of the profits. The Court held that this sum was paid with the rest of the aggregate price to acquire the business and thereafter profits were made in the business; the sum was not paid as an outlay in a business already acquired in order to carry it on and to earn a profit out of this expense as an expense of carrying it on. The same is true of the appellants. The whole price paid in cash or in account was a sum employed or intended to be employed as capital in the trade of the company and therefore cannot be deducted in ascertaining profit for Income Tax or Excess Profits Duty.

Much has been said as to the nature of capital and the right description of this sum of £30,000 assuming it to be capital. I neither think it necessary to attempt to define the term nor to select an appropriate adjective for it. Doubtless Mr Smith would wisely provide for some replacement of his outlay before flattering himself that he had made this handsome profit, but we are dealing with a firm which, consisting as it did of one person only, was under no legal obligation to keep its accounts in any particular form, or even to keep accounts at all. If he paid his taxes and paid his way and kept out of debt, it did not matter what he called the money with which he did it. The only question is whether he can claim to deduct this £30,000 without making a deduction, which the law calls, in the language of the Income Tax Acts, a sum "employed as capital" in his trade, and without making a deduction from the profits or gains from his trade "on account of diminution of capital employed." I think the answer is that he cannot, and so his appeal fails.

LORD MOULTON died before their Lordships' judgment was delivered.

Their Lordships ordered that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

Counsel for the Appellants — Sir John Simon, K.C.—Latter—Fleming. Agents—Wright, Johnston, & Mackenzie, Glasgow —Arch. Menzies & White, W.S., Edinburgh —Ince, Colt, Ince, & Roscoe, London, Solicitors.

Counsel for the Respondent—Attorney-General (Sir Gordon Hewart, K.C.)—Lord Advocate (Morison, K.C.)—R. C. Henderson —Hills. Agents—Stair A. Gillon, Solicitor for Scotland of the Board of Inland Revenue —H. Bertram Cox, Solicitor for England of the Board of Inland Revenue.

COURT OF SESSION.

Thursday, March 3.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Glasgow.

ALBERTI *v.* BERNARDI.

Process—Removal to Court of Session for Jury Trial—Remit to Sheriff—Action of Slander—Trivial Character of Action—Test of Suitability for Jury Trial—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

An action of damages for slander having been remitted to the Court of Session for jury trial under section 30 of the Sheriff Courts (Scotland) Act 1907, the Court *remitted* the case back to the Sheriff-Substitute as unsuitable for jury trial in respect of the trivial character of the action as revealed by the pleadings.

Observed (*distinguishing Greer* v. *Corporation of Glasgow*, 1915 S.C. 171, 52 S.L.R. 109) that the test of suitability for trial by jury was different in actions of damages for slander from what it was in actions of damages for physical injury.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—Section 30—"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. . . ."

Mrs Ida Aimarosti or Alberti, 16 Douglas Street, Glasgow, brought an action in the Sheriff Court at Glasgow against Amedo Bernardi, 405 Argyle Street, Glasgow, concluding for £150 damages for slander.

The pursuer averred, *inter alia*—"(Cond. 2) On the evening of Tuesday, 27th July 1920, between 11 and 12 o'clock, while the pursuer along with two of her children was on her way home from her husband's shop at 415 Argyle Street, the defender met her at the corner of Carrick Street and Argyle Street, and addressing her in Italian made statements of and concerning her to the effect that she was 'budello,' which in English means that she was a 'whore' and worse than a whore. The pursuer denied that she was 'budello,' and asked defender if he could prove it. The defender answered 'Yes,' and repeated the expression 'budello' over and over again in the presence and hearing of a large number of persons, and in particular of Mrs Ward, 69 Cadogan Street, Mr Herron, 67 Cadogan Street, Thomas Knox, 16 Brown Street, and Mrs

Sileno, 15 Brown Street, who all understood the defender to mean that the pursuer was a whore and that he could prove it. The defender further said in English of and concerning pursuer in presence of the above named, 'You are living by receiving stolen goods.' The defender also on this occasion asserted to detectives M'Lintock and M'Kellar of the Western Division, Glasgow Police, that the pursuer was a whore."

The Sheriff - Substitute (LEE) having allowed a proof, the pursuer required the cause to be remitted to the Court of Session for jury trial in terms of section 30 of the Sheriff Courts (Scotland) Act 1907.

On 3rd March 1921 counsel for the defender moved the Court in Single Bills of the First Division to remit the case back to the Sheriff Court, and argued that where, as here, it was clear from the averments that no reasonable jury could award the pursuer £50 of damages the case was unsuitable for jury trial—*Smellies* v. *Whitelaw*, March 20, 1907, 44 S.L.R. 586; *Greer* v. *Corporation of Glasgow*, 1915 S.C. 171, 52 S.L.R. 109.

Argued for the pursuer—The rule laid down in the case of *Greer* did not apply to actions of slander, the importance of which lay rather in vindication of character than in damages in terms of money. Here the alleged statements seriously affected pursuer's character, and the case was therefore suitable for jury trial.

At advising—

LORD PRESIDENT—The question is whether this case should be sent to a jury, or whether, as the respondent moves us to do, we should send the case back to the Sheriff-Substitute. There is no doubt that in an appeal under section 30 of the Sheriff Court Act 1907 this Court has a discretion to take the latter course. It appears from the record, and particularly from the averments of the pursuer, that the slander complained of was an incident occurring in the course of a midnight meeting between the parties in Argyle Street, Glasgow, which was attended with a considerable display of temper, and in which it is very likely that a number of *verba volantia* were exchanged. The question whether the words used amounted to a slander will have to be determined according as the circumstances, when established in evidence, reveal the whole affair to have been in the nature of a *rixa*, or on the other hand justify the imputation to the defender of slanderous intention. We were referred to *Greer* v. *Corporation of Glasgow* (1915 S.C. 171) as containing a definition of the class of case in which the Court ought to exercise its discretion by remitting back. That case referred to a claim in respect of physical injuries, and what I venture to think a sound general rule applicable to actions of that character was laid down to the effect that if the physical injuries founded on appeared to be such as would not reasonably warrant a verdict of more than £50, then the case should be regarded as one which is not of sufficient importance to warrant the elaboration and expense involved in a trial by jury in this Court. I hesitate, however, to apply generally to actions of slander a rule which measures the importance of the cause simply by the amount which a reasonable verdict would not exceed. For the importance of an action which involves character is not necessarily measured either by the amount of damages to which a pursuer restricts his claim, or by the amount which a jury might reasonably award. But whether a particular measure is applicable or not, I think the real underlying consideration is the same in all cases, namely, the relatively serious or relatively trivial character of the action as that is revealed by the pleadings. I have already indicated what I think is the substance of the pursuer's averments in this case, and I cannot think that it is one which it is reasonable to send to a jury in preference to allowing the proof to be taken before the Sheriff-Substitute. I am therefore for exercising our discretion by sending the case back.

LORD MACKENZIE—I am of the same opinion. It was not disputed by Mr Duffes that this case belongs to a class in which the Court may exercise their discretion under section 30 of the Act of 1907. When that is admitted it only remains for me to say that I cannot conceive of a case more appropriate for the exercise of that discretion, because the circumstances as disclosed upon record show that whatever language was used was used in the course of a street squabble.

As regards the rule laid down in *Greer's* case (1915 S.C. 171), that is a good working rule for cases of personal injury, but as regards actions of damages for slander I do not know that it is necessary to lay down any hard-and-fast rule. Each case must be disposed of upon its own circumstances.

LORD SKERRINGTON—I agree with your Lordships. The test whether an action is suitable for trial by jury is different in a case where character is involved from what it is in a case where the whole question is one as to the extent of a physical injury. None the less we must be satisfied that a case proposed to be sent to a jury is reasonably suitable for that form of trial. The relevancy of this action is not disputed, but the surrounding circumstances savour strongly of a brawl or squabble. I think that it is not a case suitable for jury trial, and that it is well suited to be tried by the Sheriff-Substitute in the district where the cause of action arose.

LORD CULLEN did not hear the case.

The Court remitted the case to the Sheriff-Substitute.

Counsel for Pursuer—Duffes. Agent—James G. Bryson, Solicitor.

Counsel for Defender—Scott. Agents—Ross & Ross, S.S.C.