sons, who are his next-of-kin, have intimated to the bank that they dispute the alleged donation, and claim that the money belongs to them in whole or in part. It does not appear whether they propose to reduce the deceased's will, or merely claim to bring the fund into the executry with a view to claiming *legitim*. But there can be no doubt that they propose to lodge a claim in this multiplepoinding if it is allowed to proceed.

Mrs Price lodged defences, pleading that the action was incompetent, there being no double distress, but the Lord Ordinary repelled this plea, and sustained the competency of the action.

"*Opinion.*— . . . Practically, therefore, the case just comes to this—A deposit is held by the bank, which is, on the one hand, claimed by an alleged donee, and is, on the other hand, claimed by the next-of-kin of the deceased. And in that state of matters (the donee's alleged title as executrix not being put forward) I do not see how I can be asked to hold that there is no double distress. The bank are not, I think, bound to try with the alleged donee the question whether this is a valid donation. Neither can they in the circumstances, and in view of the attitude of the next-of-kin, safely assume that it was a valid donation. The objector could remove all difficulty by confirming as executrix of the deceased, but, as I have said, she declines to do that. And that being so, I do not see how I can view the case otherwise than simply a competition between an alleged donee of the deceased and his next-of-kin. I shall accordingly repel the objections, and allow the multiplepoinding to proceed. I do so all the more willingly because I do not think that any cheaper or more convenient mode could be devised for trying the question, which sooner or later must be tried."

Mrs Price reclaimed, and argued—There was nothing better settled than that a person claiming *legitim* was not entitled to sue directly for the recovery of monies belonging to the deceased. He must proceed against the deceased's executor. No claim made by the deceased's sons, therefore, could compete with the claim of the reclaimer, who was the executrix-nominate under the will of the deceased, but such claim could only be made through her. There was, therefore, only one claimant, and the action was incompetent—*Connell's Trustee* v. *Chalk, &c.*, March 6, 1878, 5 R. 735.

Argued for the bank—The reclaimer based her claim on the alleged donation, and refused to put forward her title as executrix, and the claim of the deceased's sons was, therefore, a competing claim, and created double distress.

At advising—

Lord President—I think the Lord Ordinary was quite right to sustain the competency of the action. His Lordship puts the matter rather tersely in the last paragraph of his note—"A deposit is held by the bank, which is, on the one hand, claimed by an alleged donee, and is, on the other, claimed by the next-of-kin of the deceased. And in that state of matters (the donee's alleged title as executrix not being put forward) I do not see how I can be asked to hold that there is no double distress." The fallacy of the reclaimer seems to lie in not recognising the complete distinction between the demand actually made upon the bank, and the demand which the reclaimer might have made in her character of executrix. Accordingly, I think there is a distinct competition between the next-of-kin and the reclaimer, who claims, on the footing of the alleged donation, that the money is to go into her pocket.

Lord Adam and Lord Kinnear concurred.

The Court adhered.

Counsel for Royal Bank—Dundas—Fleming. Agents—Dundas & Wilson, C.S.

Counsel for Mrs Price—W. Campbell. Agents—Gill & Pringle, W.S.

Counsel for Dunlops—A. S. D. Thomson—W. Thomson. Agents—W. & J. L. Officer, W.S.

Tuesday, January 24.

FIRST DIVISION.

M'CALLUM *v.* M'CALLUM.

Parent and Child—Action of Divorce—Interim Custody of Children—Conjugal Rights (Scotland) Amendment Act 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 9.

Section 9 of the Conjugal Rights Act 1861 provides that in any action of separation or divorce the Court may make such interim orders as to it shall seem proper, with respect to the custody of the pupil children of the marriage to which the action relates.

A husband, after raising an action of divorce against his wife on the ground of adultery, presented a petition to the Inner House for the custody of his children pending the result of the action of divorce.

Held that where an action of divorce was in dependence, it was, in general, more expedient that questions as to the interim custody of the children of the parties should be determined by the judge in such action, and petition *refused.*

This was a petition presented by James M'Callum, quarryman, Pretoria, South Africa, on 21st December 1892, in which the petitioner craved the Court to find him entitled to the custody of the four children of the marriage between him and Alice Carlyle or M'Callum, his wife, the eldest of whom was nine, and the youngest three years of age, and to ordain his wife to deliver the said children to his sister, who resided at North Queensferry.

The petition contained statements to the following effect—The petitioner and respondent were married in 1884. In April 1890 the petitioner, in order to improve his circumstances, accepted work at Pretoria, South Africa, leaving his wife and children in the house which they had occupied with him in Kirkcaldy. He had since then lived in Africa, but intended to return and live in Scotland. Since his absence he had remitted funds sufficient to maintain his wife and children creditably. The petitioner had learned that his wife had become much addicted to drink, and that she seriously neglected the children, leaving them without proper food and clothing. He had further learned within the last few weeks circumstances as to his wife's conduct which had led to his raising an action of divorce for adultery against her on December 20, 1892. In those circumstances it was indispensable for the interests of the children that he should exercise his right to regulate the place of their upbringing and education by removing them from his wife's custody. He therefore presented this petition for custody of the children pending the result of the action of divorce. He had given authority to his sister to receive and take charge of the children.

Mrs M'Callum lodged answers, in which she made the following statements—"Considering the petitioner's income and the respondent's needs, his allowance to her has been grossly inadequate, and during his absence he has treated her and his family with great neglect. Denied that the respondent is addicted to drink, or that she neglects her children. Averred that her children are extremely healthy, and that they are well cared for by the respondent. Admitted that an action of divorce has been raised against the respondent. Defences are not yet due in that action. That action includes a conclusion for the custody of the children in question. The respondent submits that the present petition is incompetent and unnecessary; and further, that in the circumstances it would prejudice the respondent's interests in the divorce proceedings."

At the discussion the respondent also produced and founded on letters which she alleged had been written to her by the petitioner from Africa, and which she alleged to be most indecent in their character. Counsel for the petitioner did not admit that said letters had been written by the petitioner.

It further appeared that in her defence to the action of divorce the respondent admitted the adultery with which she was charged, but pleaded (1) no jurisdiction; (2) lenocinium; (3) the pursuer is barred by his conduct from obtaining decree of divorce.

The 9th section of the Conjugal Rights Amendment Act 1861 provides that "in any action for separation *a mensa et thoro*, or for divorce, the Court may from time to time make such interim orders, and may in the final decree make such provision as to it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates."

Argued for the petitioner—The provision in the Conjugal Rights Act did not interfere in any way with the *nobile officium* of the Inner House, and the present application was competent. Further a sufficient case had been made out for the granting of the petition, for the respondent admitted that she had committed adultery, and the answers contained nothing to show that the petitioner was unfit to have the custody of the children. The fact that the petitioner was at present abroad did not deprive him of his right to regulate the place of their education—*Pagan* v. *Pagan*, July 3, 1883, 10 R. 1072. The letters founded on by respondent were not admitted to have been written by the petitioner, and could not be taken into consideration.

Argued for the respondent—The application was unnecessary, and should be refused. Much the most expedient course was to leave the Lord Ordinary, before whom the action of divorce was in dependence, to decide the question of the interim custody of the children. Further, the petitioner had failed to state any sufficient grounds for the granting of this application. The fact that the respondent had committed adultery was not of itself sufficient ground for depriving her of the custody of the children, and the allegation now made by her as to the obscene character of the petitioner's letters, if true, placed him in as bad a position in regard to the question of custody as the respondent. Besides the conduct of the parents, the Court must also have regard for the welfare of the children, and the wishes of the mother as well as of the father—Guardianship of Infants Act 1886 (49 and 50 Vict. c. 27), section 5.

At advising—

LORD PRESIDENT—It is clear that under the 9th section of the Conjugal Rights Act 1861 it is competent for the Lord Ordinary, before whom an action for divorce is in dependence, to make "such interim orders . . . as it shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates." It is plainly convenient and expedient that the Court possessed of an action which ultimately will decide in what way the subject of the custody of the children is to be dealt with, should also determine interim questions of custody. I do not say at all that that provision of the Conjugal Rights Act divests the Inner House of power as to questions of custody, but I take it that what the section contemplates as the normal mode of determining questions of this kind is that they should be determined by the Court which is seised with the action for the time, and that what we have now to consider is whether any special circumstances have arisen calling for the exercise of the *nobile officium* of this Court. I cannot say that I have heard anything stated to distinguish this from the ordinary run of cases of the kind, and although the action of divorce has not proceeded very

far before the Lord Ordinary, he has probably better means of determining the merits of this application than we have. I think, therefore, that this application should be made a step in the action of divorce.

LORD ADAM—The provision in section 9 of the Conjugal Rights Act 1861 was introduced in order to give the Lord Ordinary, before whom an action of separation or divorce was depending, power to deal with questions of this kind, because that was more convenient for parties than that they should have to come to the Inner House. That being so, it appears to me that this is a case in which the course provided for by the statute should be followed, and that the petitioner should renew his application in the action before the Lord Ordinary. It is obvious that the Lord Ordinary has more facilities for making any inquiries that may be necessary than we have. At the same time I have no doubt of our power to deal with such an application.

LORD KINNEAR—I have no doubt as to the competency of this application, but for the reasons stated by your Lordships I think that in general it is more convenient that interim regulations of this kind should be made by the Lord Ordinary before whom the case between the spouses is being tried, and the spouses are convened, because when the Lord Ordinary has disposed of that case on its merits he will be asked to make regulations as to the future custody of the children, having regard to the result of his decision on the merits. It would evidently be inconvenient that his Lordship in making such regulations should be embarrassed by a previous order pronounced by the Inner House, the grounds of which were not before him.

On the whole matter I think it is more convenient that this application should be renewed before the Lord Ordinary.

The Court refused the petition.

Counsel for the Petitioner—Sym. Agents—Dowie & Scott, S.S.C.

Counsel for the Respondent—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Tuesday, January 24.

SECOND DIVISION.

[Sheriff of Lanarkshire.

NICOL *v.* PICKEN.

Reparation—Landlord and Tenant—Process—Appeal—Jury Trial—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*Remit back to Sheriff for Restricted Proof—Relevancy.*

A tenant sued his landlord for damages caused by the landlord's alleged illegal interference with the roof of his house. Upon appeal for jury trial under section 40 of the Judicature Act, the Court *remitted* the case to the Sheriff for proof, restricted to the averments in certain specified articles of the condescendence, the other averments being held irrelevant.

Andrew Nicol, miner, sued his sometime landlord, John Picken, for £500 damages.

The pursuer was the defender's tenant from Whitsunday 1891 to Whitsunday 1892. In articles 13, 14, and 15 of the condescendence he averred that in April 1892 the defender removed the roof of a room in the pursuer's house, so that the rain came through the ceiling of the room and destroyed his furniture, and made the house uninhabitable; that although the defender knew that the pursuer's wife was lying seriously ill, he nevertheless caused certain building operations to be carried on upon the premises, so as to materially aggravate her illness and accelerate her death; that in consequence of all these illegal operations the pursuer was obliged to take another house at an increased rent, and that his wife died there, her end being accelerated by the defender's operations. The previous articles of the condescendence contained a long account of alleged proceedings on the part of the defender before the licensing authorities, which terminated in the defender's transferring his business premises from subjects rented by him to his own property, in part of which the pursuer was tenant, the result of which was the interference complained of.

The Sheriff allowed a proof before answer.

The pursuer appealed to the Court of Session and lodged an issue.

He argued—This case was competently brought to the Court. It was a serious case of damage. The pursuer averred that the defender's illegal operations had not only caused material damage to his furniture, but had also hastened the death of his wife. This was a case which, if it had begun in the Court of Session, must necessarily have been sent to trial by jury if the pursuer desired it, and that being so, it was incompetent to send it back to the Sheriff Court for proof—*Crabb* v. *Fraser*, March 8, 1892, 19 R. 581.

The respondent argued—It had been decided that the Court could deal with a case appealed for jury trial in the way which it thought best for the parties, and either send it to jury trial, order proof before a Lord Ordinary, or remit back to the Sheriff for proof. This was really a very small case. If proof was necessary at all, it should be before the Sheriff, in whose jurisdiction the parties were resident, rather than by a jury trial or a proof in the Court of Session—*Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279; *Bethune*, &c. v. *Denham*, March 20, 1886, 13 R. 882.

At advising—

LORD JUSTICE-CLERK—If this case is one which it is competent for us to send back to the Sheriff Court that proof may be taken there, I think we should do so. It has undoubtedly been considered com-