The Court answered the first and third questions in the negative, recalled the determination of the arbitrator, and remitted to him to proceed.

Counsel for the Appellants—Horne, K.C. —Lippe. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Dykes. Agents—Gray & Handyside, S.S.C.

Tuesday, January 7, 1913.

SECOND DIVISION.

(BILL CHAMBER.)

CUMMING *v.* HENDRY.

Process—Reclaiming Note—Competency—Suspension—Caution—Effect of Offer to Find Caution—Personal Bar.

In a note of suspension a complainer contended that she was entitled to have the note passed without caution, but offered to find it if so appointed. The Lord Ordinary on the Bills passed the note on caution as offered.

Held that the complainer was not barred by her offer from reclaiming.

Mrs Annie Corner Tait or Cumming, Portobello, *complainer*, brought a note of suspension in the Bill Chamber against John Mitchell Hendry and Andrew Hendry junior, solicitors, Dundee, *respondents*, of a charge at their instance for the sum of £226, with interest, upon an extract registered bond and disposition in security.

In the note the complainer stated "that the complainer considers that in the whole circumstances of the case she is entitled to have this note passed without caution or consignation."

At the hearing in the Bill Chamber the complainer amended the note by adding after the word "complainer" in the statement, *supra*, the words "is prepared, if your Lordships shall so appoint, to find caution, but she."

On 18th December 1912 the Lord Ordinary on the Bills (HUNTER) pronounced this interlocutor—"Allows the note to be amended to the effect of offering caution, and this having been done, on caution as offered passes the note."

On the case appearing in the Single Bills of the Second Division the respondents objected to the competency of the reclaiming note, and argued—By amending the note at the hearing in the Bill Chamber to the effect of offering to find caution the complainer had virtually abandoned her objection to finding caution, and she was therefore barred from now reopening the question.

Argued for the respondents—The complainer did not abandon her contention that caution was unnecessary by offering to find it if so required, and therefore she was entitled to reclaim against the interlocutor appointing her to find it—Mackay's Manual of Practice, 429.

LORD JUSTICE-CLERK—I think that this reclaiming note cannot be held incompetent. Although the complainer amended her note of suspension to the effect of offering caution, she did not give up her contention that the note should be passed without caution, so as to preclude her from bringing that question before this Court by a reclaiming note.

LORD DUNDAS—I concur.

LORD SALVESEN—I am of the same opinion. The complainer's offer of caution was a conditional one. She maintained before the Lord Ordinary on the Bills that she was entitled to have the note passed without caution, and nothing took place in the course of the proceedings in the Bill Chamber, so far as was explained to us at the Bar, to prevent her from now insisting in that contention before this Court.

LORD GUTHRIE—I concur.

The Court appointed the cause to be put to the Summar Roll.

Counsel for the Complainers and Reclaimers—J. R. Christie. Agents—Galbraith, Stewart, & Reid, S.S.C.

Counsel for the Respondents—Lippe. Agents—Cowan & Stewart, W.S.

Saturday, January 11.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

BARCLAY *v.* T. S. SMITH & COMPANY.

Process—Sheriff—Remit for Jury Trial—Proof or Jury Trial—Trifling Character of Cause—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

In an action of damages at common law, in the Sheriff Court, for £100 for personal injury, the pursuer required the cause to be remitted to the Court of Session for jury trial. The Court *refused* the application and remitted the cause back to the Sheriff on the ground that *ex facie* of the record the injury averred by the pursuer was not serious, and the case was therefore unsuitable for jury trial in the Court of Session.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 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 that 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, or to remit it to a Lord Ordinary, or to send it for proof before a judge of the Division before whom the cause depends."

Robert Mitchell Scorgie Barclay, electrical engineer's apprentice, Aberdeen, *pursuer*, brought an action of damages for £100 in the Sheriff Court at Aberdeen against T. S. Smith & Company, a firm of motor car proprietors in Aberdeen, *defenders*, in respect of personal injury sustained by him through being run down by a motor car owing to the fault of its driver, an employee of the defenders.

The pursuer averred, *inter alia*, that on 23rd September 1912, while cycling with three companions along the North Deeside Road towards Aberdeen, he was run down from behind by a motor car driven by a servant of the defenders. "The said four cyclists were struck violently, knocked down and injured. The right mud-guard of said motor car caught pursuer and dragged him along the road for about 20 yards. The car was going at a great speed and was a considerable distance past the point where the accident happened before the driver was able to stop it. (Cond. 4) The pursuer was severely injured. He sustained numerous and severe bruises on the body, arms, and legs. The cycle, worth seven guineas, was completely destroyed, and his clothing was also destroyed. The cycle was hired from a hirer, to whom the pursuer is liable for the value of said cycle and who is insisting on his claim. He was for several weeks completely incapacitated from work and has not yet fully recovered. The pursuer, from the combined effect of his direct physical injuries and of his being suddenly struck down in the dark by a car, the approach of which he did not hear, has sustained severe nervous shock. It is necessary for his efficiency as an engineer and for his working at said trade with safety to himself and to his fellow-workmen that his nervous system should be in good condition. The accident will probably have permanent effect on his nervous system, and may result in his earning capacity being permanently diminished. In the course of his work as an engineer it is necessary in order to allow him to get home for meals to use a cycle and ride through congested traffic in Aberdeen. Owing to the said shock he will be unable to ride a cycle where there is traffic and he will be handicapped in carrying on his said work."

On 11th December 1912 the Sheriff-Substitute (LOUTTIT LAING) allowed a proof, and on 13th December 1912 the pursuer required the cause to be remitted to the Second Division of the Court of Session for jury trial.

Upon the case appearing in the Single Bills counsel for the defenders moved that it be remitted back to the Sheriff Court, and argued—The Court was entitled to exercise its discretion, and if it thought a case unsuitable for jury trial in the Court of Session could remit it back to the Sheriff for proof—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30. The present case was unsuitable for jury trial, because the injury averred by the pursuer was of a trifling character. In *M'Nab* v. *Fyfe*, July 7, 1904, 6 F. 925, 41 S.L.R. 736, the Court refused to allow a jury trial, although the injuries there averred were more serious than here, and that though the Court were proceeding under the Judicature Act (6 Geo. IV, cap. 120), sec. 40, which gave a narrower discretion than did the Sheriff Courts (Scotland) Act 1907, sec. 30.

Argued for the pursuer—The injury averred by the pursuer was serious, and the case was therefore suitable for jury trial in the Court of Session—*Sharples* v. *Yuile & Company*, May 23, 1905, 7 F. 657, 42 S.L.R. 538; *Duffy* v. *Young*, November 3, 1904, 7 F. 30, 42 S.L.R. 40.

LORD JUSTICE-CLERK—Since 1907 the law has been that when a cause is removed from the Sheriff Court to the Court of Session for jury trial "the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a judge of the Division before whom the cause depends"—Sheriff Courts (Scotland) Act 1907, sec. 30. I think the purpose is very plain, namely, to save the enormous expense incurred in the trial by jury of very small cases, especially where witnesses have to be brought from a long distance. But whatever was the intention of the Legislature, the statute gives us an absolute discretion in the matter. Even under the law as it stood prior to 1907 the Court was of opinion that it had such a discretion, but the Act of 1907 has made this quite clear.

In the present case I think we should exercise our discretion by remitting the case back to the Sheriff. The circumstances in the case of *M'Nab* v. *Fyfe* (6 F 925), where jury trial was refused, are very similar. In that case, as in this, the pursuer complained of severe bruises and of nervous shock. The Court, having only the power conferred on it by the law prior to 1907, refused the appeal, the Lord President saying, "On the face of the record this is a small case and more suitable for proof in the Sheriff Court than for jury trial in the Court of Session. Proceeding upon that view we have remitted other similar cases to the Sheriff Court for proof. I am of opinion that this would be the proper course to follow in the present case." I do not think there is any substantial difference between that case and the one we are dealing with now. I think this is a typical case for remitting to the Sheriff, and I would have thought this apart from the case of *M'Nab*, though that decision confirms me in my opinion. I have acted as counsel in and have tried hundreds of jury cases, and I have seen many cases where the expenses have been piled up and where the pursuer was a person of no substance, so that even though the defender was successful in obtaining a

verdict he was in the end an absolute loser. This leads to many defenders paying a substantial sum where there is no true case against them rather than run the risk of being subjected to large loss even if successful. I hold that in this case we should exercise our discretion under the Act of 1907 and remit this case to the Sheriff for proof.

LORD DUNDAS — I quite agree. The question to which the Court has to address itself is whether it thinks this case unsuitable for jury trial, and, looking to its general aspect as disclosed on the pursuer's record, I am of opinion that it is unsuitable. I understand that there has been no case decided under sec. 30 of the Act of 1907, but if authority were needed I agree that the case of *M'Nab* (6 F. 925), decided at a time when the statutory power of the Court was less explicit than it is now, is *a fortiori* of the present.

LORD GUTHRIE—I agree. In this case there are four points which weigh with me—(1) There is no averment of any serious physical injury; (2) there is no averment of any permanent injury other than the very guarded statement in cond. 4 that the accident will "probably" have a permanent effect on the pursuer's nervous system and "may" result in his earning capacity being permanently diminished; (3) there is no averment that medical attendance was made necessary by the accident; (4) the witnesses are all in Aberdeen, and much additional expense would be incurred by bringing them here if the case were tried before a jury. I agree that the views expressed in *M'Nab* (6 F. 925) are applicable in this case, and indeed in that case the averments of injury are even stronger than they are here.

LORD SALVESEN was absent.

The Court refused the pursuer's application for a jury trial in the Court of Session, and remitted to the Sheriff to proceed in the case.

Counsel for the Pursuer—A. M. Stuart. Agents—Balfour & Manson, S.S.C.

Counsel for the Defenders—R. S. Brown. Agents—Alex. Morison & Co., W.S.

Wednesday, January 15.

SECOND DIVISION.

MILLIGAN AND ANOTHER (HANNAY'S TRUSTEES).

Succession—Vesting—Fee and Liferent—Trust—Construction—Destination on Failure of Other Provisions to "my own heirs in mobilibus"—Period at which "heirs in mobilibus" to be Ascertained—Vesting subject to Defeasance.

A testator by his trust-disposition and settlement destined a part of the residue of his estate to his son and daughter in liferent in the proportions therein specified, and he directed that if either of his children should die without leaving issue, the share liferented by the deceased should "fall to my own heirs *in mobilibus*." The deed contained a clause which declared that "neither of my children shall have a vested right in the capital." The testator died survived by the son and daughter, who were his heirs *in mobilibus* at the date of his death. On the death of the daughter without issue a competition arose as to the parties entitled to the share liferented by her.

Held (*diss.* Lord Salvesen) that the parties entitled to succeed were those who were the heirs *in mobilibus* of the testator at the date of his death.

Muirhead's Trustees v. *Torrie*, November 12, 1912, 50 S.L.R. 182, *commented on.*

David Macbeth Moir Milligan and another, testamentary trustees of the deceased John Hannay, Southville, Dollar, *first parties;* Peter Hannay, only son of the testator, *second party;* and Miss Jemima Graham, executrix of the deceased Miss Elizabeth Harriet Caroline Hannay, only daughter of the testator, *third party*, presented a Special Case for the opinion and judgment of the Court of Session.

The testator died on 28th November 1901, leaving a trust-disposition and settlement, dated in 1898, whereby he conveyed in trust his whole estate of every kind belonging to him at the date of his death. The fourth purpose dealt with the residue of the trust estate, heritable and moveable. One-half thereof was directed to be given to his wife for her own absolute use and disposal, and with that the case was not concerned. With regard to the other half of the residue, the trustees were directed to hold it and pay to or apply for his wife during her life the free revenue and income to be derived from the same, and after her death, for the liferent use of the testator's son Peter Hannay and his daughter Miss Elizabeth Harriet Caroline Hannay in the proportions therein set forth. The deed contained a clause to the effect that "neither of my children shall have any vested right in the capital of said balance." With regard to the capital of the half of residue so to be liferented, the ultimate destination on the failure of the other purposes, an event which happened, was to the truster's own "heirs *in mobilibus*." The purposes which failed included a destination of the fee of the share of the residue liferented by Miss Hannay to her issue. Mr Hannay's widow survived him, but died in 1904. The son Peter survived. The daughter Miss Hannay died unmarried on 12th January 1911, leaving a settlement by which she appointed Miss Jemima Graham as her sole executrix and administrator.

Among the *questions of law* were the following:—"2. Do the testator's heirs *in mobilibus* fall to be ascertained as at his own death? or 3. Do they fall to be ascertained as at the death of Miss Hannay?"