43 S.L.R. 540, at p. 551. Section 7 (11) of the Small Landholders (Scotland) Act 1911 and section 11 (3) of the Act of 1908 contemplated the ordinary legal opinion of the Sheriff, and by the former section the Lord Ordinary was merely substituted for the Sheriff.

LORD PRESIDENT—The question we have to consider here is whether or not this reclaiming note is competent. I am of opinion that it is not competent. The decision of the question turns upon the just construction of the ninth article of the Second Schedule to the Agricultural Holdings Act 1908, which runs as follows—" . . . *quotes, v. sup.* . . ." That section does not appear to me to be doubtful in construction. It gives the arbiter the incidental power to invoke the aid of the Lord Ordinary in order to advise him upon any question of law arising in the course of the arbitration, and likewise a power to the Lord Ordinary to compel the arbiter under certain circumstances to state a question of law for his opinion. Presumably in arbitrations such as this an expert is employed who has knowledge of agricultural affairs but who probably has not any exact knowledge of law. And the object of the section is clear enough; it is to give the parties to the arbitration and the arbiter himself the advantage of the services of a legal assessor whenever that seems to be desirable. But if reclaiming notes were presented against the opinion given by the legal assessor, which, be it observed, may be given at any stage of the proceedings, and which may be given as often as is found desirable, in that case there might follow the consequences figured by the learned Judges in the Court of Appeal in the case cited—a succession of lawsuits all more or less depending upon a single arbitration, and each one of them running the gauntlet of the Court. It appears to me to be quite plain that there is a special jurisdiction here created giving the Lord Ordinary powers which hitherto he did not possess, and that in the absence of any clear indication to the contrary his opinion must be final. Whether the arbiter is bound to follow that opinion or not, I am not at present prepared to say, but at all events it is clear it may be given frequently, and it may be given at any stage. It may be compelled. I think in every instance it must be regarded as final.

LORD SKERRINGTON—I agree with your Lordship. It is quite clear, I think, that the Small Landholders Act of 1911 does not invoke the ordinary jurisdiction of the Lord Ordinary on the Bills, but creates a new and special jurisdiction. In these circumstances, it lies upon the appellant to show that the statute confers upon him a right of appeal, and he is unable to do so. *Prima facie*, in legal language, an opinion is one thing and a judgment another. A mere opinion is not a thing which can be appealed unless there is special provision to that effect, as is found in section 11, sub-section 3, of the Agricultural Holdings Act of 1908. The distinction between an opinion and a judgment was recognised by section 63 of the Court of Session Act of 1868.

LORD DEWAR concurred.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court dismissed the reclaiming note as incompetent.

Counsel for the Reclaimers—The Solicitor-General (Morison, K.C.)—T. G. Robertson. Agent—Sir Henry Cook, W.S.

Counsel for the Respondent—Macmillan, K.C. — C. H. Brown. Agents — Skene, Edwards, & Garson, W.S.

Tuesday, November 24.

FIRST DIVISION.

[Sheriff Court at Glasgow.

GREER *v.* GLASGOW CORPORATION.

Process—Sheriff—Remit for Jury Trial—Unsuitable Case — 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 £250 for personal injury, viz., " sprain of the right ankle and severe bodily bruising and shock," 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 the averments of the pursuer did not disclose that the case was other than one in which no jury of reasonable men could award a verdict of more than £50.

Authorities reviewed by Lord Skerrington.

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 which the cause depends."

Mrs Margaret Rennie or Greer, wife of James Greer, and residing at 50 Lyon Street, Garscube Road, Glasgow, with the consent of the said James Greer as her curator, *pursuer*, brought an action of damages for £250 in the Sheriff Court at Glasgow against the Corporation of the City of Glasgow, proprietors of the Glasgow and District Electric Tramways, Glasgow, *defenders*,

in respect of personal injuries sustained through the fault of the defenders' servants acting in the course of and within the scope of their employment.

The pursuer averred, *inter alia*—"(Cond. 2) On or about the 19th August 1914 the pursuer boarded one of the defenders' tramway cars in Trongate, Glasgow, and purchased a halfpenny ticket for the purpose of proceeding to the tramway stopping place at No. 1 New City Road. (Cond. 3) The pursuer on arriving at her destination, which was the said stopping place, proceeded to get off the said tramway car, and when in the act of leaving the step of the platform, the said tramway car, which had been stopped, was suddenly started by the defenders' servants (acting in the course and within the scope of their employment by the defenders) and without giving the pursuer time to get off the platform of the said tramway car. The pursuer, who was standing on said step and in the act of alighting therefrom, was thrown from the said step, grasped the rail of the car to save herself, and was dragged some distance along the street, and sustained a sprain of her right ankle and severe bodily bruising and shock. She is confined to the house as the result of the said accident, and has suffered and still suffers great pain in consequence thereof."

The Sheriff-Substitute (A. S. D. THOMSON) having allowed a proof, the pursuer on 29th October 1914 required the cause to be remitted to the First 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 case was on the face of it unsuited for jury trial, the alleged injuries being vague and trifling in character. The case was *a fortiori* of *Barclay* v. *T. S. Smith & Company*, 1913 S.C. 473, 50 S.L.R. 308, in respect that nervous shock was not averred. The decision in *M'Nab* v. *Fyfe*, July 7, 1904, 6 F. 925, 41 S.L.R. 736, should be followed.

Argued for the pursuer—The averments of injury must be construed in relation to the facts of the case as disclosed on record, on which a jury might well award more than £50 damages. The pursuer had been confined to the house for a considerable period. The decision in *Barclay* v. *T. S. Smith & Company* (*cit. sup.*) was limited in the subsequent case of *Mackie* v. *Davidson*, 1913 S.C. 675, Lord Justice-Clerk at 676, Lord Salvesen at 677, 50 S.L.R. 461. A criterion of "unsuitability for jury trial" was laid down in *Sharples* v. *Yuill & Company*, May 23, 1905, 7 F. 657, Lord President at 664, 42 S.L.R 538.

At advising—

LORD PRESIDENT—This action was raised in the Sheriff Court of Lanarkshire at Glasgow and has been brought before this Court at the instance of the pursuer in terms of the 30th section of the Sheriff Courts Act of 1907. The pursuer moves for issues. That motion is resisted by the defenders, who ask us to send the case back to the Sheriff Court in order that the facts may be investigated there. Unquestionably the action is an ordinary action of damages, and one of the class specially appropriated by statute for jury trial, and the sole ground on which the defenders' motion rested was this—that the condescendence here disclosed a claim which could not reasonably result in a verdict for £50. If we are of that opinion we are entitled and ought to remit the case to the Sheriff Court for trial there.

In my judgment the pursuer's own averments here disclose a case in which no reasonable jury could return a verdict for £50, for her account of the injuries she sustained in consequence of the accident which befell her is this—"a sprain of her right ankle and severe bodily bruising and shock." Now I interpret "severe bodily bruising and shock" which followed from the sprained ankle as being just the bodily bruising and shock which a sprained ankle would naturally cause. It is to be observed that the pursuer does not say that she either required or received medical or surgical treatment. All she says with regard to the result of the accident is that she was confined to the house and has suffered and still suffers great pain.

This case, I think, is a stronger one than any of those cited to us which the Court on the grounds I have just indicated remitted the case to the Sheriff Court for investigation, and I am of opinion that the averments of the pursuer here as set out in the third article of the condescendence disclose a case in which no jury of reasonable men could return a verdict for £50; and therefore I propose to your Lordships that we should refuse the pursuer's motion and remit to the Sheriff to proceed in the cause.

LORD JOHNSTON—I agree with your Lordship that this case should be sent back to the Sheriff Court. The question on which the disposal of this and similar cases depends is what did the Legislature mean by the word "unsuitable" in section 30 of the Sheriff Court Act 1907. We have been accustomed for a century to talk of causes as causes "appropriate" to jury trial, that expression having been used in the Act of 1825, section 28, and at first sight one is disposed to assume that the word "unsuitable" is used in the Act of 1907, section 30, as just a colloquial equivalent for not "appropriate."

But when the enumeration of the causes appropriate to jury trial is considered the reason of their appropriation appears from the very enumeration. And I think there is good reason to conclude that "unsuitable" is capable of covering, and is intended to cover, something more than not "appropriate." A cause may, I think, be "unsuitable" for a jury in the sense of the Act of 1907, not merely when it raises questions which are of law or of mixed fact and law, but also where the circumstances as disclosed upon the record make it improper to call twelve men from their own business to determine that which ought to be determined in much simpler fashion, if not in the Small Debt Court.

LORD SKERRINGTON—The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) repealed section 40 of the Judicature Act

1825 so far as relating to appeals for jury trial from the Sheriff Court to the Court of Session. By section 30 it defined of new the cases in which it shall be competent to either of the parties to a cause originating in the Sheriff Court "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." This language is more imperative and more precise than that used in section 40 of the Judicature Act, but it does no more than express what the Court had in a long train of decisions held to be implied in that section. Accordingly I think that it is still competent to refer to the decisions upon the Act of 1825 as throwing light upon the proper practice to be followed under the Act 1907. Further, I do not think that it was intended to abolish the convenient legal fiction according to which a defender who conceived that the action should be dismissed as irrelevant was held entitled to obtain a judgment of the Court of Session upon this question by posing as a person who conceived that the action ought to be tried by jury rather than by a proof in the Sheriff Court. Though section 30 does not in so many words empower the Court of Session to dismiss the action as irrelevant, I have no doubt of the Court's power to do so.

As regards the decisions upon section 40 of the Act of 1825, they are commented on, and the principles to be deduced from them are summarised in the opinion of the Lord President (Dunedin) in *Sharples* v. *Fuill & Company*. For the purposes of the present case it is sufficient to say that he rejects the idea that "because a case is small in its amount it ought to be remitted to the sheriff." He sums up the matter as follows:—"In deciding whether a case is or is not suitable for jury trial, it [the Court] will apply the same criterion as it does in cases raised before itself—that is to say, it will consider whether the action is of the class specially appropriated by statute to jury trial, and if so, whether there is any special cause for not so trying it. And further, as to amount, it will be guided by the standard fixed by the Legislature, viz., £40, so that unless the action on the face of it discloses a claim which in the opinion of the Court could not reasonably be entitled to a verdict amounting to more than £40, it will not refuse a jury trial to an otherwise appropriate case." This opinion of the Lord President is of very high authority, because it was delivered as the judgment of the Court (consisting of the Lord President, Lord Adam, Lord M'Laren, and Lord Kinnear), and it was stated that the Judges of the other Division had been consulted and agreed with it. It was followed by the Second Division in *Smellies* v. *Whitelaw*, 44 S.L.R. 586, where two pursuers each claimed £100 as damages for slander and appealed to the Court of Session for jury trial. The Court remitted to the Sheriff to allow a proof, being of opinion that neither pursuer could reasonably be entitled to a verdict for more than £20.

Counsel for the respondent referred us to the case of *M'Nab* v. *Fyfe*, which the First Division remitted to the Sheriff because on the face of the record it was "a small case." The unfortunate workman had fallen from a height of 26 feet, and had been totally incapacitated from work of any kind and under medical treatment for six weeks, and he alleged that the incapacity was likely to continue for a considerable time. He complained of severe and extensive bruising, severe shock, and great pain. This case was anterior to that of *Sharples*. It was not cited in the opinion of the Lord President in the latter case, and I doubt whether it can be reconciled with the principles which after full and careful deliberation were there laid down. The case of *M'Nab* was specially founded on in the Second Division case of *Barclay* v. *Smith & Company*, to which we were also referred, but it is noteworthy that the more important case of *Sharples* was not there cited to the Court. If it is really necessary to go back beyond the case of *Sharples* (which I doubt) I think that the opinions in *Duffy* v. *Young*, 7 F. 30, 42 S.L.R. 40, are more instructive than the very short opinion in the case of *M'Nab*. The opinion of Lord Salvesen in the case of *Mackie* v. *Davidson*, 1913 S.C. 675, is also instructive. Both this case and *Barclay's* case arose, of course, under the Act of 1907.

In the present case I am not prepared to affirm that the injuries of which the pursuer complains are necessarily of so trifling a character that no reasonable jury would award her more than £50. The averments are so vague that it is impossible in my judgment to form any definite opinion in regard to this question. I think it conceivable that the evidence led at the trial might be such as to justify an award of more than £50 without being open to the objection that the evidence went beyond the averments. Accordingly the case does not fall within the precise language used by the Lord President in *Sharples'* case. But I do not think that his Lordship intended to lay down a formula which must always be rigidly adhered to. There are many cases like the present one where the injuries complained of—"sprain," "bruising," and "shock"—are ordinarily of a comparatively trifling character, though occasionally such injuries or their consequences may be very serious. It is not too much to expect that a pursuer who wishes to have his case tried by jury should set forth the special circumstances upon which he intends to rely as showing that a sum of more than £50 would not be an unreasonable award. If he does not choose to do this it seems only fair as regards this mere question of procedure to apply the maxim *de non apparentibus et non existentibus eadem est ratio*. The pursuer's counsel invited us to "construe" his client's averments as implying that she received injuries of a very serious character,

but I decline to accept this invitation. It is the duty of the Court to construe badly drawn deeds, but it is the duty of pleaders to draw pleadings which shall be self-explanatory. I should have considered with favour a motion to amend the record if it had been explained to us that the injuries were really of a serious character, but that the necessity for making this plain on the face of the pleadings had been overlooked when the record was closed in the Sheriff Court. No such motion was, however, made to us. I am of opinion that the case should be remitted to the Sheriff for proof, because the pursuer has failed to make it clear on her averments that the injuries complained of were such as might reasonably entitle her to an award of more than £50.

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.

LORD MACKENZIE was not present.

Counsel for the Pursuer—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders—Cooper, K.C. —W. Wilson. Agents—Campbell & Smith, S.S.C.

Tuesday, December 1.

FIRST DIVISION.

(SINGLE BILLS.)

STANDARD PROPERTY INVESTMENT COMPANY, LIMITED *v.* SCOTT.

Diligence—Expenses—Courts (Emergency Powers) Act 1914 (4 *and* 5 *Geo. V, cap.* 78), *sec.* 1 (1) (*a*)—*Unopposed Application for Leave to Proceed with Diligence.*

Where an application to proceed with diligence under the Courts (Emergency Powers) Act 1914, sec. 1 (1), is unopposed the Court will not grant the expenses of the application.

The Standard Property Investment Company, Limited, having presented an application to the Court of Session for leave to proceed with diligence on an extract registered bond in terms of the Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), sec. 1 (a), the application was not opposed and leave was granted.

On counsel moving for the expenses of the application, the Court refused the motion, the Lord President intimating that their Lordships had consulted with the learned Judges of the Second Division, and that where applications under the Courts (Emergency Powers) Act 1914 were unopposed, the expenses of the application would not be granted.

Counsel for the Applicants — Forbes. Agents—Duncan Smith & Maclaren, S.S.C.

Wednesday, December 2.

FIRST DIVISION.

(SINGLE BILLS.)

CROWE *v.* IRVINE.

Diligence — Stay of Execution — Courts (Emergency Powers) Act 1914 (4 *and* 5 *Geo. V, cap.* 78), *sec.* 1 (2)—*Inability to Pay Debt Owing to the War.*

Circumstances in which the Court *granted* a stay of execution for six weeks under sub-section (2) of section 1 of the Courts (Emergency Powers) Act 1914.

John Crowe, miner, Lochgelly, *pursuer*, brought an action in the Sheriff Court at Dunfermline against Roy Irvine, lessee of the picture house there, *defender*, for damages for injuries alleged to have been sustained by his son.

The Sheriff-Substitute having dismissed the action, the pursuer appealed and the First Division of the Court of Session recalled the interlocutor of the Sheriff-Substitute, remitted the case to him for proof, and found the defender liable to the pursuer in the expenses of the appeal. The expenses were taxed at £34, and decree was granted therefor in name of the agent-disburser.

Thereafter on December 1st 1914 the pursuer, having enrolled the case in the Single Bills, applied, as required by the Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), sec. 1 (1), for leave to proceed with diligence upon the decree for expenses.

Counsel for the defender opposed the motion, and argued—The present was a suitable occasion for applying the Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), sec. 1 (2), and staying execution. Lochgelly was a mining village whose industry had been severely curtailed by the war, and the defender's business had been in consequence ruined. From the point of view of equity it would be unjust to call upon the defender to pay at the present stage of the case while a proof was depending before the Sheriff-Substitute. A stay of execution of six months would in the circumstances be reasonable. Sections 1 (1), 1 (2), 2 (2) of the Act were referred to, and Act of Sederunt regulating proceedings under that Act of date 28th September 1914.

Argued for the pursuer—The case put by the defender was too vague, in respect that he did not show by what amount his receipts had fallen, and he made no proposal regarding the liquidation of the debt. In any event a suspension of six months was unreasonable.

LORD PRESIDENT—We have already approved of the Auditor's report here, and decerned in name of the agent-disburser. But, in respect of the application now presented by the pursuer for leave to proceed with his diligence upon his decree, we think that *prima facie* evidence has been laid before us to the effect that the defender is unable to pay by reason of circumstances attributable directly or indirectly to the present war, and accordingly we think that