THE.

SCOTTISH LAW REPORTER.

WINTER SESSION, 1921–1922.

COURT OF SESSION.

Saturday, October 15, 1921.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Edinburgh.

FRASER *v.* JOHN & JAMES TOD & SONS, LIMITED.

Process—Removal to Court of Session for Jury Trial—Refusal to Remit to Sheriff—Averments of Substantial Damage—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

A Sheriff Court action for £250 as damages for personal injury having been remitted to the Court of Session for jury trial under section 30 of the Sheriff Courts (Scotland) Act 1907, the Court *refused* to exercise the power given by that section of remitting the case back to the Sheriff, as the pursuer's averments were not "obviously irrelevant to make a substantial, as opposed to a trivial, case."

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 think the case unsuitable for jury trial, have power to remit the case back to the Sheriff. . . ."

Miss Elizabeth Fraser, bank clerk, Edinburgh, brought an action in the Sheriff Court at Edinburgh against (first) the Corporation of the City of Edinburgh, and (second) John & James Tod & Sons, Limited, Leith, concluding for £250 damages for personal injuries sustained by her. [The action so far as laid against the Corporation was subsequently dismissed of consent.] The defenders second named admitted liability, but pleaded that the damages claimed were excessive.

The pursuer averred, *inter alia*—"(Cond. 2) On Thursday, 28th April 1921, at or about 4·20 p.m., the pursuer was a passenger on one of the tramway cars belonging to the first-named defenders proceeding southwards to Morningside. She joined the said car in Princes Street, paid her fare of 3d., and in return therefor received a ticket which entitled her to travel to Morningside. She then took a seat on the top of the said tramway car at the right-hand side, looking in the direction in which said tramway car was travelling and about the second seat from the back. All went well for some distance, but when in Fountainbridge, and at or near the part thereof opposite to the America Soda Fountain shop on the west side of Earl Grey Street, the tramway car suddenly and without any warning to the passengers collided violently with a heavy steam lorry belonging to the second-named defenders. (Cond. 4) As a result of the collision the pursuer was pitched from her seat on said tramway car over the first and on to the second seat in front of her said seat, and sustained the injuries after mentioned. (Cond. 7) As a result of the said collision the pursuer was severely injured. She sustained injury to her heart, her left arm, her left leg, and her stomach, and shock to her system. She was confined to bed for eighteen days. It was found necessary to call in a medical man to attend to her, and she is still incurring the expense of treatment by him and of drugs ordered by him. She is not yet fit for work. She returned to her employment in the said bank so soon as she was able to go about, but she was not then and she is not now able to do the work she did before she met with said accident. She cannot possibly regain her normal health and capacity for many months. Since the date of the accident she has suffered and will continue to suffer pain, sleeplessness, headache, and

giddiness. Her general digestive system is upset, and she has recurring attacks of vomiting. The action of her heart is irregular, and she constantly suffers faintness and breathlessness. Her nervous system has been so injured by said accident that she lives in a state of nervous apprehension and misery. The explanation in answer is denied. (Cond. 8) The pursuer was earning as a bank clerk immediately prior to the accident the sum of £10 a-month. Her employers have not so far withheld any part of her salary since the said accident, but her earning capacity has been reduced meantime, and she is certain to be totally incapacitated for work at intervals during at least the next six months. She was totally unfit for work from 1st July 1921 to 9th July 1921, and she is advised that she must shortly stop work again for fourteen days. She has sustained the expense of convalescence in the country. The pursuer moderately estimates the loss and damage sustained and which will be sustained by her in the future, at the sum sued for. Denied that her estimate is excessive. (Cond. 9) The second-named defenders have a report from a specialist named Dr M'Kendrick on the pursuer's condition, and they are therefore well aware that they have injured her severely. They are called on to produce that report. The said defenders have been called upon to make reparation to the pursuer for her injuries, and they have offered her sundry small sums, starting with an offer of £5 and gradually raising their offer to £25, but even the last-named sum is quite inadequate. Although they admit liability they refuse to pay her reasonable compensation, and the present action is therefore necessary."

In their answers the second named defenders stated—"(*Ans.* 7 *and* 8) Admitted that the pursuer, as the result of the said collision, sustained certain injuries. Denied that the said injuries were of the nature and extent and had and will have the results condescended on by the pursuer. The pursuer's salary as a bank clerk was continued to her during her absence from business. (*Ans.* 9) Admitted that these defenders have a report from Dr M'Kendrick, and that they admit liability. They have tendered and hereby tender to the pursuer the sum of £25 in full of her claim for loss and damage, together with expenses of process. *Quoad ultra* denied."

The Sheriff-Substitute (NEISH) having allowed a proof the pursuer required the cause to be remitted to the Court of Session for jury trial in terms of section 30 of the Sheriff Courts (Scotland) Act 1907.

On 15th October 1921 counsel for the defenders second named opposed a motion for issues and moved the Court to remit the case back to the Sheriff on the ground that where, as here, it was clear from the averments that no reasonable jury could award the pursuer £50 of damages; the case was unsuitable for jury trial—*Greer* v. *Corporation of Glasgow*, 1915 S.C. 171, 52 S.L.R. 109; *Monaghan* v. *United Co-operative Baking Society*, 1917 S.C. 12, 54 S.L.R. 211.

LORD PRESIDENT—I think there are averments on this record sufficient to entitle the pursuer to an order for issues with a view to trial by jury in this Court. It may be that the case will turn out to be so trivial as to be unworthy of that procedure; but it would be impossible to treat it as such either in the Single Bills or in the Summar Roll unless the pursuer's averments were obviously irrelevant to make a substantial as opposed to a trivial case. I do not think that can be said of the averments on this record, and the case should therefore proceed in the ordinary way.

LORD MACKENZIE, LORD SKERRINGTON, and LORD CULLEN concurred.

The Court ordered issues.

Counsel for Pursuer—Maclaren. Agent—R. D. C. M'Kechnie, Solicitor.

Counsel for Defenders—J. S. C. Reid. Agents—Cumming & Duff, W.S.

Saturday, October 15.

SECOND DIVISION.

TODD'S TRUSTEES *v.* TODD'S EXECUTORS AND OTHERS.

Succession—Vesting—Direction to Pay on Death of Liferenter to Sons and Survivors or Survivor of them Equally, Share and Share alike, and to Children of Predeceasors—Period of Vesting in such Children.

A testatrix directed her trustees on the death of the liferenter to pay and divide a sum of money to and among her four sons and the survivors or survivor of them equally, "declaring always that the children of a predeceasing parent shall in every such case take equally amongst them the share which would have fallen to his father had he been in life at the time." *Held* that vesting in the sons was postponed to the death of the liferenter; that the gift to children of predeceasing sons was substitutional and not a separate and independent bequest; and that, accordingly, no right vested in the children of predeceasing sons who predeceased the liferenter.

Martin v. *Holgate* ((1866) L.R., 1 H.L. 175) *distinguished.*

Addie's Trustees v. *Jackson* (1913 S.C. 681, 50 S.L.R. 586) *followed.*

To determine their respective interests under the will of the deceased Mrs Margaret Hadden or Todd, who died on 8th October 1888, in a sum of £3500 on the expiry of a liferent thereof conferred by her will, a Special Case was presented for the opinion and judgment of the Court by Mrs Todd's trustees, *first parties*; the executors respectively of four sons of Mrs Todd and the children of one of these sons, Hadden