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Friday, October 15, 1897.

SECOND DIVISION.

[Sheriff of Lanarkshire.

FLEMING *v.* EADIE & SON.

Process — Appeal for Jury Trial — Competency — Whether Agreement not to Appeal for Jury Trial Disclosed by Interlocutor Allowing Proof.

In an action of damages for personal injury the Sheriff-Substitute pronounced the following interlocutor — "Closes the record of consent Repels the plea of irrelevancy Before answer allows a proof." The pursuer appealed to the Court of Session for jury trial, and the defenders objected to the competency of the appeal on the ground that the interlocutor allowing proof had been pronounced of consent, and disclosed an agreement between the parties not to appeal for jury trial.

Held that the appeal was competent, in respect that it did not unequivocally appear that the words "of consent" applied to anything except the repelling of the plea to the relevancy.

Paterson v. *Kidd's Trustees*, May 21, 1896, 23 R. 737, *distinguished.*

This was an action brought in the Sheriff Court at Glasgow by Walter Fleming, sanitary inspector in Glasgow, against Alexander Eadie & Son, contractors there. The pursuer sought decree for the sum of £1000 as damages for injuries caused to him, as he averred, by the fault of the defenders.

The defenders pleaded, *inter alia* (1) Irrelevant.

On 7th July 1897 the Sheriff-Substitute (SPENS) pronounced the following interlocutor—"Closes the record of consent Repels the plea of irrelevancy Before answer allows a proof and assigns Monday 18 October next at 10.30 a.m. as a diet"

The pursuer appealed for jury trial under the 40th section of the Court of Session Act 1825 (Judicature Act).

The Court of Session Act 1825 (6 George IV. c. 120), section 40, provides "that in all cases originating in the inferior courts in which the claim is in amount above forty pounds, 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 to lie *in retentis*, or granting diligence for the recovery and production of papers) it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation, which shall be passed at once without discussion and without caution."

The defenders objected to the competency of the appeal, and argued—Parties could give up their right to appeal for jury trial by bargain, and the presence of the words "of consent" in an interlocutor allowing a proof was sufficient evidence of such a bargain. Such an interlocutor was not subject to appeal in terms of the Court of Session Act 1825, section 40; *Paterson* v. *Kidd's Trustees*, May 21, 1896, 23 R. 737. That case ruled the present, from which it was not distinguished. Here the words "of consent" applied to everything in the interlocutor which followed them, and *de facto* consent was given to the allowance of proof. The only conceivable object which the defenders could have in consenting to their plea to the relevancy being repelled was that there might be a proof before the Sheriff instead of an appeal for jury trial. An allowance of proof at that stage became possible only in respect of the defenders consenting to forego their objection to the relevancy of pursuer's averments. Alternatively, the defenders were entitled to a remit to the Sheriff-Substitute so that what actually took place might be accurately

ascertained — *Whyte* v. *Whyte*, December 17, 1895, 23 R. 320.

Argued for the pursuer and appellant—The appeal was competent. The pursuer never intended or agreed to forego his right to appeal for jury trial. The case of *Paterson* v. *Kidd's Trustees, cit.*, had no bearing on the present. Here the words "of consent" really applied only to the repelling of the defenders' plea to the relevancy, whereas there these words could only apply to the allowance of proof. But further, even assuming that the words "of consent" here applied to the allowance of proof, the cases were distinguished. In *Paterson* there was a plea to the relevancy which had not been repelled, and, in view of that circumstance the Court read the interlocutor as disclosing an agreement between the parties to the effect that the facts should be ascertained by proof in the Sheriff Court before the question of relevancy was decided—See *per* Lord President at p. 738. No such agreement was disclosed here, for the defenders' plea to the relevancy had been repelled, and in consequence an allowance of proof had become inevitable. In such circumstances no agreement to forego his right to jury trial could be inferred against the pursuer from his having consented to an allowance of proof, any more than such an inference could be drawn from proof being allowed on the pursuer's motion.

LORD JUSTICE-CLERK—The interlocutor here as written in the interlocutor-sheet does not contain any punctuation at all. The only indication of the way in which the writer meant that it should be read is the use which he makes of capital letters. It is the custom of the clerks of Court to use capital letters for the beginning of each division of an interlocutor. When we look at this interlocutor I do not think there is anything on the face of it which necessarily leads us to the view which the defenders ask us to take, viz., that the allowance of proof was made of consent. There is this difference between this case and the case which was quoted to us by Mr Glegg. In that case the consent applied, and could apply, to nothing but the allowance of proof, because the interlocutor contained nothing but an allowance of proof except the formal closing of the record, whereas here the interlocutor reads "of consent Repels the plea of irrelevancy." It may very well be that it is to the repelling of the plea of irrelevancy that the consent applies. That being so, I am not inclined to strain the meaning of the words in this interlocutor in such a way as to deprive either party of an appeal to which, apart from the special wording of the interlocutor, they would have an undoubted right by statute. As I have said, it may quite well be read as applying to the repelling of the plea of irrelevancy. In that view what the Sheriff did was, that, the plea of irrelevancy having been cleared out of the way by the consent of the defender to its being repelled, he thereupon, as he necessarily must have done, allowed a proof, and in that case the provisions of the statute in terms apply, and this appeal is perfectly competent.

If there had been an allegation here that an arrangement had been made between the parties and the Sheriff that there should be a proof in the Sheriff Court, that would have been a different kind of case altogether, and one which would have opened the way to the same decision as was reached by the Lord President in the case of *Paterson*. But I think it is not definitely and clearly alleged that any such arrangement was come to in this case, and that no inquiry is requisite to clear up any matter of fact.

I am therefore of opinion that the objection stated to the competency of this appeal is not well founded and should be repelled.

LORD YOUNG—I am generally of the same opinion. Considerable inconvenience sometimes arises from the provisions of this statute, which allows appeal to this Court from the Sheriff Court with a view to jury trial. I agree with the view that it is desirable in such cases as the present by agreement of parties if possible to obviate appeal for jury trial. In these cases it is very desirable to have the facts ascertained in the Sheriff Court before being brought here. I would be prepared to give every encouragement that I could to any such arrangement. If we had evidence that any such arrangement was arrived at by the parties I should be very ready to support it, but I do not think the interlocutor before us affords evidence of anything of the kind. Of course the interlocutor has been sadly blundered. The Sheriff allows a proof before answer. As a rule that means that the Sheriff, before deciding as to the relevancy, desires to have the facts before him, and therefore allows a proof before answer. But here the relevancy was admitted, and the plea of irrelevancy was consequently repelled, and the expression "proof before answer" is out of place. I take it, however, that the fair meaning of the interlocutor is that the defender was asked whether he had anything to say in support of his plea to the relevancy, and admitted that he had not, and that consequently the only interlocutor possible in these circumstances was one repelling the plea of irrelevancy and allowing a proof. That is just the kind of interlocutor to which the provisions of the statute apply. I therefore concur with your Lordship in thinking that the objection stated to the competency of this appeal is not well founded.

LORD TRAYNER — The objection to the competency of this appeal is based on an alleged agreement come to by the parties that there should be a proof before the Sheriff instead of an appeal for jury trial. If it appeared from the interlocutor of the Sheriff-Substitute that such an agreement had been entered into I should have been prepared to follow the case of *Paterson*. That case would have been quite in point if it had appeared from the interlocutor that

what was consented to by the parties was that there should be a proof before the Sheriff. But I do not think that is the case here. In this interlocutor we find that a plea to the relevancy was repelled, the record was closed, and a proof was allowed. Now, as regards the closing of the record no consent of parties was required, and when the plea to the relevancy was repelled no consent was required for the allowance of proof. But as regards the plea to the relevancy it could only be repelled either after hearing what was to be said in support of it (which apparently was not done), or of consent of the party who had stated it. I am therefore of opinion that the words of consent in the interlocutor must be held to refer to that which alone required consent, namely, the repelling of the plea to the relevancy. In the case of *Paterson* it clearly appeared from the terms of the interlocutor that the consent applied to the allowance of proof before answer. Whereas here that is not clear, and is, in my opinion, not to be inferred from the interlocutor, expressed as it is.

I think the allegations as to what actually did take place before the Sheriff are too vague to justify us in sending the case to the Sheriff to ascertain by a report from him what it was that parties consented to, as the Court were prepared to do in the case of *Whyte*. The Sheriff probably could not give us much assistance now. No doubt a great many similar cases have been before him since, and all that he could say would be, in all likelihood, that the interlocutor stated all that he knew as to what was done at the time. I agree that the objection stated to the competency of the appeal should be repelled.

LORD MONCREIFF—I agree. I think the case of *Paterson* is clearly distinguishable on the grounds which your Lordships have stated.

It was suggested from the Bench that the case should be tried upon the record without adjusting an issue, and upon counsel for the parties stating that they had no objection to this course the Court pronounced the following interlocutor:—"Dispense with the adjustment of issues and appoint the cause to be tried upon the record."

Counsel for the Pursuer—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders — Glegg. Agents—Macpherson & Mackay, S.S.C.

Friday, October 15.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CAUGHIE *v.* JOHN ROBERTSON & COMPANY.

Reparation — Independent Wrong-Doers Sued Jointly and Severally — Form of Issue.

In an action of damages for personal injury the pursuer called two defenders and craved decree against them for a certain sum, jointly and severally. He averred that his pupil son had been injured when walking along a public footpath by falling "into a heap of smouldering ashes, placed there by the said defenders, or both or either of them," and that "the defenders had been for some time in the habit of tipping ashes in a live condition" at the place in question. The defenders maintained that the action was irrelevant. *Held* (*dub.* Lord Trayner) that the pursuer was entitled to an issue.

Form of issue *approved*.

This was an action brought in the Sheriff Court of Lanarkshire at Glasgow by James Caughie, 53 Dunn Street, Bridgeton, Glasgow, as tutor and administrator-in-law of his pupil son Robert Caughie, against John Robertson & Company, calico printers, Springfield Print Works, Dalmarnock, and James Orr & Company, bleachers, dyers, and cloth finishers, Summerfield Works, Dalmarnock. The pursuer prayed the Court "to grant a decree against the above-named defenders, ordaining them jointly and severally to pay to the pursuer, as tutor and administrator-in-law to his pupil son Robert Caughie, the sum of £200 with interest and expenses.

The pursuer averred, *inter alia*—"(Cond. 2) On or about 5th August 1896, the said Robert Caughie was walking upon the public footpath along the north or right bank of the river Clyde at Dalmarnock, when he fell into a heap of smouldering ashes, placed there by the said defenders, or both or either of them, and was severely burnt about the feet, legs, and right hand. (Cond. 3) The above-mentioned smouldering ashes are situated immediately alongside of the said public footpath which follows the bank of the Clyde at this point. An embankment has been formed immediately south of the said Summerfield Works by the tipping of ashes across this footpath which now goes over said embankment. Immediately along the edge of said footpath the defenders have been for some time in the habit of tipping ashes in a live condition. Those ashes, though dead to all appearance upon the surface, continue smouldering for some days underneath. Anyone following the line of the path and making a false step off the path would sink into the smouldering ashes and sustain injury. . . . (Cond. 4) In tipping said ashes, without having damped same, immediately alongside said public pathway, the defenders were acting