Counsel for the Petitioners—Abel. Agent—Alex. Morison, S.S.C.

Counsel for the Respondent—J. G. Stewart. Agents—Cairns, M'Intosh, & Morton, W.S.

Tuesday, October 27.

FIRST DIVISION.

[Sheriff of Forfarshire.

TOSH *v.* FERGUSON.

Process — Appeal from Sheriff — Proof — Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

Where a cause has been removed from the Sheriff Court into the Court of Session under the 40th section of the Judicature Act, the Court will not send back the cause to the Sheriff Court for trial unless special circumstances appear which render the Sheriff Court a peculiarly appropriate tribunal for ascertaining the facts.

Where an action of accounting had been removed by appeal from the Sheriff Court into the Court of Session, the Court upon this principle *remitted* to a Lord Ordinary to take the proof.

Mrs Martha Ferguson or Tosh, Kirriemuir, raised an action of accounting in the Sheriff Court of Forfarshire against her father William Ferguson, farmer, Glen Prosen, with a conclusion for payment of £480.

The pursuer averred that the defender had had entire control of her money matters, that she had paid over to him all her wages, and that she had handed him certain deposit-receipts, which he had subsequently induced her to endorse, had then uplifted, and had failed to account for.

The Sheriff-Substitute at Forfar (ROBERTSON) allowed both parties a proof of their averments, and the Sheriff (J. C. THOMSON) adhered.

The defender thereupon appealed to the Court of Session, and moved for a proof there.

The Judicature Act 1825 (6 Geo. IV. cap. 120), sec. 40, provides "that in all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts, it shall be competent to either of the parties, or who may conceive that the case ought to be tried by jury, to remove the process into the Court of Session."

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 73, enacts that "it shall be lawful, by note of appeal under this Act, to remove to the Court of Session all causes originating in the inferior Courts in which the claim is in amount above £40, at the time, and for the purpose, and subject to the conditions specified in" the Judicature Act 1825, "and such causes may be remitted to the Outer House."

Argued for the appellant—It was decided once for all in *Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279, that under the 40th section of the Judicature Act the Court was entitled to deal with any cause removed from an inferior Court as if it had originated in the Court of Session. That decision had been followed in *Willing* v. *Heys*, November 15, 1892, 20 R. 34; and the mere fact that the interest at stake was trifling was not in itself sufficient to justify the Court in sending the case back to the Sheriff—*Crabb* v. *Fraser*, March 8, 1892, 19 R. 580; *Willison* v. *Petherbridge*, July 15, 1893, 20 R. 976. There was no special feature in this case to make it peculiarly suitable for the Sheriff Court. Proof should therefore be led in the Court of Session.

Argued for the respondent—The Court had full power to remit to the Sheriff, and had exercised it where the case seemed specially suitable for trial in the Sheriff Court—*Bain* v. *Countess of Seafield*, February 13, 1894, 21 R. 536. It would be putting the pursuer to needless expense to make her bring witnesses to Edinburgh. This was just the kind of case that should be disposed of in the Sheriff Court.

LORD PRESIDENT—My Lords, at this time of day it is, of course, impossible to dispute that the Court has power to send back to the Sheriff Court for trial there a case appealed under the 40th section of the Judicature Act. But then it is necessary to observe that has only been done where circumstances could be pointed to which rendered the Sheriff Court peculiarly appropriate as a tribunal for ascertaining the facts. Now, in this case I do not think that Mr Reid has succeeded in pointing to any such specialities. It is a substantial case; it has not more local colour than belongs to other questions of disputed fact; and there are no greater facilities in the Sheriff Court for its determination than here. Accordingly, I think that, having regard to the authorities, the proper course is to have a proof in the Court of Session, and I suggest that it should be remitted to the Outer House, and in the Outer House to Lord Kincairney.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court remitted to Lord Kincairney to take the evidence.

Counsel for the Pursuers—J. A. Reid. Agents—Reid & Guild, W.S.

Counsel for the Defender—Sym. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, October 28.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

PHILLIPS AND OTHERS (SANGSTER'S TRUSTEES) *v.* THE GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED.

Insurance — Accident Insurance — Conditions of Policy — "Wilfully, wantonly, or negligently exposing himself to any unnecessary danger."

A policy of insurance against accidental death contained the express condition "that the assured shall use all due diligence for his personal safety and protection, and" the policy "does not extend to cover death or injury . . . while travelling by rail in any other than a passenger carriage, or whilst acting in violation of the bye-laws, rules, or regulations of a railway or tramway company, or riding horse or cycle races or steeplechases, or otherwise wilfully, wantonly, or negligently exposing himself to any unnecessary danger."

The insured, who was of strong constitution, a good swimmer, and accustomed to taking baths in cold water, was drowned while bathing in deep water from a boat on a cold and stormy evening in April.

Held (*aff.* judgment of Lord Stormonth-Darling) that the case fell outwith the condition of the policy, on the ground that the risks attending the act of the insured were not such as he was bound to anticipate.

Mrs Margaret Sangster or Phillips and others, testamentary trustees of the late Captain William Sangster, marine superintendent, Dundee, raised an action against The General Accident Assurance Corporation, Limited, for payment of £1000 in respect of a policy of insurance effected by the said William Sangster with that company.

Captain Sangster, who was forty-four years of age, was drowned in Loch Earn on the evening of 30th April 1895, in the following circumstances:—Finding the duties of his situation irksome, he had resigned it, and proceeded to Crieff on 29th April for a holiday. On the following day he breakfasted and lunched at Crieff, and in the afternoon went to Comrie and St Fillans, at each of which places he had a glass of wine and a biscuit, and spoke cheerfully and pleasantly to the persons who served him. He hired a boat at St Fillans, and was last seen rowing on the loch between eight and nine in the evening, which was cold and stormy. Next day the boat, with his clothes in it, was found aground at another part of the loch. The body was never recovered. It was proved that the deceased was a man of strong constitution, of high character, and of absolute solvency; that he had been in the habit of taking baths in extremely cold water; and that his doctor had advised him to use cold water as a means of recovering tone. He was an expert swimmer, and accustomed to the management of boats.

The deceased was insured for £1000 with The General Accident Assurance Corporation, Limited, under a policy which bound the company to the payment of that sum "if . . . the assured shall sustain any personal injury caused by accident within the meaning of this policy and the conditions hereto."

Condition 4 of the policy was in the following terms—"4. It is an express condition of this policy that the assured shall use all due diligence for his personal safety and protection, and it does not extend to cover death or injury by suicide or attempted suicide, whether criminal or not, or caused by or resulting from intoxication or insanity, or by duelling, fighting, or any breach of the law on the part of the assured, or by war or invasion, foreign enemy, civil commotion, popular riot, or any military or usurped power, or while travelling by rail in any other than a passenger carriage, or whilst acting in violation of the bye-laws, rules, or regulations of a railway or tramway company, or riding horse or cycle races or steeplechases, or otherwise wilfully, wantonly, or negligently exposing himself to any unnecessary danger."

In their defences the company made certain averments tending to show that the deceased had committed suicide, and founded one of their pleas-in-law thereon.

The defenders further pleaded—"(3) *Esto* that the assured was accidentally drowned while bathing, the policy is void, and the defenders should be assoilzied, in respect that the assured failed to use due diligence for his personal safety and protection; *et separatim*, that he wilfully, wantonly, or negligently exposed himself to unnecessary danger."

A proof having been led, the Lord Ordinary (STORMONTH DARLING) on 26th June 1896 granted decree against the defenders.

Opinion.—[*After examining the evidence and expressing the opinion that Captain Sangster died by accident and not by suicide, his Lordship proceeded*]—"But it is said by the defenders that if the act was not suicide, it was, at all events, so rash as to come within the clause in the policy which declares that it shall not extend to cover death or injury in consequence of the assured 'wilfully, wantonly, or negligently exposing himself to any unnecessary danger.'

"Now, this clause comes after a careful enumeration of specific things which the policy is not to cover, some of these being quite arbitrary and not specially dangerous, such as travelling by rail in any other than a passenger carriage. Nobody doubts the company's right to exclude these specific