be kept strictly apart. On these grounds I have no hesitation in holding that this question ought to be answered in the negative.

LORD PEARSON—I concur in the opinion which has been delivered. The sum of £4000 was provided by the antenuptial contract of marriage of Mr and Mrs Ramsay. There having been children born of the marriage, the spouses some years afterwards executed a mutual settlement affecting the estates of both, and bearing on the face of it to exercise certain powers of appointment vested in these spouses. The question is whether, in addition, it exercised the power of appointment which is here in question. That depends on the intention of parties to be gathered from the deed as a whole, qualified only by this, that the *onus* of proof lies upon the party who maintains that general words in a testamentary disposition are not enough to make an effectual appointment.

The mutual will which is founded on as containing the exercise of the power is entitled a mutual trust-disposition and settlement and deed of appointment by Mr and Mrs Ramsay. I do not know that one can draw any inference from the printed title, but the deed itself read as a whole demonstrates that there was no intention on the part of the spouses to exercise this particular power of appointment regarding the £4000. As has been pointed out, this deed is a composite deed. It is a mutual will operating upon the combined estates of the two parties to it, and it is also a deed of appointment. It is, I think, noticeable that the two parts of the deed are unusually sharply separated. The part which constitutes the mutual will between the spouses closes with the nomination of trustees to be executors of the two parties, a reservation of their own liferent, and a declaration that so far as the will is not altered or modified it should be effectual although found undelivered at their death. Then follows a reference to the antenuptial contract of marriage entered into by the spouses, and a narrative of the clauses of the contract having reference to two provisions for £3000, and an additional provision for a sum which turned out to be £1518, 18s. 11d. It seems to me that the fact that in exercising their power of apportionment special reference is made in the deed to these sums, excludes the idea that the parties had any intention of making an apportionment of any other sum. I assent to the opinion of Lord Ardwall as to the difficulty which lies in our way in holding that this clause of the mutual deed, as to the residue and remainder of the trust estate of the spouses, can be construed as including the provision here in question. I think it would only be by an undue stretch of language that that provision, which the husband was not bound to satisfy until after his wife's death, could be held to be part of the residue which is directed to be paid under the residuary clause of the settlement. I therefore concur in the proposed judgment.

LORD JUSTICE-CLERK—I am of the same opinion. It is a settled matter that a general disposition, such as we have here in the first part of the deed, may in certain circumstances be a sufficient and valid exercise of a power of apportionment. But I must say that I cannot see how this can apply to a case in which the parties themselves have expressed their intention of exercising the power of appointment, and have exercised it as regards certain funds. It is most unlikely that a deed making a certain allocation should apply inferentially to a sum not included in the allocation. I agree in all that your Lordships have said, and have no doubt or difficulty in holding that we must answer the question as suggested.

LORD LOW and LORD DUNDAS were sitting in the Valuation Appeal Court.

The Court answered the question in the negative.

Counsel for the First, Second, and Third Parties—Constable, K.C.—Dunbar. Agent—Thomas Henderson, W.S.

Counsel for the Fourth Parties—Munro—Maitland. Agent—John N. Rae, S.S.C.

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*Thursday, March* 4.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## THE ELLERMAN LINES, LIMITED *v.* THE CLYDE NAVIGATION TRUSTEES AND OTHERS.

## GLASGOW AND NEWPORT NEWS STEAMSHIP COMPANY, LIMITED *v.* THE CLYDE NAVIGATION TRUSTEES AND OTHERS.

*Process — Summons — Joint and Several Liability — Defenders Sued Jointly and Severally, or Severally, for Lump Sum—Joint Delinquents—Competency.*

A shipowner brought an action of damages against different defenders for an injury to his vessel which he alleged was due to the combined result of their negligent actings. The action concluded against the defenders "jointly and severally or severally" for £1500.

*Held* that as the pursuer did not ask the Court to apportion liability between the different defenders, but sought decree against each or all, as the case might be, for the whole sum sued for, the action was competent, and proof allowed.

*Process—Appeal—Sheriff—Appeal for Jury Trial — Appeal not Taken within Six Days of Interlocutor Allowing Proof — Competency — Sheriff Courts (Scotland) Act* 1907 (*7 Edw. VII, cap.* 51), *sec.* 30—*A.S., 5th January* 1909, *sec.* 4 (5).

When an interlocutor allowing proof has been pronounced in the Sheriff

Court, parties must elect at once whether they will come to the Court of Session, under the 30th section of the Sheriff Courts (Scotland) Act 1907, for jury trial or not, as no appeal under that section can be taken after the expiry of six days from the final allowance of proof.

On 23th January 1909 defenders in a Sheriff Court action, proof in which had been allowed by the Sheriff on 3rd December 1908, required the cause to be remitted to the Court of Session, under section 30 of the Sheriff Courts (Scotland) Act 1907, for jury trial. On the case being so remitted they craved the Court, as the case was admittedly unsuitable for that form of trial, to remit it to a Lord Ordinary for proof.

*Held* that as the appeal had not been taken within six days of the final allowance of proof in the Sheriff Court, it was incompetent, and fell to be dismissed.

*Observations* (*per* the Lord President) as to the procedure in appeals under sections 28 and 30 of the Sheriff Courts (Scotland) Act 1907.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30, enacts—"In cases originating in the Sheriff Court . . . where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof, . . . it shall within six days thereafter be competent to either of the parties who may conceive that the case ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a Judge of the Division before whom the cause depends."

The A.S., 5th January 1909, enacts, section 4—"Applications for remission of causes to the Court of Session, under the provisions of sections 5 and 30 of the said Act, shall from the date hereof be made in the following manner:—". . . 5. Upon the appearance of the cause in the Single Bills of the Division to which it has been remitted, parties will be heard upon any motion made to retransmit the cause to the Sheriff Court, or directed against the competency of the remission, and if the motion to retransmit be refused, and the remission held competent, the mode and course of further procedure in the cause—including all questions as to its competency or relevancy—will thereafter be determined by the said Division in the Single Bills or in the Summar Roll as they may think fit."

The Ellerman Lines, Limited, 12 Moorgate Street, London, brought an action against (1) the Trustees of the Clyde Navigation, Glasgow, and (2) John Brown & Company, shipbuilders, Clydebank, in which they craved decree against the defenders "jointly and severally, or severally," for £1500 damages in respect of a collision between the s.s. "City of Benares," belonging to them (the pursuers), and the s.s. "Almora," belonging to the Glasgow and Newport News Steamship Company, Limited, which collision they averred was due to (1) the faulty navigation of a tug having in tow a flotilla of barges belonging to the first defenders, the Clyde Navigation Trustees, and (2) to the fault of the other defenders, John Brown & Company, in having moored the cruiser "Inflexible" (then in course of construction by them) in the river Clyde, contrary to the bye-laws and regulations for the navigation of the river.

[A similar action was raised by the Glasgow and Newport News Steamship Company, Limited, the owners of the s.s. "Almora," concluding against the said defenders "jointly and severally, or severally," for £6000 damages in respect of the same collision. The two cases were heard and disposed of together.]

The following narrative is taken from the note (*infra*) of the Sheriff:—"The pursuers aver that their steamship 'City of Benares,' of 4321 tons net register, was proceeding down the Clyde on Tuesday, 26th November 1907, on a voyage for Calcutta *via* Liverpool, under the charge of a licensed pilot and accompanied by two tugs. As the ship was nearing the shipyard of the defenders, John Brown & Company, Limited, the s.s. 'Almora' was observed coming up the river on her own side. At Brown & Company's yard a new cruiser, H.M.S. 'Inflexible,' was being fitted up and was moored at the jetty on the west side of Messrs Brown's dock basin, the cruiser projecting a considerable distance into the river, so as to obstruct the fairway and impede the navigation of vessels passing up and down the river. When the 'City of Benares' was close to Messrs Brown & Company's yard the steam tug 'Clyde,' having in tow a string of flats, all belonging to the Trustees of the Clyde Navigation, emerged from said dock basin on the east side of the 'Inflexible,' and headed across the river to the south side. In order to clear the flats the helm of the 'City of Benares' was ported, and her engines, which had been working at slow, were put full speed ahead for a moment to assist the helm, and a single blast was sounded on the whistle, and in a few seconds the engines were stopped. She was then well over to the north side of the channel. As soon as it was seen that she would clear the flats the engines were again put at slow ahead. When the 'City of Benares' was approaching the 'Inflexible,' the 'Almora' was observed angling across the river, and the 'City of Benares' blew three blasts and reversed her engines full speed. Notwithstanding these precautions on the part of the 'City of Benares,' the 'Almora' continued to come over towards the north bank and collided with the 'City of Benares,' which sustained serious damage. The pursuers aver that the collision was directly attributable to (1) the fault or negligence of those in charge of the tug 'Clyde' in suddenly emerging from the dock basin without warning, and crossing

the river so as to get in the way of the 'Almora,' in breach of the bye-laws and regulations for the navigation of the river, particularly articles 14, 18, and 19 thereof, and of the Regulations for Preventing Collisions at Sea, particularly articles 23 and 25; and (2) the fault or negligence of the defenders, John Brown & Company, in having moored the 'Inflexible' inside the lines of the river walls, so as to obstruct the navigation of the fairway, in violation of article 6 of said bye-laws and regulations for the navigation of the river."

The defenders in both cases pleaded, *inter alia*, (1) the action is incompetent.

On 16th June 1908 the Sheriff-Substitute (FYFE) sustained the first plea-in-law for each of the defenders and dismissed the action.

*Note.*—"The question here raised is whether it is competent in one action to sue two defenders jointly and severally for a money claim of damages.

"Upon a consideration of the authorities I have come to the conclusion that the present action is not competently laid, unless it can be brought within the ruling of the House of Lords in the case of the *Duke of Buccleuch and Others* v. *Cowan and Others*, November 20, 1876, 4 R. (H.L.) 14.

"I am of opinion that the present case does not fall within that judgment, and accordingly that this action must be dismissed.

"I am not deciding nor offering any opinion upon an entirely separate question, whether if two such actions had been separately and relevantly laid, one against each defender, the two actions would have been conjoined for the purposes of procedure. That is a process question which does not here arise.

"The question which does arise is, whether each of these defenders may be ordained to pay the whole claim of the pursuers, for if decree were granted as concluded for, there is no doubt the pursuers would be entitled to operate it in full against any one of them.

"I do not think that in this process I could competently apportion liability for the collision between pursuers' vessels, and assess that in an apportioned money decree, which in effect is what pursuers ask me to do.

"If I could grant decree at all, it could only be a joint and several decree. No doubt the craving is for decree jointly and severally, or severally, but I do not read that as meaning that I could grant decree against each defender for a sum of money appropriate to his share of the blame for the occurrence of the casualty which led to the damage. I take the craving rather to mean that, if I found both defenders to have been in fault, I should grant a decree against them jointly and severally for the entire amount of damage proved, but that if I found only one of the defenders to have been in fault, I should grant decree against that defender only, but also for the entire amount, and that in any event there should be only one decree for one sum. Upon the authorities I am of opinion that whether a joint and several craving is competent is a question of circumstances, and that there is no direct authority covering the present case. The case referred to in the House of Lords was an action of declarator and interdict. The Duke of Buccleuch and other riparian proprietors on the river Esk sought to interdict a number of paper-makers, who had works on the river bank, from polluting the stream. There was no craving for a money decree against any of the defenders. It was asked only that they should be interdicted from discharging into the river Esk, from their respective paper-works, any impure matter whereby the stream might be polluted. In that case not only did the House of Lords not decide that it is competent to sue for damages in a joint and several action, but they all commented on the exceeding inconvenience of such a course, and the Lord Chancellor practically went the length of expressing a pretty plain opinion against the competency of such a damages claim.

"I think it is clear upon the authorities that there can only be a joint and several process to remedy a common wrong if there is a distinct relationship between the actings of the parties.

"In the Esk case the pursuers had a common interest in the stream, namely, the preservation of its purity and amenity.

"They suffered from a common grievance, created by the action of defenders in the same trade, conducted in the same way, and conducing to the same injurious result, and on this ground it was held competent to seek to restrain by one judicial decree all who contributed to the pollution.

"There was no question in the Esk case of possible burden being laid upon any one defender in excess of that laid upon any other defender, for interdict only was sought. None of the defenders was asked to put his hand into his purse. In the present case it is not averred that the two defenders were engaged in any common duty, or in executing any common work, or that what these defenders did was in any way co-related. Nor is it said that they had any common duty towards the pursuer or any duty towards each other.

"The only averment is that each defender was guilty of contravening some of the navigation rules, but not each the same rules. The pursuers' complaint against these defenders is, not that they did jointly commit one fault, but that each did commit quite separate and distinct faults.

"The possible hardship to one or other of the defenders in this action is so very obvious, that I am not prepared, in the absence of direct authority constraining me to do so, to recognise the competency of the joint and several craving in the circumstances set forth in this record."

The pursuers appealed to the Sheriff (GARDNER MILLAR), who on 3rd December 1908 recalled his Substitute's interlocutor, repelled the defenders' first plea-in-law, and allowed a proof before answer.

*Note.*—[*After the narrative, ut supra.*] "Two preliminary pleas are stated by each of the defenders, viz., that the action is

incompetent, and that pursuers' averments are irrelevant and insufficient to support their pleas-in-law, and I assume that in considering these pleas I must accept the statements of the pursuers as being true.

"The first plea—that upon the competency of the action—rests upon the defenders' argument that we must look at the quality of the act itself, and not the result, as the determining factor with reference to the responsibility of the defenders, and before they can be held to be liable there must be a common duty towards the subject or a common act on the part of the defenders, and as that is not the case here, it is incompetent to sue them in the one action; moreover, that it would be impossible in the present action to competently apportion liability for the collision, and assess that in an apportioned money decree, which is in effect what the pursuers ask the Court to do. The answer of the pursuers is that as they aver delict on the part of each of the defenders, and that the joint result of their delinquency was the injury to the pursuers' vessel, they are entitled to sue the defenders, jointly and severally, for damages for that injury. In maintaining that plea the agent for the pursuers referred to a large number of cases in which two or more defenders were sued for separate delicts resulting in an injury to the pursuers, and in which a joint and several decree was craved. I have looked over these cases and I think that in the majority of these actions the cases were decided on other grounds. But in several cases, although such a plea might have been raised, the actions were not questioned on that ground.

"Lord Watson in the case of *Palmer* v. *Wick and Pulteneytown S.S. Company*, 21 R. [H.L.] 39, points out that originally in the Court of Session the largest number of cases where a joint and several decree was asked consisted of actions for delicts proper, as, for instance, claims for reparation for manslaughter, spuilzie, and other grave delinquencies, and that the rules of procedure in these cases had been extended to claims *ex quasi delicto*. Taking the case of real delicts, such as Lord Watson refers to, I should think it clear that if two persons, totally unconnected, by quite independent wrongful acts compassed the death of anyone, they would be liable, jointly and severally, in an action of assythement at the instance of the next-of-kin. Extending the rule to quasi-delicts it follows that if two quite independent parties commit delinquencies producing a common result which ends in injury to anyone, then they also would be liable, jointly and severally, for the damage which they had caused. The pursuer in such an action would have to prove that each of the defenders had committed a fault, and that the common result of these faults necessarily ended in injury to him, and if he did so I cannot see why his claim should not be sustained. If he were compelled to sue the defenders in separate actions, averring in each case the separate fault of each, then the answer of the defenders would be that the action was not relevant, because it was not their fault alone which caused the accident, but their fault in addition to the fault of another who was not a party to the suit. As to the question of ascertaining the fault of each defender, and assessing the separate damages caused by that fault, I think the majority of the cases imply that the pursuer is entitled to go against any or all of the wrongdoers for the full amount of damage caused by the faults, leaving them to work out their right of relief, if they have any, among themselves. I agree with the Sheriff-Substitute that the case of the *Duke of Buccleuch* v. *Cowan*, 4 R. [H.L.] 14, does not have much bearing on this case, because that was an action of interdict against various parties polluting a river, and not an action of damages. The remarks of the Lord Chancellor as to actions of damages do not touch the question at issue here, as what he was commenting on was the inconvenience of several pursuers raising one action of damages against several defenders for delinquencies of the same kind but varying in extent, and the difficulty of assessing the claims for damage in such a case. But that is not the case in the present action. Upon this question of competency I would refer to the following cases—*Hamilton* v. *Turner and Others*, 5 Macph. 1086; *Palmer* v. *Wick and Pulteneytown S.S. Company*, 20 R. 275, and 21 R. [H.L.] 39; *Cowan* v. *Dalziel and Others*, 3 F. 918; *Douglas* v. *Hogarth & Gillespie*, 4 F. 149; and *Fleming* v. *Gemmell*, 1908 S.C. 340. . . .

"On the whole matter I think that the pursuers are entitled to proof."

The defenders in both actions appealed (leave to appeal having been granted by the Sheriff), and argued—The negligence of each of the defenders was distinct from that of the other, and therefore it was incompetent to sue them jointly and severally, or severally, in one action. Moreover, an action in which the Court was asked to apportion a lump sum between defenders sued jointly and severally (as the Court was really asked to do here) was incompetent.

Counsel for respondents were not called on.

LORD PRESIDENT—I have no doubt here that the course taken by the learned Sheriff was right, and that there must be a proof in these actions. The learned Sheriff-Substitute dismissed the actions as incompetent, but I cannot think that he would have done so if he had been aware of the case that was recently decided in this Court, the case of *Fleming* v. *Gemmill* (1908 S.C. 340), where your Lordships held that certain persons who had, from separate properties, polluted a stream, were liable jointly and severally in damages for the death of certain animals which had been killed as the result of drinking the polluted water. That case, I think, was the necessary sequence of what was laid down in the case long ago of the *Duke of Buccleuch* v. *Cowan* (5 Macph. 214), and I cannot help thinking that the learned Sheriff-Substitute has rather mixed up a certain other class

of cases which have nothing to do with this one.

Really, I do not think there is any complication about the matter. Of course, different pursuers cannot all be congregated into one action, unless they are suffering from one common wrong. That is not the case here, where we are dealing with only one pursuer in each case. There is a good illustration of that in the case of *Killin* v. *Weir* (7 F. 526). Well, then, the next proposition is that one pursuer cannot sue two or three defenders for separate causes of action, and put into his summons a conclusion for a slump sum, and then, by means of putting in the words jointly and severally, or severally, as the case may be, ask the Court to split up this slump sum of damages and give a several decree against each for what the Court thinks proper. An illustration of that is *Barr* v. *Neilsons* (6 Macph. 651), and the other cases that followed upon it. But where you have joint delinquents, it is quite clear, I think, that the pursuer can sue these joints delinquents, and that the meaning of a conclusion for a sum of damages jointly and severally, or severally, as the case may be, is that if he is able to show that they are joint delinquents he will get a joint and several decree against both, which he may make good against either, leaving the person who is so distressed to make good his claim of relief if he can. With that the pursuer has nothing to do; but if, on the other hand, he does not prove that they are both delinquents, but that only one is a delinquent, then he may get a decree for the same sum of damages against the one who, upon the proof, is shown to be the delinquent.

That is the case here. I say nothing here as to what is going to happen in this case, but I find here a perfectly good averment against these parties as joint delinquents. The damage that these pursuers suffered from was a collision in the river between the vessel of one of them and the vessel of the other. But the delinquency which led to the collision was not the behaviour of that other vessel, against which each pursuer alleges no fault, but was, he says, the effect of two combined delinquencies. The delinquency alleged against John Brown & Co. is that by putting out a vessel which they were building in a place where it is alleged it can be shown a vessel had no business to be, they narrowed the fairway of the river to a large extent. The delinquency of the Clyde Trustees was that a tug for which they are responsible navigated wrongly across the bows of the vessel of one of the pursuers and forced it out of its proper place. Well, of course, that may be what one may call the more proximate cause of the collision; but upon the facts it is quite possible that the collision might never have happened if it had not been that the manœuvring ground that was left was wrongeously restricted by the action of the other defenders.

Of course, it is quite understood that I am talking in necessary ignorance as to what the real facts may turn out to be. I am merely taking the averment as made, and that seems to me a perfectly simple and a perfectly good averment of joint delinquency. If made out, it means a decree against both parties jointly and severally for the damages which are due. It may be upon the facts that it is not made out, and that neither party was to blame, in which case the result will be absolvitor; or it may be the fact that the collision was truly brought about by the action of the tug, and that the position of this other vessel in the river had really nothing to do with it, and in that event there will be a several decree against the Clyde Trustees. I think the case must go back to the Sheriff for further procedure.

LORD M'LAREN—I am of the same opinion. I think the form of the conclusions of the action (under which the defenders are sought to be made liable "jointly and severally or severally") is correct. Indeed, if the circumstances are such as to raise liability which may be maintained against two parties, but may also be maintained against one of them separately, I know of no other form of conclusion except what has been taken here, liability jointly and severally, or severally. But then the real question is not as to the form of the conclusion, but as to the facts upon which that conclusion is based. If, for example, it could be shown in either of the cases that the pursuer had sustained damage—I will suppose at two different times, say in the morning of the day and again in the afternoon, and when only one defender's vessel was present—you could not possibly have one action against both defenders, because that would be a case of unconnected wrongs. In this case, however, there was only one act of damage done to the "Almora," and only one to the other vessel the "City of Benares" arising out of the same set of facts and circumstances, and the case is that the flotilla of the Clyde Navigation Trustees and the battleship being built by John Brown & Co., which being undelivered was still their property, were each in a wrong position and contributed towards this accident.

Now the argument against the action is that it is not shown that the two defenders were in intention joint contributors—that they did not combine for the purpose of wrecking the "Almora" or the "City of Benares." That is what it comes to. But then the hypothesis of the case is that neither of the parties intended to do any wrong. It was pure fault or negligence, not intentional wrong, and where the ground of action is negligence, and both parties are negligent, the idea of concert seems to me to be altogether excluded. Well, then, I cannot see that when two persons by their separate negligence — it might be, for instance, a master and a servant who were negligent in different ways — if they both contribute to a common result, I cannot see why they should not be sued in one action and under joint and several conclusions. The case of the *Duke*

*of Buccleuch* v. *Cowan and Others* (5 Macph. 214) seems to me a clear authority upon that point, and the recent case in this Division referred to by your Lordship applies the same principles under somewhat different conditions.

I therefore agree with the Sheriff that there is no good objection to the competency, and I think that any objection to the relevancy that might be taken is obviated by the amendment that the Dean of Faculty undertook to make.

LORD KINNEAR—I agree with your Lordship. I think that the rule settled by the case of *Neilsons* v. *Barr* (6 Macph. 651), and subsequently by that of *Sinclair* v. *The Caithness Flagstone Company* (25 R. 703), is perfectly sound, for the reasons your Lordship has given, and that the present case is distinguishable from both. This is not an action in which two separate people are sued for disconnected wrongs. The pursuer complains of one wrong, to wit, an obstruction in the river, to which he alleges that both defenders contributed. I only add that I quite agree with the learned Sheriff-Substitute that he cannot in this action apportion liability as between the two defenders so as to lay one part of the liability upon the one, and another upon the other, because the action concludes for a sum representing the entire loss and damage suffered by the pursuer. And if he brings that action against both or either, he is entitled to a decree for the whole amount either against both jointly and severally, or it may be against one severally, but he does not ask the Court to apportion liability as between the two, and I agree that it would not be competent to do so.

LORD PEARSON—I also agree.

The Court affirmed the interlocutor of the Sheriff, and dismissed the appeals.

Thereafter on 28th January 1909 the defenders in both actions lodged minutes requiring the cases to be remitted to the First Division of the Court of Session.

On the cases appearing in the Single Bills, counsel for the appellants stated that although the cases had been marked for remission in terms of section 30 of the Sheriff Courts (Scotland) Act 1907, they were unsuitable for jury trial, and he accordingly craved the Court to remit both cases to a Lord Ordinary for proof.

Counsel for the respondents objected to the competency of the appeals, on the ground that it was incompetent to appeal under section 30 of the Sheriff Courts Act 1907 (which dealt with appeals for jury trial) in order to ask not a jury trial but a proof, and thus get behind the Act—*Dennistoun* v. *Rainey, Knox & Company*, May 16, 1871, 9 Macph. 739, 8 S.L.R. 501, and that in any event the appeals were not timeously brought, more than six days having elapsed since the allowance of proof.

At advising—

LORD PRESIDENT—These two actions are actions at the instance of the owners of two ships, and are directed against the Trustees of the Clyde Navigation and John Brown & Company (Limited). They were raised in the Glasgow Sheriff Court, and pleas were taken both to competency and to relevancy. The Sheriff-Substitute, I think, originally dismissed the actions, but his interlocutor, upon appeal to the Sheriff Principal, was recalled. The plea as to the incompetency was repelled and a proof before answer allowed. But the interlocutor of the Sheriff Principal contained a granting of leave to appeal. Upon that the appellants came to your Lordships' Court and the appeals were heard, and both competency and relevancy were argued before your Lordships. Your Lordships disposed of that and remitted to the Sheriff to allow a proof. Your Lordships' interlocutor is—(After allowing an amendment in one of the actions)—"affirm the interlocutor of the Sheriff, dismiss the appeal, and decern, and remit to the Sheriff to proceed as accords." Upon that the defenders, having got back to the Sheriff Court, put in a note, in terms of the recent Act of Sederunt (A.S. 5th January 1909), requiring the case to be remitted to the First Division of the Court of Session. That is admittedly done under the 30th section of the recent Act, viz., the Sheriff Courts (Scotland) Act 1907. When they came here, the defenders, who had marked this appeal for removal, said to your Lordships that they admitted that the case was not suitable for jury trial, but asked that the case should be kept in the Court of Session and remitted to a Lord Ordinary for proof. And the question that was argued before your Lordships, and which I think must be decided, is whether, under the circumstances I have detailed, this removal of the cause was competent, the order for proof, of course, having been made long ago by the Sheriff, and this appeal not having been taken within six days thereafter as is provided by the 30th section.

I do not think that the appeal here was competent. The 5th section of the recent Sheriff Courts Act, after setting forth certain provisions as to extension of the jurisdiction of the Sheriff Court, provides that it shall be competent for either party, at the closing of the record or within six days thereafter, to require the case to be remitted to the Court of Session in the case of—and then it specifies certain actions. Well, now, admittedly, this action is not one of those in which this absolute right of removal is given. Then the section that deals with appeals to the Court of Session is the 28th, and that section sets forth that "It shall be competent to appeal to the Court of Session against a judgment of the Sheriff-Substitute or of the Sheriff, but that only if the value of the cause exceeds £50, and the interlocutor appealed against is a final judgment,"—that, of course, does not apply to the present case—"or is an interlocutor (*a*) granting interim decree for payment of money other than a decree for expenses"—that is not the case here—or (*b*) "sisting the action"—that is not the

case here—or "(c) against which the Sheriff or Sheriff-Substitute either *ex proprio motu*, or on the motion of any party, grants leave to appeal"; and it was under that section that the first appeal was taken to your Lordships in this case.

Well, that section, therefore, deals exhaustively with the matter of what I may call a proper appeal. But then comes the 30th section, which is headed "Removal of Cause to Court of Session for Jury Trial," and which, as your Lordships perfectly know, is the successor of what was long known as the 40th section of the Judicature Act, which was afterwards re-enacted in another form in the Court of Session Act of 1868. The section to a great extent retains the old phraseology and provides that "In cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment, and concluding for damages under the Employers' Liability Act 1880, or alternatively at common law or under the Employers' Liability Act 1880) where the claim is in amount or value above £50, and an order has been pronounced allowing proof (other than an order for proof to lie *in retentis* or for recovery of documents), it shall, within six days thereafter, be competent to either of the parties, who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose where it shall be so tried."

Now, following upon the decisions which have grown upon the 40th section of the Judicature Act, your Lordships only the other day passed an Act of Sederunt—the A.S. of 5th January 1909—dealing with those appeals—or strictly I ought to say motions—for removal for jury trial, in which you made it exceedingly clear that when a person came here for jury trial, it was quite possible and proper for the other side to have, *in limine*, argued before your Lordships' Division any questions of competency and relevancy which arose. Those points of competency and relevancy being disposed of, the case would then be either sent back to the Sheriff Court, if it ought never to have come here at all, or be sent for jury trial, or in certain rare cases kept here for proof.

It seems to me that that whole code of procedure stands by itself and is exclusive of the code of what I have called proper appeal, and that as there is obviously no intention of doing the same thing over twice, it is for the litigant in the Sheriff Court, when a proof has been ordered, to make his election between the two methods of procedure. If he considers that the case is a case suitable for jury trial, then he—that is to say, either party—may come here under the 30th section; and if he does so, whichever party does so, the other party cannot be prejudiced, because if the defender says that the case ought to be turned out at once on the ground of irrelevancy or incompetency, that can be, and will be, disposed of by the Division before any issue is granted. But, if neither of the parties think that the case is suitable for jury trial, and if, at the same time, the defender wishes to get the judgment of the Supreme Court upon the question of irrelevancy or incompetency, without being put to the expense of an inquiry, it is then perfectly possible for him, under the provisions of the 28th section, to apply to the Sheriff for leave to appeal. Of course the matter rests in the discretion of the Sheriff, but I assume that that discretion will be properly exercised. And if that leave to appeal is granted, then he will get a judgment of the Supreme Court upon relevancy and competency.

Accordingly I am of opinion that that is the procedure that must be followed in future, and that here this second application under the 30th section really was too late in being made, not being made within the six days of the allowance of proof. Of course when I say "within six days of the allowance of proof," that must mean the final allowance of proof by the Sheriff. I am not meaning for one moment that if a Sheriff-Substitute allows proof, that if an appeal is taken to the Sheriff and he then simply affirms the Sheriff-Substitute's interlocutor, I am not meaning to throw any doubt upon the decision which was pronounced under the old Sheriff Court Act, and which I think would be equally good under this, namely, that the real allowance of proof would date from the Sheriff's interlocutor, and that it would be quite time to come to the Court of Session within six days of its date.

While I say all this, inasmuch as this is the first case, and as it depends to a certain extent upon the views taken of the recent Act of Sederunt, I should not have been inclined to decide this matter technically, and to have cut out the defenders here upon the ground that they took the wrong procedure, if, upon what I call the merits of the case, I had been inclined to grant them their crave. But even if I had not come to that result upon the competency, I should have come to the same result upon their crave, because I think we should not be doing fair justice to the Act of Parliament if we allowed cases to come up here on a crave for jury trial which really was not a *bona fide* crave at all, but was merely another way of transferring the case to the Court of Session. I think that the right which your Lordships have always held we have had—and which is affirmed by the recent Act in so many words—that it should be in our power upon a case which comes here for jury trial, nevertheless to order a proof and keep it here, is a valuable right, but it is not a right as to the exercise of which I think it is ever possible, or expedient, to lay down any general rules. Cases must depend upon their own circumstances. But in general where a case is not of the character in which, under the provisions of the Sheriff Court Act, the absolute right is given to remove, I cannot think that your Lordships ought to really get behind the Act by keeping in the Court of Session cases which were perfectly properly raised

in the Sheriff Court, and which can quite well be tried and disposed of there.

Accordingly, this being a case which can be perfectly well tried in the Sheriff Court, I should not have thought it was a case which in your Lordships' discretion we would have kept in the Court of Session. I only make these observations because I do not want the defenders to think that they have met with hard justice upon the question of competency, this being the first case and dependent, perhaps, upon rules of procedure which up to this judgment would scarcely be present in the minds of practitioners in the lower Court. I hope, however, now that I have made it sufficiently clear to be the rule of practice in the lower Court that if an order for proof is pronounced, parties must then elect either at once to come within six days for jury trial, or if they do not do that and choose to ask for leave to appeal, that then the idea of jury trial is once and for all gone.

LORD M'LAREN—I concur.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON—I also agree.

The Court found that the minutes of remission were incompetent, and remitted the cases to the Sheriff-Substitute to proceed.

Counsel for Pursuers (Respondents)—Dean of Faculty (Scott Dickson, K.C.)—Horne—Spens. Agents—Morton, Smart, Macdonald, & Prosser, W.S.—J. & J. Ross, W.S.

Counsel for Defenders (Appellants)—John Brown & Company—Blackburn, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders (Appellants), the Clyde Navigation Trustees—Orr Deas. Agents—Webster, Will, & Company, S.S.C.

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*Tuesday, February* 23.

## SECOND DIVISION.

## MELLIS' TRUSTEES *v.* RITCHIE.

*Succession — Testament — Construction — Direction to Divide Fund at Death of Liferentrix Equally among her Children and Grandchildren per stirpes — Liferentrix Survived by Child having Issue — "And" Equivalent to "Whom Failing."*

By his trust-disposition and settlement A directed his trustees to pay the annual income of a certain share of his estate to B during her life, and on her death to divide the capital equally among her children and grandchildren *per stirpes*. B was survived by her son C, and also by grandchildren, the children of C. *Held* that C's children were conditional institutes, and took only in the event of their parent predeceasing B.

James Mellis, soapmaker, Prestonpans, died on 1st August 1899, leaving a trust-disposition and settlement whereby he conveyed his estate to certain trustees.

He directed his trustees to divide the residue of his estate into two equal parts, and pay and make over one of the said parts to his wife Mrs Mary Marr or Mellis absolutely as her own property; with regard to the other part of the said residue he provided that his wife should enjoy the liferent thereof and that on her death it should be dealt with as follows, viz.—"As regards one-third part or share, to pay the annual revenue and proceeds thereof to Georgina Gordon or Ritchie during her life, and on her death to divide the same equally among the children and grandchildren of the said Georgina Gordon or Ritchie *per stirpes*."

The testator's widow died on 30th December 1902. Mrs Ritchie survived her and enjoyed the liferent provided for her in the will until her death on 10th November 1903. She was survived by two sons Thomas G. G. Ritchie and Robert F. A. Ritchie, and by four children of the said Robert F. A. Ritchie.

Questions having arisen with regard to the share falling to the said Robert F. A. Ritchie, a Special Case was presented to the Court, the first parties being the trustees, the second party Robert F. A. Ritchie, and the third parties Thomas C. Ritchie and others, the children of Robert F. A. Ritchie.

The second party maintained that the intention of the truster was only to call grandchildren to the succession where their parent was deceased. The third parties maintained that as children and grandchildren were generally called together *per stirpes*, the testator's intention was to give the children of each branch an equal share along with their parent.

The questions of law were, *inter alia*—"(1) Is the second party entitled to the said third share of half of the trust estate of the said James Mellis? or (2) Are the third parties entitled to share in said third part equally with their father, the second party?"

Argued for first and third parties—The grandchildren shared along with their parent. The peculiar ending of this settlement showed that grandchildren were institutes along with their parent, and not merely conditional institutes. The second party's contention required that "and" should be read as meaning "whom failing." If that reading should be adopted the result would be that grandchildren would come in only in the event of the predecease of all the children. That could not have been intended. There should be equal division between the father and his children. Alternatively the father should get half of the fund, and the children the other half.

Argued for second party—The second party was entitled to the whole fund. The grandchildren only came in on the failure of their parent. The truster had tried to effect his meaning by a shorthand method,