

Counsel for the Pursuer (Reclaimer)—
Sandeman, K.C.—W. T. Watson. Agents
—P. Morison & Son, W.S.

Counsel for the Defenders (Respondents)
—Moncrieff, K.C.—Wark. Agents—J. & A.
Hastie, Solicitors.

Tuesday, January 16.

FIRST DIVISION.

[Sheriff Court at Glasgow.

FITZGIBBON v. HOWDEN & COMPANY AND OTHERS.

*Process—War—Jury Trial—Sheriff—Remit
for Jury Trial—Unsuitability of Case for
Jury Trial, Depending on Conditions
Arising out of the War—Sheriff Courts
(Scotland) Act 1907 (7 Edw. VII, cap. 51),
sec. 30.*

The pursuer in a sheriff court action of damages at common law for £100 for personal injury, required the case, under section 30 of the Sheriff Courts (Scotland) Act 1907, to be remitted to the Court of Session for trial by jury. The Court, after consultation with the Judges of the Second Division, refused the application, holding that while the case would in ordinary circumstances have been considered suitable for jury trial, the conditions arising out of the war rendered it unsuitable, and case remitted back to the sheriff court for proof.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 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 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."

Michael Fitzgibbon, *pursuer*, brought an action in the Sheriff Court at Glasgow against James Howden & Company, Limited, Glasgow, and others, *defenders*, concluding for £100 damages for personal injuries.

The pursuer averred that he was touched on the clothing by a motor vehicle driven by servants of the defenders; that he jumped back in alarm, breaking his leg in so doing; that the accident took place in a public street in Glasgow, and was due to the fault and negligence of the servants of the defenders, for which they were liable.

He further averred—"(Cond. 5) Pursuer was taken to the Glasgow Royal Infirmary on the date of the accident, and remained there until 1st December 1915. He was resident in the Royal Infirmary for six weeks and was at a convalescent home afterwards for two weeks. His health has

been impaired since and he has not been able to earn what he would have earned if the accident had not happened, and he is permanently injured by the accident. Pursuer estimates his loss of earnings and the damage caused him at the sum of £100."

He pleaded—"1. Pursuer having been injured by the negligence of both defenders' employees in driving vehicle for them as aforesaid is entitled to decree with expenses."

On 16th December 1916 the Sheriff-Substitute (A. S. D. THOMSON) allowed a proof. The pursuer required the case to be remitted to the Court of Session for jury trial.

In the Single Bills counsel for the defenders moved that the case be remitted back to the sheriff, and argued—The case was unsuitable for jury trial as the averments were involved, and the relevancy of the action was doubtful. Further, the averments as to injuries were not such as to form reasonable grounds for an award of over £50. Jury trial was therefore unsuitable—*Barclay v. Smith & Company*, 1913 S.C. 473, 50 S.L.R. 308. "Unsuitable" covered more than "not appropriate," which was the terminology of the Judicature (Scotland) Act 1825 (6 Geo. IV, cap. 120), section 28—*Greer v. Corporation of Glasgow*, 1915 S.C. 171, per Lord Johnston at p. 172, 52 S.L.R. 109—and the purpose of the proviso in the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 30, was to save expense in small cases—per the Lord Justice-Clerk Macdonald in *Barclay's case (cit.)* at p. 474. The expense and trouble arising under the present conditions, and necessarily entailed in a trial by jury, rendered this case unsuitable for that form of process.

Argued for the pursuer—The case was suitable for jury trial. A proof had been allowed, and the averments as to injuries—particularly the averments as to permanency of the injury and the length of time the pursuer had been incapacitated—were such that, if proved, would reasonably lead to an award of damages exceeding £50. "Suitable for jury trial" referred to the nature of the case and not to a state of affairs wholly external to the case.

At advising—

LORD PRESIDENT—If I were to apply the familiar criterion to this case, I cannot say that I should pronounce it to be a case unsuitable for jury trial within the meaning of the 30th section of the Sheriff Courts Act of 1907. But under present circumstances, and having regard to the conditions, industrial and commercial, prevailing in the country at the present time, I have no difficulty in dealing with the question. It appears to me that at a crisis like the present it would be altogether wrong to bring here a number of business men to try a case which, to say the least of it, can be equally well investigated in the sheriff court.

Accordingly I propose to your Lordships that we should remit this case for proof to the court in which it originated.

I need scarcely add that in the present circumstances, and in similar cases, the same

procedure will be followed, and that this decision has been reached by us after consultation with the judges of the other Division, and with their concurrence.

LORD MACKENZIE and LORD SKERRINGTON concurred.

LORD PRESIDENT—I desire to intimate that Lord Johnston, who is unable to be with us, also concurs.

The Court refused the pursuer's motion and remitted the case to the sheriff court for proof.

Counsel for Pursuer—R. MacGregor Mitchell. Agents—Paterson & Salmon, Solicitors.

Counsel for Defenders—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Wednesday, January 17.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

EDINBURGH ALBERT BUILDINGS COMPANY LIMITED *v.* GENERAL GUARANTEE CORPORATION LIMITED.

Lease—Hypothec—Sequestration for Rent—Invecta et Illata—Mechanical Piano Hired by Tenant of Hall Let Furnished at a Rent Payable in Advance.

The proprietors of a hall let it furnished to a tenant at a rent payable weekly in advance, to be used as a cinematograph theatre. The tenant having hired a mechanical piano on the hire-purchase system, brought it into the hall for use in the theatre. The property in the piano remained in the hirers until the whole of the instalments of the price were paid. Before the whole of the instalments were paid the tenant failed to pay his rent, though he remained in possession, and the proprietors of the hall brought a sequestration for rent, and having obtained decree in absence attached the piano. The hirers of the piano appeared by minute and craved recal of the sequestration in so far as it included the piano. *Held* that in respect of the fact that the premises were let furnished, combined with the facts that (1) the rent was payable in advance, and (2) the piano was a single article brought in, the landlord's hypothec did not extend to the piano, and the sequestration recalled as craved.

The Edinburgh Albert Buildings Co. Ltd., pursuers, brought an action in the Sheriff Court at Edinburgh, against George Senior, Edinburgh, tenant of the Albert Hall, Edinburgh, defender, concluding as follows:—“To sequestrate and to grant warrant to officers of Court to inventory and secure the whole stock, fittings, furniture, goods and other effects, so far as subject to the

pursuers' hypothec, which are or have been on the premises occupied by the defender at the Albert Hall, No. 24 Shandwick Place, Edinburgh, since 17th August 1915, in security and for payment to the pursuers of the sum of £153 sterling, being the rent thereof, at the rate of £9 per week, due and payable for the period from said 17th August 1915 to 14th December 1915, with interest thereon at the rate of five per centum per annum from the said last-mentioned date till payment, and expenses; and thereafter to grant warrant to sell by public roup the whole or so much of the sequestered effects as will satisfy and pay to the pursuers the said rent, interest and expenses; and to appoint payment to be made to the pursuers of the rents, interest and expenses aforesaid out of the proceeds of any sale or sales, or out of any sums consigned to have the sequestration recalled, and to decern against the defender for said rent, interest and expenses in the event of no sale taking place, or for such balance as may remain due to the pursuers after sequestration and sale and payment of expenses and all preferable claims therefrom; and to grant warrant to arrest on the dependence.” No appearance was entered for the defender, but the General Guarantee Corporation, Ltd., Glasgow, *compearers*, appeared by minute craving recal of the sequestration.

The lease entered into between the pursuers and defender was in the following terms:—“With reference to the note entered into between Messrs J. & J. Galletly, secretaries for and on behalf of the Edinburgh Albert Buildings Company, Ltd., and Mr George Senior, the present tenant of the Albert Hall, dated 28th March 1914, Mr Senior having represented to the directors of the company that he is unable to pay the rent of £10 weekly, stipulated by the said note, and the directors of the said company having agreed to reduce the rent of the hall as from the week commencing the 28th day of December 1914, to £9 per week, it is agreed between the parties as follows, namely:—
1. The missive of let, dated 28th March 1914, is hereby cancelled. 2. The Albert Hall shall be let by the week, commencing as on Monday, 28th December 1914, by the company to the said George Senior. 3. The rent payable shall be £9 weekly, that rent to be paid in advance every Monday by 12 o'clock noon. 4. Either party may bring the let to an end on giving one week's notice. 5. The rent of £9 before referred to shall include the occupier's taxes. 6. Mr Senior accepts the hall and fittings, etc., as referred to in the note of 28th March 1914 as in perfect order, and undertakes to leave them in the same condition at the expiry of his tenancy. 7. The proprietors will keep the property wind and water tight. All other repairs, etc., shall be done by Mr Senior.”

The pursuers *averred*—“(Cond. 3) The defender paid the rent of said hall for the period from the date of his entry down to the week ending 17th August 1915. He has paid no rent in respect of his possession from that date to 14th December 1915, when the lease was brought to an end by him.