Tuesday, March 8.

SECOND DIVISION.

[Lord Sands and a Jury.

STEWART *v.* DUNCAN.

Proof—Evidence—Admissibility—Incompetent Question—Jury Trial—Damages—Question as to whether Defender Insured—Motion for New Trial.

In the course of the evidence for the pursuer in the trial of an action of damages before a jury one of the pursuer's witnesses, being examined as to a visit paid to her by the defender on the day following the accident, deponed that he then said—"Don't be afraid to make a claim, because my car is insured." The defender denied in cross-examination that he had made this statement, but in answer to a further question he admitted that the statement was true. A verdict for the pursuer having been returned, the defender moved for a new trial on the ground of the prejudice created by the questions put. Motion *refused*, on the ground that the questions were not irrelevant on the question of credibility which had been raised.

Observed that it would be improper deliberately to bring out before a jury the fact that the defender was insured, and that to so elicit the fact might be a sufficient ground for setting aside the verdict.

Alexander Stewart, Dundee, *pursuer*, a child of six years of age, to whom a curator *ad litem* was appointed, brought an action against Thomas Duncan, Rosefield Street, Dundee, *defender*, to recover damages for personal injuries sustained by being run over by a taxi-cab owned and driven by the defender.

An issue having been allowed the case was tried before Lord Sands and a jury and a verdict was returned in favour of the pursuer. The defender then moved for a new trial on the ground, *inter alia*, that the jury had been influenced by the disclosure in the course of the evidence that the defender was insured against such claims. In the course of her examination the pursuer's mother deponed as to a visit paid to her by the defender on the day after the accident. She was asked the question —"What did he say?" and she replied—"He said 'Don't be afraid to make a claim, because my car is insured up to £1000.'" The witness, however, admitted that the defender denied responsibility for the accident. The next witness, a sister of the pursuer's mother, stated that she was present at the interview, and corroborated the above evidence. The defender, however, when cross-examined denied that he had made such a statement in the presence of the witnesses above mentioned. He was then asked whether it was true that his car was insured up to £1000 and replied in the affirmative. This evidence was subsequently commented on by counsel for the pursuer in his address to the jury.

In moving for a new trial counsel for the defender argued that the questions had been put to elicit the fact that the defender was insured so as to influence the jury in the pursuer's favour, and that such an irregularity had occurred as entitled the defender to a new trial. He referred to *Wright* v. *Hearson*, 1916, W.N. 216.

LORD JUSTICE-CLERK—[*After expressing the opinion that there was evidence on which the jury were entitled to find for the pursuer*] —The second point which was raised by Mr Paton had reference to the fact that the defender's car was insured. I am perfectly clear upon this, that it is most improper deliberately to bring out before a jury a fact which has no direct bearing on the question at issue, but which is nevertheless calculated, and might even be intended, to influence the jury. But the point to which Mr Paton takes exception was brought out in answer to questions which were unobjectionable in form, and the reference to the matter by the learned counsel for the pursuer in his address to the jury was not illegitimate, having regard to the question of credibility which had been raised. It was pertinent to that topic, and it was legitimate to mention it to the jury in reference to credibility. As the judge who presided at the trial is of opinion that the point was not improperly brought out or put to the jury, I do not think that there is ground upon which this Court should interfere with the verdict on this head.

I think it right, however, to say that if a case were deliberately sought to be made of the fact that a defender was insured, and if this fact were brought before a jury for the purpose of influencing them on the ground that the defender was insured, I should consider it most improper, and in certain circumstances the Court would be justified in setting aside the verdict because prejudice had been created, and improperly created. In my opinion it would be quite within the competency and the duty of the Court to set aside a verdict if the circumstances were such as to show that the fact that the defender was insured was improperly made a point by the pursuer before the jury. [*His Lordship then dealt with the question of procedure.*]

LORD DUNDAS—[*After expressing the opinion that there was evidence which entitled the jury to find against the defender*] —The second matter relates to the allusion before the jury to the fact that the car was insured. I concur with your Lordship in thinking that any allusion to that topic is improper, and it is the duty of counsel to avoid willingly or knowingly letting it transpire before the jury in the course of the trial, and to avoid any reference to it in their addresses to the jury. I concur with the observations made by the judges in the English case of *Wright*, [1916] W.N. 216, and I rather think there is other authority to the same effect in England. I agree with your Lordship that if a clear case was brought before us where there had been improper introduction of or allusion to this

topic it might well be a ground for setting aside a verdict. The present, however, is not such a case as your Lordship has stated, and as Lord Sands, who presided at the trial, has indicated during the discussion. [*His Lordship then dealt with the question of procedure.*]

LORD ORMIDALE — I concur with your Lordships. [*His Lordship expressed the opinion that there was evidence to support the verdict, and proceeded*]—On the point as to the disclosure of the fact that the defender's car was insured, if that information was elicited accidentally, as I understand it to have been in this case, then I think though unfortunate it may be overlooked. The only effect of introducing the topic is to prejudice the minds of the jury, and I think to introduce it deliberately would be most improper and irregular and contrary to the universal practice in this Court, and some notice of the irregularity would require to be taken. There is force in the suggestion that if the presiding judge were satisfied that it had been deliberately brought in, then the case might be immediately withdrawn from the jury. [*His Lordship then dealt with the question of procedure.*]

LORD SANDS—[*After referring to the evidence*] — As regards the question of the defender's car being insured, I regret that this came out, but the pursuer was quite justified in producing evidence as to what took place when the defender called the day after the accident and interviewed her. This statement about insurance was said to have been made in the course of the conversation, and evidence in regard to it was not impertinent or irrelevant on the question of credibility. Whilst I could not but think that the pursuer regarded it as a matter of tactical advantage that this fact should come out, it could hardly be suggested that it was deliberately brought out for an improper purpose. I could not regard the question put as one which could be disallowed as improper. Whilst I entirely concur with your Lordships' view as to the propriety of not in any way bringing out the fact of insurance, I do not think this verdict should be disturbed. [*His Lordship then dealt with the question of procedure.*]

LORD SALVESEN did not hear the case.

The Court refused the motion.

Counsel for the Pursuer—Watt, K.C.—Ingram. Agents—Milne & Lyon, W.S.

Counsel for the Defender—MacRobert, K.C.—Paton. Agents—Ross & Ross, S.S.C.

Wednesday, March 9.

FIRST DIVISION.

SINCLAIR'S TRUSTEES, PETITIONERS

Trust—Nobile Officium—Power to Make Advances out of Surplus Income—Advances to Major Beneficiaries out of Prospective Shares not yet Vested.

A testator by his settlement directed his trustees to pay an annuity of £230 to his widow, and also, "so long as my said wife shall survive me and shall remain my widow, and the youngest of my daughters shall not have attained the age of twenty-five years," to pay out of the surplus income certain annual allowances to his daughters. He thereafter provided for the ultimate division of the estate among his daughters and their issue upon the death of his widow and upon his youngest daughter attaining the age of twenty-five years, to which date vesting was postponed. But he made no provision of any annual allowances for his daughters in the contingency, which occurred, of his widow surviving after his youngest daughter had attained the age of twenty-five. Two of his four daughters being unmarried and having no other means of support, a petition was presented by the trustees for authority to make advances to them out of surplus income. The Court *authorised* the trustees to make a yearly allowance out of the surplus income of the trust, or out of the accumulations of income, of £50 to each of the unmarried daughters so long as they were unable suitably to maintain themselves, said allowance to cease on their marriage and to be deducted from their shares of the residue.

James Kinnaird, joiner, Greenock, and others, the trustees acting under the trust-disposition and settlement of William Sinclair, steamship agent, Greenock, presented a petition to the Court for authority to make advances of £50 a-year out of the surplus income of the trust funds to each of the testator's daughters Margaret and Jessie Sinclair. The testator died on 13th March 1908 leaving a widow and four daughters. By his trust-disposition and settlement he conveyed his whole means and estate to his trustees, giving among others the following directions:—"(*Fourth*) I direct my trustees to make payment to my said wife during her survivance of me of a free liferent annuity of Two hundred and thirty pounds sterling . . . declaring that the said annuity . . . shall be strictly alimentary and shall not be assignable by my said wife or subject to her debts or deeds or the diligence of her creditors: (*Fifth*) I direct my trustees so long as my said wife shall survive me and shall remain my widow and the youngest of my daughters shall not have attained the age of twenty-five years, to pay out of the surplus of the annual produce and income of my said estate which shall remain after providing