Act.

LORD M'LAREN—The case at common law is certainly an extremely narrow one, but I understand the pursuer's case includes this representation, that the defender was in the neighbourhood at the time when this accident occurred, and was in some degree responsible for the orders given and the mode adopted in connection with the clearing away of the *débris* which had been brought down by the spate. This may or may not be true in fact, but if it be shown that the defender personally had oversight or gave directions, he may be liable on this ground.

With regard to the question of sufficiency of notice under the Employers Liability Act, there does not seem to me to be any inconvenience in leaving that question to be settled at the trial, for if nothing should then be proved which the judge can recognise as a proper notice, he may withdraw that part of the case from the jury. Again, if there should be a question of fact to be decided, *e.g.*, whether the notice reached the defender in time, the judge may call upon the jury to answer that question. In this way everything in the case will be kept together, and may be brought before the Court in the event of a motion for a new trial being made.

LORD KINNEAR—I agree with your Lordships that the whole case should be sent to trial before a jury, leaving the judge at the trial to determine how he should treat the question of notice.

The Court adhered.

Counsel for the Pursuer—Dewar. Agent—W. C. Dudgeon, W.S.

Counsel for the Defender—C. S. Dickson—M'Clure. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, February 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'CALLUM *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Master and Servant—Common Employment.

In an action to recover damages for injury caused by the negligence of the defenders' servants, the defence of common employment is not applicable unless the injured person and the servants whose negligence caused the injury were not only engaged in a common employment, but were in the service of a common master.

A carter in the employment of a firm of contractors, while receiving delivery of goods at a railway station from the servants of the railway company, was injured by a bale being dropped on his leg. For the injuries thus sustained he brought an action against the railway company, alleging that the accident had been caused by the negligence of their servants.

Held that the case of *Woodhead* v. *Gartness Mineral Company*, February 10, 1877, 4 R. 469, had been overruled by the decision of the House of Lords in the English case of *Johnston* v. *Lindsay* L.R., 1891, App. Cas. 371, and that the defence of common employment could not be maintained by the railway company, in respect that the relation of master and servant did not exist between them and the pursuer.

This was an action of damages raised in the Sheriff Court at Glasgow by Robert M'Callum, a carter in the employment of Messrs Cowan & Company, contractors, Glasgow, against the North British Railway Company

The pursuer averred that he was sent on 18th November 1892 to get delivery of some esparto grass at Maryhill Station; that he went to the station in accordance with his instructions, and drew his lorry alongside the waggon containing the grass; that the

defenders' servants began to unload the bales from the truck and place them on his lorry, while he stood on the lorry to pack them; and that in the course of transferring the bales from the truck to the lorry the defenders' servants culpably and negligently tumbled one of them on his leg, and injured him severely.

The defenders pleaded, *inter alia*—(1) The pursuer's averments not being relevant or sufficient to sustain his pleas, the action should be dismissed with expenses. (2) The accident being a risk incidental to common employment, the defenders are entitled to absolvitor. (3) Alternatively, the accident to the pursuer having been caused by the negligence of persons with whom he was virtually a fellow servant, the defenders are entitled to absolvitor.

On 17th January 1893 the Sheriff-Substitute (ERSKINE MURRAY) repelled the defenders' pleas of irrelevancy and allowed a proof. The pursuer appealed to the First Division of the Court of Session for jury trial, and the defenders having objected to the relevancy, the case was sent to the Summar Roll.

Argued for the defenders—It was settled in *Woodhead* v. *Gartness Mineral Company*, February 10, 1877, 4 R. 469, that the defence of common employment applied to a case like the present, and *Woodhead's* case had been repeatedly followed in later decisions—*Wingate* v. *Monkland Iron Company*, November 8, 1884, 12 R. 91; *Maguire* v. *Russell*, June 10, 1885, 10 R. 1071; *Congleton* v. *Angus*, January 12, 1887, 14 R. 309. No doubt the doctrine of *Woodhead's* case had been rejected by the House of Lords in *Johnstone* v. *Lindsay*, L.R. 1891, App. Cas. 371, but that was an English case, and the decision was not intended to apply to Scots Law—*ibid.* opinion of Lord Herschell, p. 380; and of Lord Watson, p. 385.

Counsel for pursuer were not called on to reply on this point.

At advising—

LORD PRESIDENT—On the general question raised by the defenders, I take it that after the decision of the House of Lords in *Johnstone* v. *Lindsay* the case of *Woodhead* has been overruled, and that the doctrine established in that case is no longer the law of Scotland.

LORD ADAM concurred.

LORD M'LAREN—I agree that the decision of the House of Lords in *Johnstone* v. *Lindsay* is a decision on a branch of law prevailing throughout the United Kingdom, and is as much a decision in the law of Scotland as in the law of England, and that in consequence of that decision the defenders cannot maintain the defence of common employment.

LORD KINNEAR—I agree. I have no doubt whatever that the intention of the House of Lords in *Johnstone* v. *Lindsay* was to overrule the case of *Woodhead* as part of the Scots as well as of the English law.

The Court approved of the issue lodged by the pursuer for trial of the cause, and remitted to Lord Wellwood.

Counsel for the Pursuer—Sym—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for the Defenders—C. S. Dickson—Deas. Agent—James Watson, S.S.C.

Saturday, February 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

M'NAB (M'NICOL'S EXECUTRIX) *v.* MITCHELL AND OTHERS.

Succession—Testament—Failure of Trustees to Follow Testator's Directions—Quod fieri debet infectum valet.

A testator directed his trustees, upon the youngest of his two sons attaining majority, to determine whether in their opinion it was prudent to give both or either the uncontrolled command of their interest in his estate. If the trustees thought it imprudent in the case of either son to entrust him with uncontrolled command of his share, they were directed to place his share under such restrictions as they might deem advisable, giving him an alimentary liferent of the whole or of part only. In the event of both his sons dying without leaving heirs of their body before his estate was completely exhausted, the testator directed that what remained should be divided equally amongst the next-of-kin of himself and his wife. After the death of the testator, upon the younger of his sons attaining majority, the trustees assigned and made over his share to N. M., the elder son, who was then under curatory. It was set forth in the narrative of the deed of assignation that the trustees had considered that N. M.'s share should be placed under restrictions agreeable to the provisions of the settlement, but that a *curator bonis* having been appointed to N. M., the necessity for further interference on their part had been superseded. N. M. died unmarried and intestate. He was predeceased by his brother, who also died unmarried.

In a multiplepoinding, raised after N. M.'s death, it was *held* that the trustees having decided that N. M.'s share ought to be placed under restrictions, were bound by the terms of the settlement to have restricted his right to an alimentary liferent; that the share must be dealt with as if they had done so; and therefore that it fell to be divided equally among the next-of-kin of the testator and widow.

Donald M'Nicol died in the year 1888, leaving a trust-disposition and settlement whereby he conveyed his whole estates to the trustees therein named. After pro-