LORD JUSTICE-CLERK—In the formation of certain streets and terraces in what was formerly a part of the burgh of Hillhead, and is now in the city of Glasgow, the feus were laid off so as to leave a lane between the two houses forming the end houses of Hamilton Park Quadrant and Lacrosse Terrace, as shown on the plan produced, the lane being continued behind a street called St James Street, and carried on to the Great Western Road. When the lane was formed it was undoubtedly a private lane to which the public and the municipality as representing the public had no right. It belonged to the proprietors of the houses abutting upon it, each having the property up to the *medium filum*. According to the titles the only right over it is a right of access in favour of the feuars in Hamilton Park Quadrant.

The fact is established that for a great many years, certainly for twenty years, this lane was fenced by a gate which closed all access into it from the quadrant and the terrace, the gate being kept locked, so that the lane was only available as such to those who were supplied with keys. As the Lord Ordinary puts it, "it had none of the characteristics of a public street."

It appears that in 1901 the defenders, without any notice to the pursuers or any process of law to give sanction to their proceeding, took down the gate and an iron railing which crossed the road opposite the gate at right angles and shut off the quadrant from the crescent, and that on the pursuers replacing the obstruction the defenders again removed it.

To justify their proceedings the defenders founded on their having some time before entered this lane on the register of public streets in Glasgow under section 282 of the Glasgow Police Act of 1866, and that it thus became a public street, and that they had maintained it as such. I agree with the Lord Ordinary in holding that none of these contentions are sound, and that there is no evidence to prove that the lane between the pursuer's properties was ever taken over by the Hillhead Commissioners or was properly constituted into a public street or lane of Glasgow. It is true that in 1894 this lane was placed on the register of streets professedly under section 282 of the Act of 1866, but it is to me plain that the mere act of placing a lane on a particular register without any notice to the private proprietors, and without any opportunity afforded to them of being heard on the matter, could never deprive the proprietors of rights which they possessed before the entry was made. Procedure is prescribed for such a case by section 286, and it must, I think, be held that the right to enter upon the register depends upon the statutory procedure for the protection of the rights of owners of private property being first observed. But even were it otherwise, section 282 was not complied with, as the lane in question was not defined by reference to markings or numbers on the Ordnance Survey sheet as required by section 282.

The suggestion that there was acquiescence on the part of the pursuers is quite without support. On the contrary, when the proposal was first mooted about ten years ago protest was at once made by the proprietors and an application made to be heard on objections, which was met by intimation that procedure would be taken under section 286, which was never done, the only procedure taken being the violent removal of the gate in 1901.

I would move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD YOUNG concurred.

LORD TRAYNER—I concur in the conclusion at which the Lord Ordinary has arrived, and have nothing to add to what his Lordship has said.

LORD MONCREIFF was absent at the hearing.

The Court adhered.

Counsel for the Pursuers and Respondents — Wilson, K.C. — M. P. Fraser. Agent—L. M'Intosh, S.S.C.

Counsel for the Defenders and Reclaimers — Lord Advocate Dickson, K.C. — Lees, K.C.—Cooper. Agents—Campbell & Smith, S.S.C.

Tuesday, November 17.

FIRST DIVISION.

[Sheriff Court at Glasgow.

DICKIE *v.* SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LIMITED.

Process—Proof—Jury Trial—Proof or Jury Trial — Appeal for Jury Trial — Action of Damages for Personal Injury—Remit to Sheriff—Court of Session Act 1825 (6 *Geo. IV. c.* 120) (*Judicature Act*), *sec.* 40.

In an appeal for jury trial under section 40 of the Judicature Act in an action concluding for £50 damages for personal injury caused by an accident in Glasgow, the respondents moved that the case should be remitted back to the Sheriff for proof on the ground of its local character and trifling nature. *Held* that the appellant was entitled to a jury trial.

George Dickie, message boy, Govan, brought this action in the Sheriff Court at Glasgow against the Scottish Co-operative Wholesale Society, Limited, concluding for payment of £50.

Dickie averred that he had been run over by a lorry belonging to the defenders. As to the nature of the injury sustained he made the following averment:—"(Cond. 5) The pursuer having been carried into the consulting-rooms of Dr Barras, 563 Govan Road, Govan, was taken home, on the injury (a severe crushing of the toes of the right foot) being dressed. After being attended thereafter by Dr Campbell, 987 Govan Road, he was sent to the Western Infirmary for further attention. After a

few weeks' further treatment it was found necessary to partially amputate the great toe of the right foot. Before the pursuer recovered from the said operation a period of about twelve or fourteen weeks had elapsed from the date of the said accident."

On 19th June 1903 the Sheriff-Substitute (BALFOUR) allowed a proof.

On an appeal the Sheriff (GUTHRIE) adhered.

The pursuer appealed to the Court of Session for jury trial.

On the case being called in the Single Bills counsel for the respondents moved that the case should be remitted to the Sheriff for proof, on the ground that this was a local case of a trifling nature. He stated that the pursuer had, before action raised, offered to take £20 in full of his claim. (This statement was neither admitted nor denied.) There was no doubt of the competency of the course proposed, and it had been recently followed in numerous cases—*Walker* v. *Knowles & Sons*, January 8, 1902, 4 F. 403, 39 S.L.R. 291; *Pollock* v. *Mair*, January 10, 1901, 3 F. 332, 38 S.L.R. 250; *Gillies* v. *Scott & Co.*, July 11, 1903, 40 S.L.R. 777.

Counsel for the appellant argued that the case should be sent to a jury. An appellant had a statutory right to a jury trial, where the amount claimed exceeded £40, and though there was no doubt that it was competent to remit to the Sheriff, yet that had never been done except in cases presenting some specialty beyond the fact that the amount claimed was not very large. The present was an ordinary action for damages for personal injury, and presented no special feature except that the pursuer had estimated his claim moderately—*Jamieson* v. *Hartil*, February 5, 1898, 25 R. 551, 35 S.L.R. 450; *Dunn* v. *Cunningham*, July 9, 1902, 4 F. 977, 39 S.L.R. 755; *Cowie* v. *Diez*, July 17, 1903, 40 S.L.R. 868.

LORD PRESIDENT—The question in this case is whether the pursuer should be allowed to have the case tried by a jury in this Court either on an issue or on the record, or whether the case should be sent back for proof before the Sheriff. It certainly seems to me that the case is one which might more appropriately be tried before the Sheriff, as that course is not only much less expensive, but would not make an unreasonable demand on the services of the jurymen of the Lothians, a body of men who are often called upon to sit on cases from other parts of the country with which they have nothing to do. But this is rather a matter for consideration by the Legislature, or for the Court in exercising its power to regulate procedure, than a reason for remitting to the Sheriff unless that course is clearly competent. When the pursuer comes here in the exercise of a statutory right, it would be a strong thing for us, in the exercise of our judicial or administrative powers, to send the case back to the Sheriff for proof, although I do not say that it would be incompetent to do so. This may be a very fit matter for legislation or for regulation in virtue of the statutory powers which we possess, but though not without difficulty I have come to the conclusion that the pursuer should be allowed to go to trial before a jury here. At the same time I think that in every just interest the present state of the law on this subject is an evil for which a remedy should as soon as possible be sought.

LORD ADAM—I agree. This is an appeal for jury trial brought under the 40th section of the Judicature Act. The Judicature Act provides that such appeals shall be competent when the sum which is claimed in the action amounts to £40. In this case the sum claimed is £50, so that *ex facie* this is a perfectly competent appeal under the Judicature Act. But a motion has been made by the defenders that the case should be remitted back to the Sheriff-Substitute in Glasgow, to be tried in the Sheriff Court there, on the ground that it is of such a trifling nature that it would be more appropriately dealt with in that manner.

Now, as to the competency of such a course of action there can be no doubt. It is perfectly competent for us to send the case to a jury, to try it ourselves, or to remit it back to the Sheriff-Substitute. But when the Judicature Act has definitely fixed the sum to entitle a pursuer to a jury trial at £40, I do not think it right that we should fix it at any other figure. At the same time I quite admit that if it had appeared on the face of the pleadings that the case was in reality a trumpery case, and that the sum sued for was raised to £40 merely for the purpose of bringing it within the provisions of the Act, I should not, in such a case, hesitate to send it back to the Sheriff Court, even though the sum sued for were very much larger than the statutory amount.

Now, the test that must be applied is just this—Are the facts as pleaded such that no jury could be reasonably expected to award so large a sum of damages as £40. I cannot say that that appears to be the nature of the case now before us. Here we have a young man meeting with an accident and suffering an injury to his foot, which resulted, after a few weeks' treatment, in partial amputation. So this is the case of a young man who has been permanently mutilated, and I cannot say that I consider such a case as that a light one. If a jury saw fit to assess the damages at £40, I would not be prepared to say that that must of necessity be an unreasonable verdict. Such, then, being the circumstances of the case now before us, I cannot see my way to hold that it ought to be sent back to the Sheriff.

I should like to add that I entirely agree with your Lordship that these appeals for jury trial are becoming so numerous as to amount to a nuisance. A very large number of these cases that are brought here for trial are cases with which a Midlothian jury have nothing to do, and

they ought not to be called upon to decide them. I can only regard the frequency of these appeals as an abuse of the powers conferred by the Judicature Act.

LORD M'LAREN—We have been reminded that the Second Division of the Court has on different occasions sent back cases of small value which had been appealed for jury trial to the Sheriff Court. I readily admit that the course taken by their Lordships has much to be said for it; but we in this Division, looking to the clause of the Act (6 Geo. IV., c. 120, sec. 40) which allows appeals for jury trial in cases where the "claim" is in amount above £40, have held that the amount of the claim must be tested by the conclusions of the summons. We have remitted cases to the Sheriff on the ground that they were not suited for jury trial, but not on the ground that the claim was too small. I agree that a case has been made out for the revision of our procedure in the direction of giving the Court a larger discretion as to the disposal of cases as they arise.

LORD KINNEAR—I agree with your Lordships. I have no doubt about the competency of remitting cases which are appealed for jury trial back to the Sheriff, but in the exercise of our discretion we have never held it to be a sufficient ground for remitting to the Sheriff that the sum concluded for was not much higher than the £40 allowed by the Act of Parliament as sufficient in appeals for jury trial. In all these cases there have been grounds, connected either with the subject-matter or with the locality of the inquiry, for holding that the trial was less suitable for the Jury Court than for the local tribunal. But no ground of that sort has been suggested in the present case. The Act says that the right of appeal is to be measured by the amount of the claim and not by the value of the cause. I agree that even if the conclusions of the summons brought the pursuer within the Act of Parliament it might be possible to refuse the appeal for jury trial on the ground that there was no honest claim for the statutory amount, and that the sum of £40 was demanded only in order to have the case sent to a jury without any real intention of insisting for that amount. It may be that in certain circumstances the fact that the claim was originally made for a smaller sum might be reasonably brought forward as tending to show that the larger demand in the action was not an honest one. But in the present case there is no sufficient reason, to my mind, for saying that the claim for £50 is not perfectly honest, so far at least as the amount is concerned, if the averments as to the injury are well founded. For I agree with Lord Adam that if a jury finding these averments proved were to award £40 or £50 as damages, no one could say that that must be set aside as an extravagant verdict. I think therefore that the case must be sent to a jury if the parties insist on a trial. But no objection has been stated to us except as to the amount; and since that is the only question between the parties, and the difference cannot be a very serious one, I would venture to suggest that it might be settled without any trial either here or elsewhere.

The Court, on counsel for the respondents intimating that he disputed the relevancy of the action, sent the case to the Summar Roll.

Counsel for the Pursuer and Appellant—Pringle. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders and Respondents—Guy. Agents—Clark & Macdonald, S.S.C.

Saturday, November 14.

FIRST DIVISION.

SMITH'S TRUSTEES *v.* IRVINE AND FULLARTON PROPERTY INVESTMENT AND BUILDING SOCIETY.

Company—Building Society—Unregistered Company — Illegal Association — Winding-up — Company Established under Repealed Statute — Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 4—*Building Societies Act* 1894 (57 *and* 58 *Vict. c.* 47), *sec.* 28.

The Companies Act 1862 enacts (sec. 4), after provisions relating to the formation of banking companies, "No company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any other business than has for its object the acquisition of gain . . . unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament."

A building society consisting of more than twenty persons was in 1873 established and certified under the provisions of the Building Societies Act 1836. By the Building Societies Act 1894 (sec. 25, sub-sec. 2) (quoted *infra*) the Act of 1836 was repealed, as from 1st January 1897, as to all societies certified under the former Act after 1856.

To an application for the winding-up of the building society as an unregistered company, under section 199 of the Companies Act 1862, it was objected that, in consequence of the repeal of the Act of 1836 by the Act of 1894, the society had, under section 4 of the Companies Act, ceased to exist as a legal society and could not be wound up under the Act. *Held* that the society having originally been legal was not brought within the scope of the illegality constituted by section 4 of the Companies Act by the repeal of the statute under which it was consti-