that opinion is, that while the Sheriff Courts by their original constitution had unlimited jurisdiction in personal actions, the Legislature had thought fit to restrict that jurisdiction by providing that it should only exist concurrently with a right in either party to remove the case to the Court of Session for jury trial if the case be of the value of forty pounds. If the question were open I should doubt whether this Court had the power in such cases to remit to the Sheriff. But it has been decided in a very authoritative way that this course may be taken. I agree that the circumstances of this case are such as to render it more suitable for investigation before the local tribunal rather than the Court of Session because of the entirely exceptional character of the case, and because of its affinity to cases arising under the Act 31 and 32 Vict. cap. 96 in which the judge is final on the facts. Neither party desires that the case should be sent to a jury, and we cannot, I think, be wrong in taking the course which will make the decision on the facts final, at all events in the Court of Session.

LORD KINNEAR—I agree with your Lordship in the chair.

The Court remitted the case to the Sheriff for proof.

Counsel for the Pursuer—C. S. Dickson—Dewar. Agents—Cornillon, Craig, & Thomas, S.S.C.

Counsel for the Defenders — Graham Murray, Q.C. — Maconochie. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, February 15.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACKENZIE *v.* LUCAS & AIRD.

Process—Interlocutor Ordering Proof—Reclaiming-Note within Six Days—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28—*Act of Sederunt*, 11*th July* 1828—*Act of Sederunt*, 20*th July* 1853.

The Court of Session Act 1868, sec. 28, provides that any interlocutor by a Lord Ordinary ordering proof "shall be final unless within six days from its date the parties or either of them shall present a reclaiming-note against it to one of the Divisions of the Court."

Upon 30th January a Lord Ordinary "allowed parties a proof of their respective averments on record on a day to be afterwards fixed."

The Court rose for recess upon 3rd February, and met again upon Tuesday 13th February. On 12th February the pursuer boxed a reclaiming-note to the Second Division against the Lord Ordinary's interlocutor. *Held* that the reclaiming-note was incompetent.

The Act of Sederunt, 11th July 1828, for carrying out the provisions of the Judicature Act 1825 (6 Geo. IV. cap. 12), provides —"79. It is declared that where the twenty-one days allowed by the statute for presenting a note reclaiming against an interlocutor of a Lord Ordinary in the Outer House expire during vacation or recess, the reclaiming-days continue open till the first box-day in the vacation; or if they expire during the recess, the reclaiming-days shall continue open till the box-day in the recess; or if they expire after the box-day in the recess, they shall continue open till the first sederunt-day after the recess."

The Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 11, limits reclaiming-days to ten except for judgments on the merits and decrees in absence.

The Act of Sederunt, 20th July 1853, following upon the Court of Session Act 1850, provides "That where the ten days therein mentioned expire during vacation or during any recess of the Court, they shall continue open till the first box-day in the vacation or till the box-day in the recess; or if they expire after the box-day in the recess, they shall continue open till the first sederunt-day after the recess."

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 28, provides that a reclaiming-note against an interlocutor of the Lord Ordinary ordering proof must be presented within six days from the date of the interlocutor.

Alexander Mackenzie, labourer, Fortrose, sued Lucas & Aird, contractors, Fort William, for damages for personal injuries.

Upon 16th January 1894 the Lord Ordinary closed the record, and appointed issues for the trial of the cause to be adjusted on 23rd inst. Upon 30th January he pronounced this interlocutor—"Dispenses with the adjustment of issues: Allows the parties a proof of their respective averments on record on a day to be afterwards fixed." The Court rose for recess upon Saturday 3rd and sat again upon Tuesday 13th February.

Upon 12th February the pursuer boxed a reclaiming-note against the interlocutor of 30th January.

The defenders objected to the competency of the reclaiming-note, and argued—This note had not been timeously presented within six days. It was true that the six days expired in vacation, but the clerk's office was open during a part of that time. The note should have been presented to the clerk on the first day the office was open, and that would have been compliance with the provisions of the statute. The note could have been boxed on the earliest opportunity, as lodging the principal note with the clerk was the most important part of duty in "presenting" the note—*Bain, &c.* v. *Allan, &c.*, February 29, 1884, 11 R. 650. The relaxations which had been granted as to lodging reclaiming-notes on twenty-one days' and ten days' interlocutors had been given by special Acts of Sederunt—11th July 1828 and 20th July 1853—and could not

be extended to reclaiming-notes of this kind, which must be lodged within six days of the interlocutor granting proof.

The pursuer argued—The statutory words "present a reclaiming-note" were very indefinite. The intention of the Act was fulfilled if one of the two things necessary in presenting a reclaiming-note were done timeously; these were lodging the principal note in the clerk's hands and boxing copies of the note to the Court. The six days expired in vacation, and on the first day it was possible to do so, viz., February 12, the note was boxed—*Henderson* v. *Henderson*, October 17, 1888, 16 R. 5; *Allan's Trustee* v. *Allan & Son*, October 23, 1891, 19 R. 15. These cases held that where it was impossible to do what was ordered by the statute a reasonable compliance was all that could be asked.

At advising—

LORD RUTHERFURD CLARK—I think this reclaiming-note is incompetent, and that the Act of Sederunt does not apply. The statute says that a reclaiming-note of this kind ought to be presented within six days, and I think it must be presented within that time.

LORD TRAYNER—I agree. I think that the provisions of the statute are imperative. I think that the boxing of the prints on the first day they could be boxed is not enough; there must be presentation of the reclaiming-note to the Court within six days.

LORD YOUNG—It seems to me not at all doubtful that in deciding this question, exactly the same considerations must weigh with the Court which had weight when the Court passed the Acts of Sederunt which regulated the way in which reclaiming-notes against judgments which might be reclaimed against in twenty-one days, or in ten days, should be lodged in vacation. I pointed out during the discussion that these Acts of Sederunt were founded upon considerations of good sense and expediency as to what should be done in such cases, and I thought that the same considerations were applicable to this case. No Act of Sederunt, moreover, regulating reclaiming-notes which must be presented within six days has been passed, and the only question therefore is whether a Division of the Court may not act upon the same considerations of good sense and expediency which actuated the Court in passing these Acts of Sederunt.

I think it would be standing out for matters of form for the Court not to act upon such considerations, and the result is that we refuse this reclaiming-note.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the reclaiming-note as incompetent.

Counsel for the Reclaimer—Salvesen—Dewar. Agent—James Ross Smith, S.S.C.

Counsel for the Respondents—Dundas. Agents—Dundas & Wilson, C.S.

Friday, February 16.

SECOND DIVISION.

CLARK'S TRUSTEES *v.* CLARK.

Succession—Trust—Liferent with Power of Testing—Exercise of Power.

A truster directed his trustees to hold and apply, pay, and convey the residue of his estate for behoof of all his children and their respective issue equally, one-half of the shares falling to his sons to be paid to them on attaining the age of twenty-five, after his death, and the other half of the shares falling to sons to be held and applied, paid, and conveyed to and for their behoof in liferent, for their respective alimentary uses only, and to and for behoof of their respective children *per stirpes* in fee. He further provided "that in the event of any of my sons dying without leaving issue, it shall be competent to him to test upon the share of residue that may have been liferented by him, and that in favour of such person or persons, or for such uses and purposes, and in such way and manner, all as he may think fit."

A son, who survived the truster, and died aged thirty without issue, by his will, bequeathed certain legacies, and provided "the residue and remainder of my real and personal estate I give, devise, and bequeath unto my brothers equally," whom he appointed his executors.

Held that the will was a valid exercise of the power of testing conferred by the trust-disposition and settlement of his father.

Hyslop v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413, *followed*.

James Clark, thread manufacturer and merchant in Paisley, died on 3rd August 1881, leaving a trust-disposition and settlement dated 17th August 1880, and recorded 28th July 1881. He was survived by six sons and two daughters. By his trust-disposition and settlement he disponed and made over his whole means and estate to certain trustees, and directed them to pay an annuity to his wife and sundry bequests—"and (lastly) with regard to the residue of my means and estate, I direct my trustees to hold and apply, pay and convey, the same to and for behoof of all my children equally and their respective issue as follows, viz., one-half of the shares falling to sons to be paid and conveyed on my death to such of them as shall then be twenty-five years of age, and to such of them as shall not then have attained that age, on their respectively attaining the age of twenty-five years; and the other half of the shares falling to sons and the whole of the shares falling to daughters to be held and applied, paid, and conveyed to and for their behoof in liferent, for their respective alimentary uses only, and to and for behoof of their respective children *per stirpes* in fee:... Declaring, with regard to the shares