dation for that purpose. The defences are in my opinion irrelevant. If the defender wishes to challenge the pursuers' alleged right of ferry, he must do so in a different process and with different averments.

LORD CULLEN—I think that the doubts as to the relevancy of the defences expressed by the Sheriff in his opinion relative to the interlocutor appealed against was well founded, and that when the defences are closely examined it is seen that there is no sufficient and relevant challenge of the pursuers' title. As that is so, and as the defender alleges no title whatever of his own, it appears to me clear that the pursuers are entitled to interdict. I also concur regarding the terms in which the interdict should be given.

LORD SANDS—I agree that there is here no relevant defence. It occurred to me in the course of the argument that a distinction might be drawn between the Crown's property in ferries and the Crown's property in such a subject as salmon fishings. The latter is a patrimonial right, but the former partakes perhaps more of the nature of a fiduciary right in the interests of the public. Further, salmon fishing is in its own nature a *tenementum*. The taking of salmon anywhere within the kingdom without a grant is an invasion of the Crown's right. I doubt if ferry, *i.e.*, the transport of travellers across water between public places, is a *tenementum* until a grant of ferry at the spot has been made by the Crown or the Crown has equipped a ferry. If nothing of the kind has been done it would not, as I am disposed to think, be an invasion of any right of the Crown to transport travellers for hire. In this view it might possibly be a relevant defence in a case of this kind to plead "There is here no ferry. The right of creating a ferry is latent in the Crown, and I am simply exercising the ordinary right of navigation." That, however, is not the defence stated, and the defence which is stated is, I think, irrelevant.

The Court recalled the interlocutors of the Sheriff-Substitute and Sheriff, and granted interdict against the defender from conveying passengers for hire by boat between the village of Kyleakin and the village known as Kyle of Lochalsh, "or in any way interfering with the pursuers in the possession of their right of ferry."

Counsel for the Pursuers and Appellants — Robertson, K.C. — Jamieson. Agents— Hope, Todd, & Kirk, W.S.

Counsel for the Defender and Respondent —MacRobert, K.C.—Macgregor. Agents— Laing & Motherwell, W.S.

Friday, June 27.

SECOND DIVISION.

[Sheriff Court at Hamilton.

MOFFAT *v.* SEWELL.

Process—Removal to Court of Session for Jury Trial — Motion to Retransmit — Whether Motion Timeously Made—Sheriff Courts (Scotland) Act 1907 (*7 Edw. VII, cap.* 51), *sec.* 30—*C.A.S., D,* iv, 5.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—Section 30 —"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 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: 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 Codifying Act of Sederunt enacts —D, iv, 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."

An action of damages for personal injuries was removed from the Sheriff Court to the Court of Session for jury trial under section 30 of the Sheriff Courts (Scotland) Act 1907. When the case appeared in the Single Bills the defender took no objection to the suitability of the case for jury trial, but on the case being called in the summar roll the defender moved that it should be remitted back to the Sheriff.

The Court *refused* the motion, in respect that (*per* the Lord Justice-Clerk, Lord Ormidale, and Lord Anderson) the objection had not been taken timeously, and (*per* Lord Hunter) on the ground that the case was not unsuitable for jury trial.

Mrs Margaret Sinclair or Moffat, Uddingston, *pursuer*, brought an action in the Sheriff Court at Hamilton against John George Sewell, writer, Glasgow, *defender*, for £500 damages for personal injuries.

The pursuer alleged that she fell when walking on a foot-pavement which was the private property of the defender and in his possession and control, and that the accident was due to the defective con-

dition of the pavement, for which the defender was responsible.

The pursuer averred, *inter alia*—"(Cond. 3) The said foot-pavement is the property of the defender and it is open to the use of the public. The defender invites the public (including the pursuer) to walk on the said foot-pavement, and the said invitation is acted on. On or about 11th April 1923, about noon, whilst the pursuer was so using the said pavement, she inadvertently put her left foot into a hole in said pavement at a point in said pavement opposite the close numbered 82 Main Street, Uddingston. The said hole was irregular in shape, and was 9 inches or thereby in diameter and 8 inches or thereby in depth. As a result of the pursuer so placing her foot in said hole she fell to the ground and sustained serious injury to her left foot and leg, *which were badly twisted. Trouble in the knee and ankle joints supervened and has resulted in a permanent impairment of movement of the knee joint. She also* suffered severe shock. [The words in italics were added by way of amendment at the bar of the Second Division.] (Cond. 4) The pursuer was as from the date of the said accident confined to bed for a very considerable period as a direct consequence of her said injuries. She is still confined to the house, and it is with the greatest difficulty and pain that she is able to move about the house. It is believed and averred that the injuries sustained by the pursuer are of a serious nature and that she will be permanently disabled. . . . (Cond. 5) The pursuer was an employed person and was engaged going out as a daily helper. She earned an average weekly remuneration amounting to 30s., and she was the support of her son George Moffat, who is eleven years of age and is still in attendance at school. She has not earned anything since the date of the said accident, and it is believed and averred that she will never regain her full wage-earning capacity. She has also been put to considerable expenses both in the treatment of her injuries and for domestic help."

The defender pleaded, *inter alia*—"The action is irrelevant."

On 22nd May 1924 the Sheriff-Substitute (HAY SHENNAN) repelled the first plea-in-law for the defender and allowed a proof.

On 24th May 1924 the pursuer required the cause to be remitted to the Second Division of the Court of Session for jury trial in terms of section 30 of the Sheriff Courts (Scotland) Act 1907.

On 11th June 1924 the Court appointed the pursuer to print and box the issue or issues proposed for the trial of the cause, and on 18th June 1924 the Court appointed the cause with the issue proposed by the pursuer to be put to the summar roll.

On 27th June 1924, when the case was called in the summar roll, counsel for the defender moved the Court to remit the case back to the Sheriff, and argued—The pursuer's averments did not disclose injuries of so serious a nature as to make the case suitable for jury trial—*Greer* v. *Corporation of Glasgow*, 1915 S.C. 171, 52 S.L.R. 109. The nature of the injuries was not specifically averred—*Monaghan* v. *United Co-operative Baking Society*, 1917 S.C. 12, 54 S.L.R. 211, *per* Lord Justice-Clerk (Scott Dickson) at 1917 S.C. 14, 54 S.L.R. 212. Admittedly the motion to remit the case back to the Sheriff should have been made when the case appeared in the Single Bills, but it was not too late to make the motion when the case appeared in the summar roll. The terms of the Codifying Act of Sederunt, D, iv, 5, were not imperative. Section 30 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) vested in the Court a discretionary power to remit back a case to the sheriff at any time, and it was *pars judicis* to exercise the power *ex proprio motu*. [Counsel also submitted an argument in support of the defender's first plea-in-law, with which this report is not concerned.]

Argued for the pursuer—The motion to remit the case back to the Sheriff came too late. In terms of the Codifying Act of Sederunt, D, iv, 5, it was imperative that the motion, if made, should be made in the Single Bills. [Counsel also submitted an argument on relevancy, with which this report is not concerned.]

LORD JUSTICE-CLERK (ALNESS)—[*After dealing with a question which is not reported*]—The defender proceeded to maintain, however, that the case should now be retransmitted to the Sheriff Court in order to be tried there, and that an issue should not be approved in this Court for jury trial. In answer to that contention the pursuer maintained that the objection taken is a belated one, that it should have been taken in the Single Bills, and that not having been taken there it is now too late to take it. That contention gains considerable force from the terms of the Codifying Act of Sederunt, D, iv, 5, to which we were referred.

The underlying idea of that provision, which I do not detain your Lordships by reading again, seems to me to be that if a case which has competently been remitted to the Court of Session is to be retransmitted to the Sheriff Court on the ground that it is unsuitable for jury trial, that matter should be determined, so to speak, at the doorway of this Court. When one considers the texture of the section as a whole, it suggests to my mind the segregation of the two topics, viz., that the topic of retransmission should be discussed and exhausted in the Single Bills, whereupon a discussion on further procedure, including, as the Act of Sederunt says, competency or relevancy, should subsequently and separately proceed. It appears to me that the terms of the section postulate the disposal of the question of retransmission in the Single Bills. That at any rate is the proper procedure, and I think it is well that litigants should know and recognise that that is so. The defender in any case is barred from taking the objection now because he did not intimate in the Single Bills (assuming that the objection could competently be considered at a later stage) that he proposed to table the objection.

But I have no hesitation in saying that for my part the objection which the defender has taken is too late, and that as it was not taken in the Single Bills it cannot be listened to now.

LORD ORMIDALE—I think the really interesting question is in regard to the operation of the Codifying Act of Sederunt, D, iv, 5, and is whether or not it is imperative when it is sought to have any case sent back to the Sheriff on the ground that it is not suitable for jury trial here, that the objection should be taken in the Single Bills.

I agree with your Lordship that it is. At any rate it is necessary to sound the note of objection in the Single Bills if the objection is to be competently relied upon at all. It is true that the Act of Sederunt is merely a procedure Act. The words of the Sheriff Courts Act are perfectly general. But I do not for my own part see why the enactment of the Act of Sederunt should not prevail in a matter of this sort. So long as the rule is there and acted upon I fail to see that any inconvenience can result to any litigant from the fact that on the first appearance of the case in this Court one party can prevail if he should take a particular point which he makes good. I do not mean to say that if the person taking the objection is heard upon the point the Court should of necessity hear him out. My own impression is that it is not by any means necessary to decide the question forthwith, but that the Court has the inherent power which in exceptional cases would warrant it to direct that the point which had been brought to its notice should be considered together with other questions in the summar roll. The concluding part of the section undoubtedly indicates the contrary view, because it separates questions of relevancy and questions of competency from this question whether or not the case should be sent back to the Sheriff. But at the same time, in special circumstances, provided that a party has raised the question in the Single Bills, I should not like to close the door so that if the Court found it convenient and without prejudice to either party, it should remit the question along with other questions to the summar roll for further consideration.

LORD HUNTER—As regards the question raised on the Act of Sederunt I do not know that I quite agree with what has been said by your Lordships. I am not inclined myself to take the same strict view of the language used. At the same time I am not prepared to express any definite opinion upon this matter, because I do not think it was very material in the present case, and it may be that in a future case the argument may lead one to a clearer opinion upon the matter.

The Codifying Act of Sederunt in this connection is not, as I think, felicitously expressed. When the terms of D, iv, 5 are examined it is clear that what is contemplated is that a party objecting to a case being brought to the Court of Session should take his objection in the Single Bills. As your Lordship has said, it looks as though what were contemplated were two separate discussions—one as to the question of retransmitting, and then a separate discussion upon questions of relevancy and competency. If that is the proper construction of the Act of Sederunt, I think it is an unfortunate construction. It appears to me that in very many cases the whole of these questions should be discussed together at one hearing in the summar roll, and I personally can conceive of no particular advantage in separate discussions taking place.

When the phraseology of D, iv, 5 is considered it appears that what primarily falls to be discussed is the question whether the case has been competently remitted, and that that is the point which is to be determined in the Single Bills. But there is, to my mind, a separate and different question which arises under the Sheriff Courts (Scotland) Act of 1907, and that is a question involving the discretion of the Court either to send the case back to the Sheriff Court or have the case determined by a Lord Ordinary or by a member of the Division before which the case has been brought. I cannot myself see that that discretion which is conferred by Act of Parliament, and which has not, in my opinion, been taken away or limited or restricted by the Act of Sederunt, can be properly exercised unless the Court is put fully in possession of questions of relevancy and competency—I mean competency of the action as opposed to the competency of remitting the case. If what I have suggested is the real interpretation of D, iv, 5, it would still be open to the Court to exercise the discretion on the discussion in the summar roll. Under section 30 of the Sheriff Courts Act 1907 not every case that starts in the Sheriff Court can be remitted for jury trial to the Court of Session. Certain cases are excluded, and in such instances it may be right enough that the words of the Act of Sederunt should be strictly applied, and that there should be no further discussion when the matter is in the summar roll. But I think where the matter has to be dealt with under the proviso to the section, the rigid and narrow construction that is suggested of the Act of Sederunt would be an unfortunate construction and might lead to quite unnecessary expense in the way of duplication of discussion, which I cannot think was the object of the Act of Sederunt.

Therefore upon that matter, although I express no concluded opinion, I certainly do not proceed upon any hypothesis that the appellant was in any way excluded from asking us to retransmit. The ground upon which I proceed is that I think this is not a case where in the exercise of our discretion and upon the facts now before us we ought to transmit, but one in which we ought to allow the jury trial asked for.

LORD ANDERSON—Three points were debated in this case. The first had reference to procedure, the second to relevancy, and the third to the mode of trial.

With regard to procedure, the warrant for removal of an action of this sort from the Sheriff Court to this Court for jury trial is found in section 30 of the Sheriff Court Act 1907, and the warrant which this Court has for refusing the jury trial that is sought is to be found in the proviso to that section. By that proviso this Court is empowered to do one of three things—it may retransmit the case to the Sheriff Court for proof before the Sheriff, or remit to a Lord Ordinary for trial, or remit for proof before a judge of this Division. The section is silent as to the procedure to be followed when retransmission is sought, but that procedure is prescribed by the Act of Sederunt which has been referred to, viz., D, iv, 5 of the Codifying Act of Sederunt. The scheme of the procedure which is there prescribed seems to me to be plainly this—that this matter of retransmission is treated, although it is not described, as a point of competency, and it is suggested by the Act of Sederunt that that point of competency should be broached and decided at the outset in the Single Bills. There is good reason for that, because the only ground upon which, according to the decisions, retransmission has been sought when a case has been brought here for jury trial is that the case is of insufficient value for consideration in the Court of Session—that the real value of the case is less that £50, although the conclusions of the summons may be for more than £50, and therefore it is an action in which the Sheriff has privative jurisdiction. Accordingly it is proper, in my opinion, that that point of competency, which is really a matter of the jurisdiction of this Court, should be decided at the outset before any other question is considered. And it seems to me that the procedure prescribed is that the matter should be not only mooted but disposed of in the Single Bills. As no motion was made in the Single Bills to have the case retransmitted, we must hold that the defender's challenge of the jurisdiction of this Court is now too late.

As regards the question of relevancy, therefore, if the defender wishes to raise it after the case has been removed to this Court for jury trial, he must, in my opinion, make up his mind to assume the value of the case to be above £50, and refrain from moving in the Single Bills to have the case retransmitted in respect of its value. Only by following that course of procedure, as it seems to me, can he raise at this stage the question of relevancy.

As to the mode of trial, no reason has been assigned for refusing the pursuer the jury trial which she claims.

The Court refused the defender's motion, and approved of the proposed issue.

Counsel for the Appellant (Pursuer)—Aitchison, K.C.—Gibson. Agents—W. G. Leechman & Company, Solicitors.

Counsel for the Respondent (Defender)—Gentles, K.C.—Gilchrist. Agents—Manson & Turner Macfarlane, W.S.

Friday, June 27.

FIRST DIVISION.

[Court of Exchequer.

CORMACK'S TRUSTEES *v.* INLAND REVENUE.

Revenue — Stamp Duty — Discharge by Widow of Legal Rights in Return for Annuity—Conveyance on Sale or Bond for the Security of an Annuity—Stamp Act 1891 (54 *and* 55 *Vict. cap.* 39), *secs.* 13 (3), 54, 56 (3), 60, *and First Schedule.*

A widow whose testamentary provisions made for her by her husband were of much less value than her legal rights made a claim for the latter. Thereafter she came to an agreement with her husband's testamentary trustees under which she discharged her "whole rights of aliment, mournings, terce, and *jus relictæ*," and in consideration of this discharge agreed to accept (1) an annuity of £4100 for her life free of income tax and super tax; (2) the liferent of a dwelling-house to be provided by the trustees; and (3) the liferent of certain furniture. Questions having arisen as to the amount of stamp duty exigible on this deed, *held* that the transaction embodied therein was not a release or renunciation upon a sale, but was the only security for an annuity for the term of life and was therefore chargeable under the heading of "Bond, Covenant," &c., in the First Schedule to the Stamp Act 1891.

On 16th August 1923 the testamentary trustees of the late James Cormack, shipowner, Leith, presented an instrument to the Commissioners of Inland Revenue and required them to express their opinion as to the stamp duty with which it was chargeable. The Commissioners being of opinion that the instrument was liable to conveyance-on-sale duty assessed it accordingly, and at the request of the trustees stated a Case for the opinion of the Court. The instrument embodied an agreement entered into between the trustees of the said James Cormack and Mrs Fanny Campbell Begg or Cormack, his widow. The terms of the agreement are sufficiently set forth in the opinion of the Lord President as follows:—"The question is as to the assessment of stamp duty upon an agreement entered into between the late Mr Cormack's testamentary trustees (appellants) and his widow. The circumstances, as these may be gathered from the agreement itself, were as follows:—By his trust-disposition and settlement Mr Cormack had provided his widow in (1) £200 in name of mournings and aliment, (2) the liferent use of his house and furniture (subject to certain burdens), and (3) an alimentary annuity of £500 a year. He also secured her right to a sum of £700 (covered by two policies of insurance) which had originally belonged to his wife but fell under his *jus mariti*. Subject to certain legacies the whole residue of the estate was settled on the children of