

the fourth clause of the settlement, and therefore there is no room for the argument that it may have been the intention of the trustor 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 life interest 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 Inver-

ness 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

taken on commission. The prejudice which may arise from proceeding at a time when the pursuer cannot go into the witness-box will fall upon himself rather than upon his opponent.

LORD STORMONTH DARLING—I concur.

LORD ADAM and LORD M'LAREN were absent.

The Court granted the pursuer's motion.

Counsel for the Pursuer—Munro. Agents—Steedman, Ramage, & Bruce, W.S.

Counsel for the Defender—W. Æ. Mackintosh. Agent—Arch. Menzies. S.S.C.

Tuesday, March 14.

FIRST DIVISION.

MITCHELL, PETITIONER.

*Parent and Child—Custody of Illegitimate Child—Mother's Right to Custody—Child Brought up by Another Person at that Person's Expense—Right of Mother's Nominee to Custody—Custody of Children Act 1891 (54 and 55 Vict. c. 3), secs. 1 and 3.*

A petition by a mother for the custody of her illegitimate female child was opposed by the person in whose custody the child was at the date of the petition, and who had practically seen to and paid the expense of the upbringing of the child. The Court, having regard to the welfare of the child and the whole circumstances, *refused* to make an order for the delivery of the child to the mother or to persons nominated by the mother.

The Custody of Children Act (54 and 55 Vict. c. 3), section 1, enacts—"Where the parent of a child applies to the High Court or the Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may in its discretion decline to issue the writ or make the order." Section 3—"Where a parent has (a) abandoned or deserted his child; or (b) allowed his child to be brought up by another person at that person's expense, or by the guardians of a poor law union, for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child."

This was a petition at the instance of Mrs Margaret M'Donald or Mitchell, wife of and residing with John Mitchell, labourer, 4 Niddry Street, Edinburgh, with the consent and concurrence of her husband, praying for the custody of her illegitimate child.

The petitioner averred that on 2nd June 1897, while in the service of Henry T. Blair, Avontoun House, Linlithgow, she gave birth to an illegitimate female child, Elizabeth Aitken; that on 2nd July 1897 she placed the child in the custody of Mr and Mrs Cunningham, Maddiston, Polmont, where it remained till July 1904; that in the beginning of July 1904 it was sent at the request of Miss Elizabeth Wright (Mr Blair's housekeeper) to Avontoun House to reside with her during the holidays; that on the termination of the holidays Mr Cunningham requested Miss Wright to allow the child to return to him, but she declined to do so; that since then the petitioner had made repeated applications to Miss Wright for the custody of her child, but she refused to give it up.

The petitioner further averred that on 23rd August 1904 she was married to her present husband; that she had now a house of her own and was anxious to get the custody of her child, and that her husband was also desirous of having the child brought up in their home.

In these circumstances she prayed the Court to find her "entitled to the custody of the said child" and "to ordain the said Miss Elizabeth Wright to deliver up the said child to the petitioner, or to those having her authority, . . . to remain in the custody of the petitioner."

Miss Wright lodged answers, in which she made, *inter alia*, the following averments:—"The petitioner is a cousin of the respondent, and when petitioner found herself with child she appealed to the respondent for assistance. The respondent, out of compassion and sympathy for the petitioner, made all the arrangements for the birth of said child, paid for the medical and nursing attendance, and provided all the necessary clothing. She further arranged with the petitioner that the said child should be brought up and maintained under her care and at her expense. The respondent further employed her law-agents to take proceedings against the alleged father of the child, which they did, and obtained decree for alimony against him. He has been paying occasionally from 5s. to 8s. a month under said decree. The respondent paid her law-agents their charges in connection with said proceedings. In accordance with the foresaid arrangement as to the custody and maintenance of said child, the respondent placed the child when a month old in the custody of the said Mrs James Cunningham, paying her £1 a month from July 1897 to July 1904, in all £84. The respondent has also expended about £5 a year on the child's clothing. The petitioner has paid nothing towards said child's maintenance. The respondent frequently saw the child at Mrs Cunningham's and each year had her for a short holiday with herself at Avontoun House. . . . On 31st March and 11th April 1902 the petitioner and respondent entered into a minute of agreement, which is produced and referred to. By said agreement the petitioner, *inter alia*, agreed to allow the child to remain under the custody and