Tuesday, May 16.

SECOND DIVISION.

[Lord Pearson, Ordinary.

VALLERY *v.* ROBERT M'ALPINE & SONS.

Process—Jury Trial or Proof—Action of Damages for Personal Injuries — Employers' Liability Act 1880 (*43 and 44 Vict. cap.* 42)*—Discretion of Lord Ordinary in Determining Procedure — Evidence Act* 1866 (*29 and 30 Vict. c.* 112), *sec.* 4.

An action of damages for personal injuries brought under the Employers' Liability Act 1880 in the Sheriff Court is, when transmitted to the Court of Session under sec. 6 (1) of the Act, in the same position, as regards the question whether it shall be sent to proof or jury trial, as an action originally raised in the Court of Session.

Process—Jury Trial or Proof—Action of Damages for Personal Injuries—"Special Cause"—Irrelevancy of Averments—Discretion of Lord Ordinary—Evidence Act 1866 (*29 and 30 Vict. cap.* 112), *sec.* 4.

The fact that in the opinion of the Lord Ordinary the averments in an action of damages for personal injuries were in some respects of doubtful relevancy, and that there might be difficulty in distinguishing between the averments which were relevant and those which were not, *held* to be a "special cause" entitling him, in the exercise of his discretion, to send the case to proof instead of jury trial, a discretion in the exercise of which the Court would not interfere unless on very strong grounds.

The Evidence Act 1866 (29 and 30 Vict. cap. 112) provides, sec. 4—"If both parties consent thereto, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section first hereof in any cause which may be in dependence before him notwithstanding of the provisions contained in 69 Geo. IV. cap. 120, sec. 28, and the provisions in 13 and 14 Vict. cap. 36, sec. 49; and the judgment to be pronounced by him after such proof shall be subject to review in the like manner as other judgments pronounced by him."

The former of the enactments referred to in the above section (6 Geo. IV. cap. 120, sec. 8) enumerates the causes appropriate to the Jury Court, and included "actions on account of injury to the person." The latter, (13 and 14 Vict. cap. 36), sec. 49, provides that "it shall be competent for the Court to allow proof on commission in any of such enumerated causes where the action is not an action for libel, or for nuisance, or properly and in substance an action of damages."

Joseph Vallery, labourer, brought an action in the Sheriff Court of Lanarkshire, at Glasgow, against Robert M'Alpine & Sons, contractors, in which he sued them for £160, 11s. under the Employers' Liability Act 1880 for damages for personal injuries sustained by him while working in their employment.

The action was on a note at the instance of the defenders transmitted to the Court of Session under the provisions of sec. 6, sub-sec. 1, of the Employers' Liability Act 1880, and sec. 9 of the Sheriff Courts (Scotland) Act 1877.

The pursuer moved the Lord Ordinary to adjust issues with a view to the trial of the cause before a jury. The defenders opposed this motion, and moved that the cause be tried by proof before the Lord Ordinary. On 14th March 1905 the Lord Ordinary refused the pursuer's motion and ordered a proof to be taken before him.

Opinion.—"My opinion is that this case ought to go to proof. I rest that opinion on the ground that in some respects the averments are of doubtful relevancy, and further, that there may be difficulty in distinguishing between the averments which are relevant and those which are not. In this I find sufficient special cause for not sending the case to trial."

The pursuer reclaimed, contending that he was entitled to have the case tried by a jury.

Argued for the pursuer and reclaimer—Actions of damages for personal injury had always been considered specially jury cases—Court of Session Act 1825 (6 Geo. IV, c. 120), sec. 28, and Court of Session Act 1850 (13 and 14 Vict. c. 36), sec. 49—and it was only by consent of parties, "or if special cause be shown"—Evidence Act 1866 (29 and 30 Vict. c. 112), sec. 4—that it was competent to the Lord Ordinary to allow a proof. The fact that in some respects the averments might be of doubtful relevancy, or that there might be difficulty in distinguishing those which were relevant from those which were irrelevant was not a "special cause." The Court therefore were not being asked to interfere with the exercise of the Lord Ordinary's discretion, for in the present case he had none to exercise—*M'Avoy, &c.* v. *Young's Paraffin Oil Co., Limited*, November 5, 1881, 9 R. 100, 19 S.L.R. 61; *Morrison* v. *Baird & Co.*, December 2, 1882, 10 R. 271, 20 S.L.R. 87; *M'Intosh* v. *Commissioners of Lochgelly*, November 3, 1897, 25 R. 32, 35 S.L.R. 50; *M'Mullen* v. *Newhouse Coal Co.*, May 27, 1896, 23 R. 759, 33 S.L.R. 598; *M'Nally* v. *King's Trustees*, October 27, 1886, 4 R. 8, 24 S.L.R. 15.

Argued for the defenders and respondents — This case was for all purposes to be regarded as a case originating in the Court of Session. A judge of that Court had already exercised his discretion as to the mode of trial, and it was settled law that the Court would not interfere with that discretion except upon the most serious grounds—*Weir* v. *Grace*, March 10, 1898, 25 R. 739, 35 S.L.R. 566; *Edinburgh Railway Access and Property Co.* v. *John Ritchie & Co.*, January 7, 1903, 5 F. 299, 40 S.L.R. 244. Cases arising out of appeals from the Sheriff Court for jury trial under the 40th section of the Judicature Act 1885, where the

Court had allowed jury trials, were hardly in point owing to the possible reluctance of the Court to send the case back to the Sheriff Court for proof, and also to the fact that the allowance of jury trial in them did not involve the overruling of the discretion of a judge of the Court of Session. Difficulty as to the relevancy or irrelevancy of averments was distinctly a "special cause," and the case was peculiarly one suited for proof —*Jack* v. *Rivet, Bolt, and Nut Co., Limited*, March 10, 1904, 6 F. 572, 41 S.L.R. 429; *M'Nab* v. *Fyfe*, July 5, 1904, 6 F. 925, 41 S.L.R. 736.

LORD JUSTICE-CLERK—There is no doubt that an action such as the present need not necessarily be sent to trial before a jury. After the action has been removed to the Court of Session under section 6 of the Employers' Liability Act it is for the Lord Ordinary to determine the mode of trial, as in the case of an action originally raised in the Court of Session. In the present instance the Lord Ordinary has exercised his discretion by sending the case to proof, and I should be very slow to interfere with what he has decided in the exercise of his discretion. I do not say that there might not be cases in which the Court would interfere, but it would require to be on very strong grounds. Here no cause has been shown for altering the decision of the Lord Ordinary.

LORD KYLLACHY and LORD KINCAIRNEY concurred.

The Court adhered.

Counsel for the Reclaimer—A. J. Young. —W. Thomson. Agent—W. I. Haig Scott, S.S.C.

Counsel for the Respondents — J. R. Christie. Agents—R. R. Denholm & Kerr, S.S.C.

Saturday, May 20.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

THE SINGER MANUFACTURING COMPANY *v.* CLELLAND.

Process—Master and Servant—Workmen's Compensation Act (60 *and* 61 *Vict. c.* 37)*—Transmission of Process—Act of Sederunt of* 3*rd June* 1898.

The Act of Sederunt of 3rd June 1898, which regulates procedure under the Workmen's Compensation Act 1897, by section 9 (*f*) makes certain regulations as to printing with this proviso—"Provided always that it shall not be necessary to print any document except the case without a special order from the Court, and provided also that either party may move for an order on the sheriff-clerk to transmit the process."

In a stated case under the Workmen's Compensation Act 1897 the Court *refused* a motion for an order on the sheriff-clerk to transmit the process, made on the ground that there was appended to the Sheriff's findings a note which might in certain circumstances be useful in deciding the case.

This was a stated case in an arbitration under the Workmen's Compensation Act 1897 between the Singer Manufacturing Company, Kilbowie, Clydebank, Dumbartonshire, and Joseph Clelland, sawyer, 1 Elgin Street, Clydebank, brought from the Sheriff Court at Dumbarton. The arbitration was at the instance of the Company to review the weekly payments made by them to Clelland, and to have the same ordered to be ended. The Sheriff-Substitute (BLAIR) reduced the compensation payable to one penny per week until further orders of Court and found the Company liable in expenses. The Company appealed.

Upon the case appearing in the Single Bills counsel for the appellants asked for an order on the Sheriff-Clerk to transmit the process, and referred to the Act of Sederunt of 3rd June 1898 (*quoted in the rubric*). It was explained that a note appended to the Sheriff-Substitute's decision might, in the opinion of the appellants, be of use in the decision of the case under certain circumstances.

Counsel did not appear for the respondent.

The Court (LORD PRESIDENT, LORD ADAM, LORD M'LAREN, and LORD KINNEAR) refused the motion.

Counsel for the Appellants—Constable. Agents—J. W. & J. Mackenzie, W.S.

Agents for the Respondent—Mackay & Young, W.S.

Saturday, May 20.

SECOND DIVISION.

CLEMENTS *v.* THE LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF THE CITY OF EDINBURGH.

Expenses—Jury Trial—Skilled Witnesses —Case Settled before Trial—Investigations Previous to Trial—Judge's Certificate—A.S. 15*th July* 1876.

The Act of Sederunt, 15th July 1876, provides that when it is found necessary to employ skilled persons to make investigations previous to a trial or proof in order to qualify them to give evidence thereat, such additional charges for the trouble and expense of such persons shall be allowed as may be fair and reasonable, "provided that the judge who tries the cause shall, on a motion made to him either at the trial or proof or within eight days thereafter, . . . certify that it was a fit case for such additional allowance."

An action was settled before trial on the basis of a payment to one of the parties by the other of a sum of money and his expenses.