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-

petent for this Court to remit such cases to the Sheriff Court for proof when they have been appealed to the Court of Session for jury trial under the section of the Judicature Act allowing that procedure. That point having been matter of decision, and considering as I do that this is eminently a case in which the evidence should be taken rather by a proof before the Sheriff than by a jury trial in this Court, I move your Lordships to remit the case to the Sheriff Court for proof so far as relates to the matters set forth in the 13th, 14th, and 15th articles of the condescendence.

LORD YOUNG—I am of the same opinion. It must be distinctly understood there is no doubt about the competency of this appeal, and in this competent appeal it is within our competency and our duty to consider, in the interests of the parties, whether it should be sent to jury trial or to a proof.

We have considered this competent appeal, and in our opinion it is not a fit case for jury trial, but should be sent for proof before the Sheriff-Substitute. The appeal is brought under the 40th section of the Judicature Act, and it would be an unfortunate thing if the language of the statute had been such as to prevent us doing what in our opinion was best in the interests of the parties, but that point has been considered and decided, and I am of opinion that the result arrived at is both a sound and expedient one. I think we should follow the course pointed out by the former decisions in this case.

I merely make this explanation to show that in my opinion when an appeal is brought competently before us, it is open to us to consider, in view of the whole facts of the case, what is the best course to follow in the interests of the parties.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I think it may now be held to be settled by the decisions cited in the course of the discussion that it is competent for this Court, if they think fit, to remit back to the Sheriff, for the purpose of taking proof, a case appealed from the Sheriff for jury trial under the 40th section of the Judicature Act. But for these decisions I should have entertained doubt of the competency of that proceeding, although I have no doubt of the expediency of the course which the Court has adopted. The power of the Court, however, so to deal with an appeal like the present being determined, I think this a case in which that power should be exercised. Many of the pursuer's averments appear to me to be quite irrelevant, and therefore the remit to the Sheriff to take a proof should be restricted to the matters set forth in the proposed issue—that is, a proof of the 13th, 14th, and 15th articles of the pursuer's condescendence, the other averments so far as relevant being admitted.

The Court remitted to the Sheriff to take the proof, restricted to matters contained in articles 13, 14, and 15 of the condescendence.

Counsel for the Appellant—G. Smith—Able. Agents—Gill & Pringle, W.S.

Counsel for the Respondent — Clyde. Agents—Drummond & Reid, S.S.C.

Tuesday, January 24.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

THE WICK AND PULTENEYTOWN STEAM SHIPPING COMPANY, LIMITED *v.* PALMER.

Relief — Reparation — Relief among Co-Delinquents — Judgment Debt — Right of One of Two Joint-Debtors who has Paid Whole Debt contained in Decree to Assignation of Debt.

A widow and children raised an action against a shipping company for damages, on account of the death of her husband and their father, who was killed, while unloading a steamer, by being hit on the head by the pulley of a crane, the hook of which had suddenly given way. The fault alleged was defective tackle. Thereafter a supplementary action was raised on the same grounds by the same parties against the stevedore, the fault alleged on his part being that he had handled the tackle in a defective manner. The actions were conjoined and went to trial. The jury returned a verdict for the pursuers, and the two defenders were decerned to make payment conjunctly and severally of the damages found due.

The pursuers in the conjoined actions having charged the Shipping Company for the whole sum, and received payment thereof from them, and granted in exchange a receipt and assignation of the sums so paid, together with the extract decree—*held* that the Shipping Company were entitled to exact one-half of the damages from the stevedore.

Opinion by Lord Young, that where there is a judgment debt, it is inadmissible to look behind the decree, and that if one of two joint debtors under such a decree pays the whole, he has a right to assignation of the debt from the person to whom he has paid it, in order that he may recover one-half thereof from his co-debtor.

On 11th September 1891 Helen Brown or Fowlis, the widow of David Fowlis, lumper, Grangemouth, and their six children, raised an action against the Wick and Pulteneytown Steam Shipping Company, Limited, concluding for damages to them on account of the death of her husband and their father, who was killed while assisting to unload the said Shipping Company's steamer "St Fergus" at Grangemouth on the morning of the 23rd April 1891. His death was caused by his having been hit upon the head by a