to the pupil children of the truster along with the original trustees. The assumed trustees claimed to act as such tutors, but the original trustees denied their right to do so.

The questions submitted to the Court were:—"(1) Are the said George Walker, James Bruce and Alexander Ellis, as surviving trustees nominated by the said James Giles, sole tutors of Alexander Bruce Giles and Mary Giles, the pupil children of the said James Giles? or, (2) Are the said Alexander Stronach junior, and Henry John Gibson, assumed trustees of the said James Giles, tutors to the said children along with the said George Walker, James Bruce, and Alexander Ellis?"

At advising—

LORD NEAVES—The father alone can appoint a utor-nominate, and he cannot delegate his power of doing so. There is a distinct *delectus personæ* in the father; and there is no example of such a power as this being validly exercised. No authority has been cited on the point. The *dictum* of Paulus quoted is a good one against *uncertain* appointments "*Tutor incertus dari non potest.*" The law should stand as it is; it is *ultra vires* to let assumed trustees be assumed as tutors.

LORD ORMIDALE—The father, knowing the circumstances of his children, is the best judge of those who should be tutors to them, but the appointing of persons of whom he knew nothing may be an injustice to the children, and is not in accordance with law.

LORD GIFFORD—The father has a *delectus personæ* and must himself nominate, and cannot delegate his power of nominating.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"Find that George Walker, James Bruce, and Alexander Ellis, as surviving trustees nominated by James Giles, are sole tutors of Alexander Bruce Giles and Mary Giles, the pupil children of the said James Giles, and find both parties to the Special Case entitled to payment of their expenses out of the estate, and decern."

Counsel for the Original Trustees—J. D. Dickson. Agents—Bruce & Kerr, W.S.

Counsel for the Assumed Trustees—Lee. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, November 24.

SECOND DIVISION.

[Sheriff of Roxburgh.

LAIDLAW & SONS *v.* WILSON & ARMSTRONG.

Process—Jury Trial—Issues—Proof before Answer. In an action in the Sheriff-court the Sheriff allowed a proof before answer. The respondents appealed, and wished issues to be adjusted with a view to a jury trial. *Held* that, the case being one in which law and facts were both involved, the proper course was to allow a proof before answer.

Process—Proof before Answer—Act 6 *Geo.* IV., *c.* 120, ¿ 40—*Court of Session Act*, 1868—*Proof before one of the Judges of the Division—Remit to the Sheriff.* *Held* (*dis.* Lord Ormidale) that under Act 6 Geo. IV., c. 120, ¿ 40, it was equally competent for the Court to remit the case for proof before the Sheriff, and to order the proof to be taken either before one of the Lords Ordinary or before one of the Judges of the Division.

In this action the question which came before the Court arose out of the interlocutors pronounced respectively by the Sheriff-Substitute (RUSSELL) of Roxburghshire, and by the Sheriff-Depute (PATTISON) on appeal. These interlocutors were as follows:—

"*Jedburgh, 27th July* 1874.—Having again considered the closed record, after having heard parties' procurators on the question of the relevancy of the action, before answer Allows to the parties a proof of their respective averments, and to the petitioners a conjunct probation: Grants diligence against witnesses and havers, and appoints a meeting with parties' procurators on the 30th inst., in order to fix a time for taking the proof.

"*Note.*—While the essential facts are to a great extent disputed, the Sheriff-Substitute is of opinion the questions raised in the preliminary defences cannot be satisfactorily disposed of. On the face of the petition, read with reference to the admitted statements on the record, he does not find grounds on which the petition can be dismissed as incompetent. It is not unusual in similar petitions to crave alternatively either the delivery of a specific subject, or the payment of its value, as stated in the petition. The absence in the present case of any general claim for damages in the petition does not appear a good ground of objection to it. After the facts have been ascertained, it is quite possible that questions of some difficulty may arise for decision with reference to the cravings of the petition; but at present these cannot be determined. The petitioners appear entitled to obtain, with a view to their use in the proof, the documents described in the specification lodged by them, and the early production of them will greatly facilitate the proceedings at the taking of the proof. Unless the respondents produce these voluntarily, the Sheriff-Substitute will be prepared to grant a diligence for their recovery."

"*Edinburgh, 8th September* 1874.—The Sheriff having considered the appeal and reclaiming petition for the respondents, answers for the petitioners, closed record, and whole process, Repels the plea of incompetency maintained by the respondents Repels also the plea of irrelevancy and insufficiency of the statements in the petition, so far as maintained to the effect of dismissing the action; and with this addition adheres to the interlocutor reclaimed against.

"*Note.*—The plea of incompetency being in the Sheriff's opinion unfounded, and going to the very existence of the process, he considers it right that it should be repelled. The plea of irrelevancy generally is a defence on the merits, and it is not, except in some exceptional cases, advisable to dispose of it without a proof. It is generally best, as is done here, to allow a proof before answer. But when it is pleaded to the effect of craving a dismissal of the action, it falls within the same category as a plea of incompetency; and, so far as pleaded to that effect, requires to be repelled.

"The Sheriff observes that the respondents, in answering certain articles of the petitioners' condescendence, not only deny the statements, but call them irrelevant. Thus—'Not known, irrelevant

and denied.' This is a bad and incorrect form of pleading, and ought not to be allowed. Irrelevancy is a matter of law, not an answer in point of fact, and it ought to have no place in the answer to statements in point of fact. It is at the same time illogical to deny a statement which is characterised as irrelevant. If it is irrelevant it is no matter whether it be true or not. One of the best tests of relevancy is to inquire whether the respondent is prepared to admit the statement objected to in point of fact. If he is not, it may safely be assumed that it is relevant."

The respondents appealed by virtue of Act 6 Geo. IV., c. 120, § 40, and Court of Session Act 1868, § 73, to the Second Division.

The respondents (appellants) wished issues adjusted to try the cause by jury, but the petitioners respondents) wished the case to go to a proof, and stated that they would be perfectly satisfied to have the evidence taken either before one of the Judges of the Division or before the Lord Ordinary.

At advising—

LORD ORMIDALE—My Lords, I have felt some difficulty in this case and I should like to state from what it arises. It does so from a consideration of the case of *Dennistoun* v. *Knox*, 1871, 9 Macph. 739. There is no doubt that it is competent for either party to appeal for the purpose of getting the cause tried by jury, and then for the Court itself *proprio motu*, or at the instance of either party, to order a proof and quash the whole proceedings. This is quite settled. In this case neither party has maintained that the question is one of such a character as will enable it to be determined without some further investigation. I am entirely of opinion that there should be such investigation, and, what is more, that the investigation should take place without adjusting issues to go to a jury, because I think from the peculiar circumstances it would be very difficult to frame appropriate issues. I therefore would be inclined to think that a proof before answer would be the proper course.

But then, although coming to this conclusion, on the other hand, if we look at the case of *Dennistoun*, to which I have alluded, it seems to me to be doubtful whether it is competent that the proof be taken before any Judge here—it should rather go back to the Sheriff. If a proof is allowed before a Judge here, the case may be taken on appeal to the House of Lords—on an appeal, moreover, which would include fact as well as law, and the Act 6 Geo. IV., § 120, was intended to obviate such a result.

LORD JUSTICE-CLERK—I should be very reluctant to think that where parties have come here asking for an investigation into the facts we must send them back again to the Sheriff. In *Dennistoun's* case the party who advocated for a jury trial turned round when he got into this Court and asked for a proof, and the Court very properly sent him back to the Sheriff-court. Here it would be very difficult to make any issue or issues that would bring out the point of the case, and I think your Lordships should order a proof before answer—to be taken before one of the Judges of this Division.

LORD NEAVES—I quite agree. If I can satisfy my mind that a case, wherever it began, should be ried by a proof, I can see no impediment to that proof being taken before one of your Lordships, if, in the opinion of the Court, justice in the case can be well satisfied by such a course. Section 40 of the Judicature Act, no doubt, was intended to relieve the House of Lords of appeals on matters of fact; but since that day there has grown up a great deal less repugnance to proofs taken here.

LORD GIFFORD—I am of the same opinion as your Lordship in the chair, and I do not think that there is anywhere anything to exclude the proposed course.

The Court ordered a proof before answer of the facts averred by either party, and appointed the same to be taken before Lord Gifford.

Counsel for Appellants (Respondents)—Solicitor-General (Watson), Q.C., and Smith. Agent—Adam Shiell, S.S.C.

Counsel for Respondents (Petitioners)—Dean of Faculty (Clark), Q.C., and Trayner. Agent—David Dove, S.S.C.

I., Clerk.

Tuesday, November 24.

SECOND DIVISION.

[Sheriff of Clackmannan.

ADAM SPOWART *v.* MOIR.

General Police and Improvement (Scotland) Act, 1862, *sec.* 135—*Nuisance.*

Where the Commissioners of Police of Alloa erected a public urinal in a street of the burgh without notice, and a petition for its removal was presented to the Sheriff by the proprietor and the tenants of two shops in front of which the urinal had been erected, on the allegation "that it will be and become a nuisance."—*Held* that the petitioners were entitled to proof of their allegation.

This petition, at the instance of John Adam, proprietor of two shops and a dwelling house in Candle Street, Alloa, and John Spowart, the tenant thereof, against James Moir, clerk to the Commissioners of Police of the burgh of Alloa, set forth that the Commissioners had erected a public urinal in Candle Street in front of the petitioners' premises, without notice to the petitioners, and contrary to the provision of the General Police and Improvement (Scotland) Act, 1862; that it will be and become a nuisance to the public, and more especially to the petitioners, and an obstruction to the street; and concluded with a prayer for the removal of said urinal. The facts of the case and the contentions of parties are fully set forth in the interlocutor of the Sheriff-Depute, affirming the judgment of the Sheriff-Substitute.

"*Edinburgh*, 19*th October* 1874.—The Sheriff having heard parties' procurators orally, and made avizandum, and considered the cause, dismisses the defender's appeal against the Sheriff-Substitute's interlocutor of 28th September last, and adheres to the said interlocutor, and decerns.

"*Note.*—The question here raised is an example of the looseness of expression complained of in that otherwise valuable statute, the General Police Act of 1862.

"The complaint of the petitioners, the proprietor and tenant respectively of a shop and dwelling-house in Candle Street, Alloa, is that the