the landlord taking over the sheep stock of his predecessor at a valuation.

The evidence shows that the stipulations as to the mode in which this is to be done vary considerably, and thus it is essential that they should be reduced to writing.

No doubt in consequence of this difficulty the tenant's declarator is founded on a presumed adoption of the estate regulations which in article twelve make certain provisions on that subject. But he is at once met with the rejoinder that when the landlord was willing to grant him a formal lease embodying those regulations, he deliberately refused to accept it on the ground that he had not agreed to those conditions, and announced his intention of possessing, and did possess, under the missives of lease apart from the regulations. I think it is quite sufficient for the landlord's case to hold that the tenant is now barred from going back on the construction of the contract. He has from the first repudiated the conditions, and in particular the first half of article twelve. It is out of the question that he should now be allowed to maintain that he is entitled to the benefit of the latter half of that article when, the lease being at an end, the landlord no longer has it in his power to enforce the earlier portion of it.

Even if I held the landlord bound to take over the stock, I think there are solid grounds for holding that he has sufficiently implemented any obligations which lay upon him by taking over twelve hundred sheep, that being within a score of the numbers which were on the farm when the tenant took it over from his predecessor.

The Lord Justice-Clerk concurred.

Lord Young was absent.

The Court adhered with additional expenses.

Counsel for the Reclaimer—Salvesen—A. S. D. Thomson. Agents—Gill & Pringle, W.S.

Counsel for the Respondent—Johnston, Q.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 17.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

CURRAN *v.* ROBERT M'ALPINE & SONS.

Process—Appeal—Appeal for Jury Trial—Competency—Court of Session Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

In an action of damages for personal injuries laid alternatively at common law and under the Employers Liability Act 1880, the defenders averred that the pursuer had discharged any claims otherwise competent to him by accepting payments under an insurance scheme organised by them for the benefit of their employees, under which it was a condition of receiving such payments that the receipt of them should bar all legal claims. The Sheriff-Substitute, *ante omnia*, allowed a proof of these averments, and thereupon the pursuer appealed for jury trial. *Held*, in accordance with the views expressed in *M'Coll* v. *J. & A. Gardner*, January 12, 1898, 25 R. 395, that the appeal was incompetent, in respect that it had not been taken upon an interlocutor allowing proof on the merits of the cause.

This was an action brought in the Sheriff Court at Glasgow by Bat Curran, labourer, against Robert M'Alpine & Sons, railway contractors there, in which the pursuer craved decree for £500 at common law, or alternatively for £170 under the Employers Liability Act 1880, as damages for personal injuries sustained by him through the fault of the defenders while he was working in their employment.

The defenders denied liability, but in addition put in a separate statement of facts in which they averred that the defenders had a scheme of insurance whereby, in consideration of a payment by themselves and a contribution by their servants, certain benefits were assured to their employees in the event of their sustaining injuries, that the pursuer was aware of this scheme, and that deductions under it had been made from his wages, that in terms of a notice setting forth the terms of the scheme, which was posted up at the defenders' offices and at their store, it was provided that any workman of defenders by accepting the payments therein provided, discharged his claims at common law and under the Employers Liability Act 1880, that the pursuer had received sundry payments from the defenders under the scheme, and that he had thereby discharged his claims, if any.

The defenders pleaded—"(3) The pursuer having accepted payments from defenders under their scheme as condescended on, has discharged any claims otherwise competent to him under common law or statute, and the defenders should be assoilzied."

The Sheriff-Substitute (Balfour) on 26th July 1898 issued the following interlocutor:—"Having considered the case, *ante omnia*, allows the defenders a proof of the averments in their statement of facts annexed to the defences, and to the pursuer a conjunct probation, and appoints the case to be put to the diet roll of 31st August.

The pursuer appealed to the Court of Session for jury trial.

The defenders objected to the competency of the appeal, and argued—This appeal was incompetent—*M'Coll* v. *Gardner & Company*, January 12, 1898, 25 R. 395.

Argued for the pursuer and appellant—This appeal was competent—*Conroy* v. *A. & J. Inglis*, June 4, 1895, 22 R. 620; *Robertson* v. *Earl of Dudley*, July 13, 1875, 2 R. 935. The Court of Session Act 1825 (6 Geo. 4, cap. 120) (Judicature Act), section 40,

enacted that either party in an action for more than £40 might appeal as soon as an order or interlocutor allowing a proof had been pronounced in the inferior court (unless it were an interlocutor allowing a proof to lie *in retentis*, or granting diligence for recovery and production of papers). The effect of this was that any interlocutor allowing proof, except those specially excepted, was appealable. This interlocutor was an interlocutor allowing a proof, and was not one of those excepted. The right of appeal was not restricted to the case of interlocutors allowing a proof on the whole case, or upon the merits.

LORD JUSTICE-CLERK—I think this is an incompetent appeal. The interlocutor allowing proof did not allow a proof with regard to the merits of the case, but only a proof of certain averments which, if consistent with fact, would exclude the pursuer's case altogether. Now, in the case of *M'Coll* we held that the kind of interlocutor allowing a proof to which the Judicature Act refers is an interlocutor allowing a proof on the merits of a case, and that it does not refer to an interlocutor allowing a proof as to some preliminary question incidental to the main inquiry, a kind of interlocutor which so far from allowing a proof on the merits tends rather in the direction of excluding it. Looking to this case of *M'Coll* which was so recently decided, I am of opinion that this case should be dealt with in accordance with the views there expressed, and should therefore be dismissed. It will be quite competent for the pursuer, if he is successful in this preliminary inquiry, to appeal for jury trial when a proof on the merits is allowed.

LORD YOUNG—I also think this appeal is incompetent.

LORD TRAYNER — I agree, and have nothing to add to my opinion in *M'Coll*, to which I adhere.

LORD MONCREIFF was absent.

The Court dismissed the appeal.

Counsel for the Pursuer—G. Watt—W. F. Trotter. Agent—J. Struthers Soutar, Solicitor.

Counsel for the Defenders — Wilton. Agents—Robertson, Dods, & Rhind, W.S.

Wednesday, December 21.

SECOND DIVISION.

[Lord Low Ordinary.

M'TERNAN *v.* BENNETT.

Reparation — Slander — Privilege — Malice —Relevancy—False Charge by Police Constable.

An action of damages was raised against two police constables. The pursuer averred that he had been charged by the defenders with assaulting them, and convicted on their evidence and sentenced to imprisonment, that on the day of the assault he was a long distance from the *locus*, that after his conviction evidence of this was brought to the authorities and that he was liberated and the sentence quashed, and that his apprehension, conviction, and imprisonment were due to the unfounded statements and representations of the defenders, whose charges and evidence against him were false to their knowledge, and were malicious and without just or probable cause.

Held (*aff.* judgment of Lord Ordinary) that the pursuer had averred a relevant case of malice to go to trial.

Police — Statute — Statutory Limitation of Time within which Action must be Brought—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1.

The Public Authorities Protection Act 1893, sec. 1, provides, *inter alia*, that any action, prosecution, or other proceeding against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority shall not lie or be instituted unless it is commenced within six months next after the act complained of.

An action of damages was raised against two police constables for falsely and maliciously charging the pursuer with assaulting them and for giving evidence at the trial which led to his conviction and imprisonment. The action was not raised till six months after the event had elapsed.

Held (*aff.* judgment of Lord Ordinary) that the action was not excluded by the statute.

Process—Commencement of Action—Poor's Roll.

Opinion (*per* Lord Low) that proceedings by a person to get himself put upon the poor's roll in order that he might raise an action could not be regarded as the commencement of an action within the meaning of a statute limiting the time within which action must be brought.

By section 1 of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) it is enacted that where "any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect (*a*): the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof." . . .