other class of cases the degree of negligence is to affect not the liability but the measure of damages. In the case of injury from negligence where no question of contract is concerned, liability depends upon negligence, and where negligence is established liability follows independently of the degree of negligence, and it is not the negligence but the liability to compensate which determines the damages. In such cases Lord Cranworth's dictum in *Wilson* v. *Brett*, 1843, 11 M. and W. 113, that "gross negligence is ordinary negligence with a vituperative epithet" holds good, and Lord Willes's further dictum in *Lord* v. *Midland Railway Company*, L.R., 2 C.P. 339, that "any negligence is gross in one who undertakes a duty and fails to perform it," is equally applicable.

"I think that the judgment in *Cooley's* case is also open to this criticism, that it is inconsistent with itself. It accepts the position that the jury may not give vindictive damages, and that it is the duty of the presiding Judge so to direct. If by vindictive is meant the satisfaction of the legal analogue of the natural vendetta, the statement may be justified in relation to the principle adopted. But if, as I think it must be, the expression means punitive or exemplary, I do not see how it is possible to avoid giving such damages if the jury are entitled, and if entitled bound, to take into consideration the degree of negligence.

"When I say above that I think the issue has become a false issue, because presiding judges, or many of them, do not subscribe and give effect to the principle which underlies it, I have the support of Lord Shand and Lord Adam in the case of *Cunningham* v. *Duncan & Jamieson*, 16 R. 383, where Lord Shand says, at page 389—'I do not for myself say that I should recommend a jury to make the nature and extent of the company's fault an element in determining the amount of damages to be awarded;' and Lord Adam adds (page 391)—'No doubt the question of fault is laid before the jury, but in my experience a jury is never asked to enlarge or diminish the amount of damages on the ground of the extent of fault on the part of the defender. That has not been, in my experience, the nature of the inquiry in actions of damages for fault or negligence.'

"If Lord Adam is right the customary issue is a false issue. It is liable to hamper the judge and to mislead the jury. The issue which I should, but for the practice following on *Cooley's* case, have approved is—It being admitted that on or about 18th August 1906, and at or near Saltcoats Railway Station on the line of the defenders, the pursuer, while travelling in a train belonging to the defenders, was injured in her person through the fault of the defenders or those for whom they are responsible, to her loss, injury, and damage—What is the amount of compensation to which the pursuer is entitled in respect thereof? Damages laid at £1500.

"If the pleas-in-law are examined it is found, as might be expected, that it is compensation for injury which is the subject of the action, and that what the parties have joined issue about is whether the compensation sued for is reasonable or excessive. These pleas are consistent with the right and the liability that arise out of the circumstances.

"I am not apprehensive that the form of issue which I would adopt would exclude any relevant matter from proof. There are (1) circumstances relating to the position of the individual party injured, as for instance occupation and prospects in life; (2) circumstances surrounding the accident to the individual injured — where shock must always be a factor in the consideration it is an essential to know the circumstances surrounding the occasion of the injury to him or her; (3) circumstances surrounding the cause of the occurrence which occasions the injury. To establish liability proof on the last two heads is relevant and necessary. But where liability is admitted proof on the first two is all that is required. And it would be admissible though fault is not formally put in issue. Whereas if it is formally put in issue, I do not see how the presiding judge can either exclude or restrict proof on the last head."

Thursday, January 23.

SECOND DIVISION.

DUFF'S TRUSTEES AND OTHERS *v.* LEIGHTON'S EXECUTOR.

Succession—Trust—Vesting—Survivorship Clause—"Without Issue"—Direction to Sell Heritable Subject and Divide Proceeds on Death of Liferentrix.

A testator directed his trustees to convey a certain heritable property to his sister M. in liferent, and directed them after her death to sell the property and divide the free proceeds equally among his nephews and nieces *nominatim*, "and, failing any of them without issue, to the survivors and survivor of them equally if more than one."

Held that "without issue" here meant without leaving issue at the period of division, and consequently that nothing had vested in a niece who had survived the testator but predeceased the liferentrix leaving a child, or in the child, who had also predeceased the liferentrix.

Thomas Garland, merchant and shipowner, Dundee, died on 25th December 1878, leaving a trust-disposition and settlement dated 17th January 1872, whereby he conveyed to trustees his whole estate, heritable and moveable, including, *inter alia*, "in the second place," certain heritable property in Blackness Terrace, Dundee.

The sixth purpose of the trust-disposition and settlement was—"*In the sixth place*, my said trustee shall, as soon as convenient after my death, convey the foresaid property belonging to me at Black-

ness Terrace, being the subjects secondly before disponed, to and in favour of the said Miss Mary Garland, my sister, in liferent for her liferent use allenarly during all the days of her life after my death: And after the death of the said Miss Mary Garland, I direct my said trustees to sell and dispose of the foresaid subjects at Blackness Terrace in one lot, and to divide the free proceeds thereof equally among my said nephews and nieces, Thomas Garland, Joseph Garland, Christian Garland, Agnes Garland, Elizabeth Garland, and Ann Garland, and, failing any of them without issue, to the survivors and survivor of them, equally if more than one."

The truster was survived by his sister Mary Garland and by the nephews and nieces mentioned in the sixth purpose. Christina Garland (named in the settlement Christian Garland) afterwards became the wife of Andrew Lowden; Agnes Garland became the wife of John Stewart Duff; Elizabeth Garland became the wife of Robert Leighton; and Ann Garland became the wife of James Scott. The truster's sister Mary Garland enjoyed the liferent of the subjects at Blackness Terrace, Dundee, until her death on 10th January 1885. Mrs Elizabeth Garland or Leighton died intestate on 20th September 1879, leaving one child, Eliza Robina Garland Leighton, who died on 26th December 1879, both thus predeceasing the liferentrix. The other nephews and nieces survived the liferentrix.

A question having arisen among the parties interested as to whether Elizabeth Garland, afterwards Mrs Elizabeth Garland or Leighton, had a vested right in the property situated at Blackness Terrace at her death, a special case was presented for the opinion of the Court.

The parties to the special case were—(1) John Stewart Duff and others, the trustees of the deceased Mrs Agnes Duff, *first parties*; (2) the husband and children of Mrs Ann Scott, now deceased, *second parties*; (3) Robert Leighton, as executor-dative *qua* next-of-kin of Eliza Robina Garland Leighton, his daughter, and as an individual, *third party*; (4) the judcial factor on the trust estate of Thomas Garland, now deceased, *fourth party*; (5) the testamentary trustees of Joseph Garland junior, *fifth parties*; (6) the testamentary trustees of Mrs Christina Lowden, *sixth parties*.

The party of the third part *contended* that Mrs Elizabeth Garland or Leighton had a vested right to one-sixth share *pro indiviso* of the property at Blackness Terrace, Dundee, as at her death. On the other hand, the party of the fourth part contended that vesting did not take place until the date of the death of Mary Garland the liferentrix, and that accordingly Mrs Elizabeth Garland or Leighton had no vested right as at her death, and in this contention the parties of the first, second, fifth, and sixth parts concurred.

The question of law was—"Had the said Elizabeth Garland, afterwards Mrs Elizabeth Garland or Leighton, a vested right to one-sixth share *pro indiviso* of said property situated at Blackness Terrace, Dundee, as at her death? or, Was vesting postponed till the date of the death of the liferentrix of said property, the said Mary Garland?"

Argued for the first, second, fourth, fifth, and sixth parties—A survivorship clause was referable to the period of division—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 314. There could be no vesting, for there was no gift, till the occurrence of the death of the liferentrix, the period of division—*Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103; *Forbes* v. *M'Condach's Trustees*, December 12, 1890, 18 R. 230, 28 S.L.R. 188. Though "failing issue" more usually meant without having had issue, as in *Cunningham* v. *Cunningham*, November 29, 1889, 17 R. 218, 27 S.L.R. 106, yet here it meant without leaving issue surviving the liferentrix. The destination to issue was just the primary destination prolonged—*Hendry's Trustees* v. *Hendry*, January 31, 1872, 10 Macph. 432, Lord Kinloch at p. 437, 9 S.L.R. 263.

Argued for the third party—The primary and usual meaning of "without issue" was without having had issue—*Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226; *Steel's Trustees* v. *Steedman*, December 31, 1902, 5 F. 239, 40 S.L.R. 202. The destination-over to survivors could not operate, as Mrs Leighton had had issue. Vesting took place in her *a morte testatoris*, subject to defeasance in the event of her predeceasing the liferentrix without having had issue. The event causing defeasance had not happened.

LORD JUSTICE-CLERK—I cannot say that I think the interpretation of this deed presents any serious difficulty. It is very plain on the face of it that the gift here is a gift to certain people on a certain event, that event being the death of the liferentrix; and the gift takes the form of a direction to trustees after the death of the liferentrix to sell and dispose of the subjects and to divide the proceeds among certain persons named, who are the testator's nephews and nieces, and, "failing any of them without issue, to the survivors and survivor of them." I take that to mean that if any one of the nephews and nieces named dies, his or her share is to go to the survivor unless he or she has issue. The question here is as to a share destined to a niece who died before the liferentrix. She had a child, but that child also died before the liferentrix. I think that share must go to the survivors; and in these circumstances the first alternative of the question should be answered in the negative, and the second alternative in the affirmative.

LORD STORMONTH DARLING—I agree with your Lordship in the chair. The ordinary rule is that a clause of survivorship such as you find here is referable to the date of distribution, which is fixed as the death of the liferentrix; and I think that the real meaning of this clause in the settlement,

substituting issue for a parent, was simply to give expression by the testator to what would otherwise have been an implication of law under the *conditio si sine liberis decesserit*, for the issue could only take what had already vested in the parent.

LORD LOW—I agree. It is to be observed that the only gift which is given to the nephews and nieces is contained in the direction to the trustees at the death of the liferentrix to realise the subjects liferented, and divide the proceeds thereof among her nephews and nieces. That being so, I think it is plain that the survivorship clause applies to the period of division and payment and to no other. Now the only difficulty arises from the fact that the survivorship clause is expressed in this way—"Failing any of them without issue, to the survivors or survivor of them.' The expression "without issue" can be construed either as "without ever having had issue" or "without leaving issue." Which of these two constructions is to be adopted depends on the context. It seems to me that here it means "without leaving issue," the time to which the words apply being the termination of the liferent and the period of division. If at that period a nephew or a niece has died without leaving any child then alive to represent him or her, his or her share passes to the survivors. Accordingly, Elizabeth and her child having both predeceased the liferentrix, nothing vested in either of them.

LORD ARDWALL — I am of the same opinion. In the sixth purpose of the trust-disposition and deed of settlement of Mrs Duff there is no gift of the fee of the property at Blackness Terrace or the proceeds thereof till after the death of the liferentrix Miss Mary Garland, because the only words of gift are contained in a direction to the trustees after that event to sell and dispose of the said property, and to divide the free proceeds thereof among certain named beneficiaries. Accordingly until after the death of the liferentrix there was no gift made, and indeed there was no fund to divide, and therefore in my opinion it cannot be held that there was any vesting of the shares of that fund in any of the beneficiaries—see *Bryson's Trustees* v. *Clarke*, 8 R. 142. I think it is equally clear that the survivorship clause refers to the same period, namely, the death of the liferentrix—see *Young* v. *Robertson*, 4 Macq. 318. Now the survivorship clause comes to this, that the share of any of the nephews or nieces who predecease the liferentrix is to accresce to the survivors and the only event in which accretion is not to take place is the event of any nephew or niece leaving issue alive who should survive to take the share of the parent. Mrs Leighton had a child, but that child died before the liferentrix, and therefore no share fell to either mother or child; and the whole proceeds of the said subjects now fall to be divided in terms of the directions of the deed among the nephews and nieces of the truster who survived the liferentrix.

The Court answered the first alternative of the question of law in the negative, and the second in the affirmative.

Counsel for the First, Second, Fourth, Fifth, and Sixth Parties—Ingram. Agents—Galloway, Davidson, & Mann, S.S.C.

Counsel for the Third Party—D. Anderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, January 23.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MALONE *v.* CAYZER, IRVINE, & COMPANY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *Schedule* 1, *sec.* 1—*Death Resulting from Injury—Suicide—Averments that Accident to Eye Brought about Insanity Resulting in Suicide—Relevancy.*

A workman who had lost the sight of his left eye met with an accident involving the loss of sight of his remaining eye. He thereafter became insane and committed suicide. In an arbitration under the Workmen's Compensation Act 1897 at the instance of his widow against his former employers the pursuer averred—"In consequence of the said injury the said J. M. received a severe shock and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye and consequent blindness the said J. M.'s mind became affected and he became insane and . . . committed suicide. . . . The death of the said J. M. was due to the foresaid accident. . . ."

Held that there must be a proof.

Per the Lord President—The claimant "will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way—she must show that it was in fact the result of the injury."

Statement of law by Collins (M.R.) in *Dunham* v. *Clare*, [1902] 2 K.B. 292, *approved.*

The Workmen's Compensation Act 1897, (60 and 61 Vict. c. 37), Schedule 1, sec. 1, enacts — "The amount of compensation under this Act shall be—(*a*) When death results from the injury. . . ."

In an arbitration under the Workmen's Compensation Act 1897 between Mrs Mary Ann Mullen or Malone, 401 Rutherglen Road, Glasgow, pursuer, and Cayzer, Irvine, & Company, shipowners, 109 Hope Street, Glasgow, defenders, the pursuer claimed compensation for the death of her hus-