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.

Held that expenses included fees to expert witnesses for preparation in so far as fair and reasonable, although there was no judge's certificate, the Act of Sederunt being applicable only to cases which had proceeded to trial.

The Act of Sederunt, 15th July 1876, entitled "for regulating the fees and charges of enrolled law-agents practising before the Supreme Courts of Scotland," in the table of fees thereto annexed, provides (under head V, "Jury Trials and Proofs," sub-head iii, "Allowances to Witnesses," sec. 2) that "in cases where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land surveyors, or accountants, 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 expenses of such persons shall be allowed as may be considered 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 if in session, or if in vacation within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance."

James Clements brought an action against the Lord Provost, Magistrates, and Town Council of the city of Edinburgh, in which he sued them for £2000 sterling for damages for the death of his son. The defenders were taking down a bridge with a view to its reconstruction, and it fell upon the pursuer's son while he was passing underneath it and killed him. The pursuer averred that the operations were being carried out in an improper and careless manner and specified various defects in the apparatus employed. He also averred that both he and his wife, who was pregnant at the time, had suffered in health owing to grief and shock caused by their son's death. After the issues had been adjusted the case was settled by joint minute, the pursuer accepting a specified sum and his expenses.

In taxing the pursuer's account of expenses the Auditor disallowed fees amounting to £14, 9s. paid to certain skilled witnesses whom the pursuer had consulted—one civil engineer and two doctors—with a view to the preparation of his case. To his report the Auditor appended the following note:—"The Auditor has disallowed the fees to skilled witnesses simply because the witnesses have not been certified in terms of the Act of Sederunt. It is true that the case was settled before going to trial, but the Auditor understands the rule of the Court to be that even in that case a certificate is necessary, and that without it he has no discretion—*Turnbull* v. *North British Railway Company*, 5 F. 944. Had he had such discretion he would in the present case have allowed the fees as charged, as they seem to him moderate, both as to the number and class of the witnesses and the amounts charged."

The pursuer lodged objections to the Auditor's report, contending that the fees to the skilled witnesses should have been allowed.

Argued for the pursuer—The Act of Sederunt applied only to cases which had gone to trial; in cases which did not go the length of trial there could be no "judge who tries the cause" to give a certificate, and in them the fees, if just and reasonable, being part of the expenses, must be allowed. This had hitherto been the Auditor's practice—*M'Dougall* v. *Caledonian Railway Company*, June 28, 1878, 5 R. 1011, 15 S.L.R. 603; *Lord Elphinstone* v. *Monkland Iron and Coal Company, Limited*, February 2, 1887, 14 R. 449, 24 S.L.R. 323; *A B* v. *C D*, July 20, 1894, 21 R. 1083, 31 S.L.R. 848; Mackay's Manual of Practice, p. 674; Smith on Expenses, p. 319. The case of *Turnbull* v. *North British Railway Company*, June 12, 1903, 5 F. 945, 40 S.L.R. 699, on which the defenders founded, contained only the adverse dicta of an English judge and was not authoritative.

Argued for the defenders—*Turnbull* v. *North British Railway Company* (*cit. sup.*) was the latest expression of opinion on the subject. The fees of expert witnesses were not by the common law part of the expenses of a case, from which it followed that it was only in the particular case where they were made so by the Act of Sederunt, *i.e.*, where the witnesses were certified by the judge, that they could be allowed by the Auditor.

LORD JUSTICE-CLERK—I think it is quite plain that this is not a case falling under the Act of Sederunt. The Act of Sederunt provides for a certificate being granted with regard to expert witnesses by the judge who tried the cause. But this case never went to trial, and the question is whether in these circumstances such a certificate is required. Issues had been adjusted, and from that point onward the case was not before any judge in particular. It might have been enrolled before the Lord Ordinary to fix a day for trial, or it might have come before the Lord President or the Lord Justice-Clerk, or before some other judge appointed to try the case at the sittings. But till the trial there was no judge from whom it would have been possible to obtain the certificate. And further, the certificate referred to by the Act of Sederunt is a certificate regarding witnesses who have been examined, not witnesses who might have been examined if the trial had gone on. So I think that this case is altogether outside the Act of Sederunt and that no certificate is required when the case has been settled before going to trial. When the case is settled on the footing that the pursuer is to get his expenses, I think any question as to what such expenses include falls to be decided according to the ordinary practice of the Court, with the assistance of the Auditor, and that the pursuer will be entitled to get his ordinary and proper charges according to the circumstances of the case. Here the Auditor has said that the fees in question are moderate both as to the number and class of the witnesses for whom they are charged; and, as regards the proper charges,

the matter was really one for his decision, and as he has reported that the charges are proper and moderate, I think they should be allowed.

LORD KYLLACHY—I am of the same opinion. The Act of Sederunt plainly does not apply. We are consequently thrown back upon the rule which would have applied if the Act of Sederunt had not been passed; and the only such rule of which I know is that a successful litigant who is found entitled to expenses shall get the expenses incurred by him according to what is just and reasonable in the circumstances. I think therefore the Auditor in this case was quite entitled to allow such payments as he thought just and reasonable for expert witnesses.

LORD KINCAIRNEY—I entirely concur, and I adopt your Lordship's opinion.

LORD STORMONTH DARLING—I concur.

The Court sustained the pursuer's objections.

Counsel for the Pursuer — Macmillan. Agents—Davidson & Syme, W.S.

Counsel for the Defenders — M'Clure. Agent—Thomas Hunter, W.S.

Tuesday, May 23.

FIRST DIVISION.

[Sheriff Court at Glasgow.

SHARPLES *v.* WALTER YUILL & COMPANY.

Process—Appeal for Jury Trial—Proof—Jury Trial—Right to Jury Trial—Method of Inquiry—Judicature Act (6 *Geo. IV. c.* 120), *sec.* 40—*Court of Session Act* 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 73.

Held, after consultation with the Judges of the Second Division, that when a case is appealed for jury trial under the Judicature Act, section 40, the Court is not bound to grant such trial, but (*a*) may decide the case on any legal ground which is capable of disposing of the case without inquiry, or (*b*) may order inquiry by some other method than jury trial if it considers jury trial unsuitable. Such inquiry may be either by proof before a judge in the Court of Session or by proof before the Sheriff; and in deciding between these two methods the Court will keep in view, in relation to the nature of the case, that the one course will, and the other will not, allow of ultimate appeal to the House of Lords on the facts.

Process—Appeal for Jury Trial—Proof—Jury Trial—Criteria of Suitability for Jury Trial—Trifling Nature of Case—Special Cause—Judicature Act (6 *Geo. IV. c.* 120), *sec.* 40—*Court of Session Act* 1868 (31 *and* 32 *Vict. c.* 100, *sec.* 73).

Held, after consultation with the Judges of the Second Division, that, where a case is appealed for jury trial, the Court in deciding whether the case is or is not suitable for jury trial will apply the same criterion as it does in cases raised before itself. The Court will consider whether the action is of the class specially appropriated by statute to jury trial, and if so, whether there is any special cause for not so trying it; and, as to amount, the Court will be guided by the standard fixed by the Legislature, viz., £40, so that unless the action on the face of it discloses a claim which in the opinion of the Court could not reasonably be entitled to a verdict amounting to £40, the Court will not refuse a jury trial to an otherwise appropriate case.

Cecilia Sharples, laundry worker, residing with her father Thomas Sharples, iron turner, 12 Water Row, Govan, with his consent raised an action in the Sheriff Court at Glasgow against Walter Yuill & Company, proprietors of the Victoria Laundry, Windsor Street, Govan. In it she sought to recover £100 at common-law, or alternatively £39 under the Employers' Liability Act 1880, and averred:—"(Cond 3) On the morning of 15th November 1904, and at or about 6 a.m. the pursuer was proceeding to her work at the Victoria Laundry and Dye Works, Windsor Street, Govan, and, as was her usual custom and also the custom of the other workers, entered by the gate leading to said works. Pursuer had just entered by the gate when she fell into a hole which the pursuer believes and avers was excavated on or about 14th November 1904. The hole in question was of considerable depth, and the pursuer sustained serious injuries by reason of falling."

On 9th February 1905, the Sheriff-Substitute (BOYD) allowed a proof. The pursuer appealed for jury trial. When the case appeared in the Single Bills the defenders moved that it should be dismissed as irrelevant or at least sent back to the Sheriff in respect of its trifling nature. The Court put out the case for discussion on the question of sending it back to the Sheriff

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 73, enacts:—"It shall be lawful by note of appeal under this Act to remove to the Court of Session all causes originating in the inferior courts in which the claim is in amount above £40, at the time and for the purpose and subject to the conditions specified in the 40th section of the Act 6 Geo. IV, c. 120, and such causes may be remitted to the Outer House."

6 Geo. IV, c. 120 (The Judicature Act), section 40, contains this proviso—"But it is hereby expressly provided and declared that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof *in retentis* or granting diligence for the recovery and production of papers), it shall be compe-