I think that question is decided by the judgment of this Court in the case of *Niddrie and Benhar Coal Company*, and also by the judgment of the Court of Appeal in England (which although not binding we are generally ready to follow) in the case of *Neagle*. I entirely agree with the opinions in both of these cases and also with what has been said by Lord M'Laren and Lord Adam, and I see no necessity for saying more except that on the grounds of these decisions we must answer this question in the negative. A separate point was raised which I do not think was properly before us; and I do not know that the argument urged in support of it was brought to any legitimate or intelligent conclusion. The point was that this proceeding before the Sheriff was irregular because no recourse could be had to arbitration proceedings if there be an agreement determining the point which it is proposed to submit to the arbiter. It is true that it is only in default of an agreement that the parties can go to arbitration at all. But there is no averment in this case of any agreement which could possibly prevent them going to arbitration.

The averment is that the employers had agreed to pay and had paid the workman weekly compensation till 25th February 1903, and on the 25th February they stopped the payment, and both parties must be held as admitting that there was no binding agreement compelling the employer to pay or the workman to accept compensation after the 25th February 1903. It was said that the only remedy open to the workman in consequence of the employers' discontinuance of the payment is a formal proceeding for review under the 12th section of the first schedule, and not an application for arbitration. But that section does not prescribe any particular form of procedure as a necessary preliminary of a new arbitration, or a new agreement for fixing the amount of compensation when a former arrangement is brought to an end. The employer took the matter of review into his own hands by stopping the payments he had been making, and by so doing he opened the way for a new agreement or failing agreement for arbitration. The parties had made no agreement upon the discontinuance of the payments, and therefore they were quite within their rights when they went before the Sheriff as arbiter, and asked him to consider the question of compensation upon the facts which they brought before him in evidence. When he came to consider these facts he found only one difficulty which is stated in the question of law before us, and upon that question, as I have stated, I agree with what has been said by your Lordships.

The LORD PRESIDENT concurred.

The Court answered the question of law in the negative.

Counsel for the Appellant—Wilson, K.C. D. Anderson. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Respondents—G. Watt, K.C.—A. Moncreiff. Agents—Simpson & Marwick, W.S.

Tuesday, June 7.

FIRST DIVISION.

[Lord Low, Ordinary.

TRAILL & SONS *v.* ACTIESELSKABAT DALBEATTIE LIMITED.

Reparation—Personal Injuries—Assignation of Claim—Title to Sue.

An employer, A, paid compensation to the widow and children of one of his employees who had been killed through an accident, and took from them an assignation of all claims competent to them against a third party, B, through whose fault the accident was said to have occurred. *Held* that the assignation was valid and effectual, and that A had a good title in his own name to sue B.

Reparation—Negligence—Liability of Shipowners for Injury Caused to Employee of Stevedores through Defect in Tackle Supplied by them to Stevedores for Unloading—Relevancy.

A workman employed by a firm of stevedores, in unloading a vessel was injured through the breaking of a sling-rope supplied to the stevedores by the shipowners. In an action for compensation paid to the widow and children of the injured man, based upon alleged fault, it was averred that the sling-rope was knowingly supplied for the purpose for which it was being used; that it was insufficient through defect, and that the insufficiency, while not apparent in any ordinary examination, would have been discovered by a proper test which the shipowners ought to have applied to plant upon the fitness of which the workmen were entitled to rely. The shipowners pleaded that the case was irrelevant. *Held* that the facts averred, if established, might disclose a case arising within the rule of *Heaven* v. *Pender*, 11 Q.B.D. 503, and case remitted to the Lord Ordinary to allow a proof.

In July 1902 David Traill & Sons, stevedores, Grangemouth, were employed at Grangemouth Harbour in discharging the cargo of the s.s. "Dalbeattie," belonging to Actieselskabat Dalbeattie Limited. John Gemmell, a labourer in their employment, was injured through a load of timber falling upon him, and died shortly afterwards from his injuries. His widow and children raised an action against Traill & Sons, in which it was sought to make them responsible for his death. Traill & Sons maintained that they at anyrate were not liable, but after sundry procedure paid the widow and children the sum of £247, 18s. 10d. In respect of that payment the

widow and children assigned to Traill & Sons "all claims competent to us or any of us, and all right of action now competent or which was at any time competent to us or any of us against Actieselskabat Dalbeattie, Limited, and—Lindvig, or either or both of them, the owners and registered owner of the s.s. "Dalbeattie" of Kragerol, for compensation in respect of the death of the said John Gemmell, . . . with full power to our said assignees and their foresaids to institute and follow forth whatever legal proceedings they may deem expedient for enforcing the said claim against the owners of the said steamship, they always freeing and relieving us of all expenses of and incident to the said proceedings." . . .

Traill & Sons raised an action against Actieselskabat Dalbeattie Limited and Lindvig, the registered owner of the "Dalbeattie," in which they made the following averments:—"(Cond. 2) The defenders supplied the plant, or at all events part of the plant, for discharging the cargo from said vessel, and in particular they supplied to the pursuers a sling-rope in which sets of deals which composed the cargo were collected and encircled, the rope thereafter being attached to the chain of the hydraulic crane and swung with its load to the quay side. It is the usual custom among shipowners (at all events it is the usual custom among shipowners at the port of Grangemouth) to supply sling-ropes to the stevedores for discharging cargo. The said sling-rope was one of a number of sling-ropes supplied by the defenders to the pursuers, in accordance with the said custom and in accordance with the defenders' own practice, knowingly for the purpose of being used by the pursuers for discharging said cargo. Said sling-rope so supplied by the defenders was defective and insufficient for its purpose, and in consequence thereof the rope broke and so caused the accident after-mentioned. Said rope was old, and on examination after the accident it was discovered to be mildewed and rotten in the centre, and therefore to be in such a condition that it should not have been used for the purpose of discharging cargo. A proper inspection or test of the rope by the defenders before they supplied the same to the pursuers' workmen would have revealed the defective condition of the rope as well as the fact that the rope was insufficient for its purpose. It is believed and averred that it was not tested or examined from the time it was made. It was the duty of the defenders to test and examine said rope periodically in order to see that it was fit for the purpose to which they applied it. The pursuers in doing work for the defenders relied and were entitled to rely on the fitness and sufficiency of the plant supplied to them by the defenders, and particularly on the fitness and sufficiency of the said sling-rope, the defective condition of which as before described, was not known to them and could not have been discovered by them by an ordinary examination. By and in consequence of the defective condition of the said rope it broke, with the result that it precipitated a load upon John Gemmell, a stevedore in the employment of the pursuers, causing such injuries that he died on the 16th day of July 1902."

They pleaded—"(1) The death of the said John Gemmell being due to the fault of the defenders, or of those for whom they are responsible, the defenders are liable in reparation to the representatives of the said John Gemmell. (2) The pursuers, as the assignees of the said representatives, are entitled to decree in terms of the conclusions of the summons, with expenses."

The defenders pleaded—"(1) No title to sue. (2) The pursuers' statements are irrelevant."

Upon the 14th January 1904 the Lord Ordinary (Low) pronounced an interlocutor whereby he repelled the first plea-in-law for the defenders and allowed the pursuers to lodge in process a draft issue.

Opinion.—"The pursuers are stevedores, and in July 1902 they were employed by the defenders to discharge from the ship 'Dalbeattie' a cargo of deals. The defenders supplied the sling-ropes which were used in hoisting the deals out of the hold. One of these ropes broke, and the deals which it was supporting fell upon one of the pursuers' workmen of the name of Gemmell and killed him. The widow and children of the latter then brought an action of damages against the pursuers, who, although they denied liability, paid the widow and children a sum of money, and took an assignation from them of all claims and right of action competent to them against the defenders in respect of Gemmell's death.

"The present action is brought by the pursuers as assignees of Gemmell's widow and children, and the only question which was argued before me was whether any right which the widow and children had to claim damages from the defenders in respect of Gemmell's death was capable of being assigned.

"The defenders argued that, although it had never been actually decided that such a right could not be assigned, there was no instance of an action of the kind being brought by an assignee, and the non-assignable nature of the right was shown by the fact that it did not pass to executors nor to a trustee in bankruptcy.

"It must, no doubt, be now regarded as settled by the case of *Bern's Executor* v. *Montrose Asylum*, 20 R. 859, 30 S.L.R. 748, that an executor has no title to institute an action of damages for personal injury to the deceased person whom he represents. It is, however, also settled that if an action has actually been raised by the injured person prior to his death his executor is entitled to carry it on—*Neilson* v. *Rodger*, 16 D. 325. It seems to me that the chief ground in principle for the distinction between these two cases is that it is entirely in the option of the person injured whether he will claim damages or not. If he dies without making the claim the executor has no right to exercise the option which was

personal to the deceased, but if the option has been exercised by bringing an action the executor may carry it on.

"It does not, in my opinion, follow that a claim of damages for personal injury cannot be assigned. There may be, although I do not say there are, reasons why a gratuitous assignation of such a claim would not be effectual; but that is not the case with which I am dealing. Mrs Gemmell and her children have assigned their claim to the pursuers because the latter have indemnified them for the loss which they have sustained. In such circumstances I cannot see any reason why the assignation should not be effectual. It certainly cannot be said that Mrs Gemmell and her children have not exercised their option to enforce the claim, because they have in fact done so, and it is not said that the defenders—assuming that they were truly the wrongdoers—are in any way prejudiced by the claim being made by assignees of the persons injured and not by these persons themselves.

"The defenders, as I have said, argued that such a claim as that in question could not be assignable because it did not pass to a trustee in bankruptcy. But I do not think that it can be said that the rule is that a claim of damages for personal injury does not pass to a trustee in bankruptcy. I think that the general rule is the other way, and that the most that can be said is that the modern tendency of the law is to make an exception where the injury is one solely affecting the personal character or the feelings of the bankrupt.

"Thus in the case of *Thom* v. *Bridges*, 19 D., 721, it was held that a trustee in bankruptcy was entitled to be sisted in place of the bankrupt as pursuer in an action in which the latter claimed *solatium* for imprisonment. Again, in *Neilson* v. *Rodger* (*supra*), Lord Wood said that it could not be denied that 'where a claim for damages and *solatium* arises on account of bodily injury or from any other cause . . . that is a moveable claim, and is assignable either by positive conveyance or implied legal assignation.' In the same case Lord Cockburn said that a claim for bodily injury could, 'without doubt,' be assigned. Again in *Gardiner* v. *Main*, 22 R. 100, 32 S.L.R., 91, where it was held that a person who had voluntarily paid damages to a workman who had been injured could not claim relief from the true wrongdoers, Lord M'Laren said that a competent course for the pursuer to have adopted would have been to take from the workman an assignation of his claims against the wrongdoer.

"The defenders also referred to the case of *Simpson & Company* v. *Thomson*, 5 R. (H.L.), 40, 15 S.L.R. 293. That was a case in which underwriters, who had paid insurance to the owner of a ship which had been sunk in a colision, sought to exercise that owner's right to claim damages against the owners of the other ship through whose fault the collision had occurred. In giving judgment Lord Chancellor Cairns laid it down as a well-known principle of law that 'where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or re-imbursed himself for the loss.'

"The Lord Chancellor, however, went on to say that where by virtue of that rule underwriters enforced a claim of damages which the owner of the ship might have asserted against a wrongdoer, they must sue in his name, and not in their own.

"The defenders relied upon that decision as an authority for saying that it was incompetent for the pursuers to sue in their own name, although they might have done so in the names of Mrs Gemmell and her children. I am of opinion that that argument is not well founded. It may very well be that the pursuers, having indemnified Mrs Gemmell and her children, would have been entitled to bring this action in the names of the latter without any assignation. But the pursuers have obtained an assignation, and the claim being one which, in my judgment, was capable of being assigned, they have a good title to sue in their own name.

"I shall therefore repel the first plea in law for the defenders."

Upon the 18th February 1904 the Lord Ordinary (Low) pronounced another interlocutor, whereby he approved of an issue in these terms:—"Whether on or about 16th July 1902 in Grangemouth Dock, John Gemmell, labourer, . . . sustained personal injuries from the effect of which he died on the same day, through the fault of the defenders, to the loss, injury, and damage of . . ."

Opinion—"When this case was previously before me the only question which was argued was whether the claim of the widow and children of the workman Gemmell (who was killed on board the defenders' ship), against those through whose fault his death was caused, could be assigned.

"I answered that question in the affirmative, and the defenders now maintain that the pursuers' averments are not relevant. Whether that contention is well-founded or not depends upon whether the averments disclose any duty on the part of the defenders to the pursuers' servants.

"Shortly stated, the facts averred by the pursuers are these—They are stevedores, and they were employed by the defenders to discharge a cargo of deals from a ship belonging to the latter. The defenders supplied part of the plant for discharging the cargo, including ropes for hoisting the deals out of the hold. That is said to be in accordance with custom. One of the ropes broke, and the parcel of deals which it was supporting fell upon Gemmell, who was a workman in the employment of the pursuers. The rope was an old rope, and was rotten in the centre. A proper inspection or test of the rope would have shown its defective condition, but that it was defective could not be discovered 'by an ordinary examination,' by which I understand that a mere examination of the outside of the rope would not have revealed any defect.

"I am not prepared to say that these averments are not relevant.

"The rope was supplied by the defenders for work to be done for them on board their own ship, and the work was of a kind which necessarily involved the employment of workmen. The workman who was killed, therefore, had not gone on board as a volunteer, but he was, so to speak, on board by the invitation of the defenders. In such circumstances I think that the defenders were under obligation, and had a duty to the workmen employed, to use reasonable care and skill to secure that the appliances which they furnished for the work were fit for the purpose.

"The defenders relied upon the judgment of the House of Lords in the *Caledonian Railway Company* v. *Mulholland*, App. Cas. 1898, p. 216. It seems to me that that case differed in essential particulars from the present. The circumstances here are very much the same as those which occurred in *Heaven* v. *Pender*, 11 Q.B. Div. 503. The judgment in the latter case must be regarded as authoritative, not only by reason of the eminence of the Judges by whom it was pronounced, but because it was referred to with apparent approval in the House of Lords in the *Caledonian Railway Company* v. *Mulholland*.

"The defenders, however, further maintain that the pursuers could not sue as assignees of Mrs Gemmell and her children because their averments showed that they were not in the position of third parties who had paid to Mrs Gemmell and her children a sum of money in return for an assignation of a claim which the latter had against the defenders, but that they had paid the money in settlement of a claim in which they were truly the debtors. That fact the defenders contended might not bar the pursuers from bringing an action of relief against the defenders (although such an action could have been resisted upon other grounds), but it did bar them from suing as assignees.

"That contention is founded upon the fact that Gemmell was the pursuers' servant and was working in their employment when he met his death, and the argument is that the pursuers are responsible to Gemmell and those representing him for having put him to work with an insufficient rope. The answer to that view seems to me to be that an employer does not warrant the sufficiency of the appliances which he furnishes to his workmen, but is only bound to use all reasonable care and skill to secure that they are sufficient; and, assuming the pursuers' averments to be true, I cannot affirm that they failed in that obligation. It would have been different if the rope had been patently insufficient, if, for example, it had been frayed or obviously too slender to carry the weight of the deals. But the pursuers' averment, as I read it, is that the rope was to outward appearance sufficient in every respect. That, no doubt, would not have saved the pursuers from liability if they had themselves supplied the rope, because in that case their duty would have been to see that the rope was in fact sufficient. But the rope having been supplied by the defenders, I do not think that the pursuers were under obligation to test it as they would have been bound to do if it had been their own. I think that the rope having been apparently sound and strong, the pursuers were justified in assuming that the defenders had fulfilled the obligation which they were under to them of using all reasonable care to secure that the rope was in fact in that condition.

"I am therefore of opinion that the pursuers have stated a relevant case for enquiry, and accordingly I shall allow an issue."

The defenders reclaimed, and argued—(1) The pursuers had no title, for it was not competent for a person who had received personal injuries to assign his right to sue for damages. There was no precedent for such a claim being assigned, and it had been decided that it was not carried to an executor or a trustee in bankruptcy—*Bern's Executor* v. *Montrose Asylum*, June 22, 1893, 20 R. 859, 30 S.L.R. 748; *Pulling* v. *Great Eastern Railway Company*, 1882, L.R. 9 Q.B.D. 110; *Hill* v. *Boyle*, L.R. 4 Eq. 260; *ex parte Vine*, 1878, L.R. 8 Ch. D. 364. It would be curious if what was not carried by these universal assignations could still be assigned, and it would be inconvenient, for then such claims as the present might be arrested, and questions of this kind would have to be tried in a furthcoming or multiplepoinding. It was a well established rule in the case of damage to ships that the underwriters could not sue, the action must be in the name of the owners—*Simpson & Company* v. *Thomson*, December 13, 1877, 5 R. (H.L.) 40, 15 S.L.R. 293. But even if such a claim were assignable, then the assignees were in the same position as the assigners who had received compensation, and all that could be claimed would be the balance of compensation still due—*Douglas* v. *Hogarth*, November 19, 1901, 39 S.L.R. 118, or if the assignees were in any way different from the assigners the action became one of relief, which could not be raised by a party who had settled—*Ovington* v. *M'Vicar*, May 12, 1864, 2 Macph. 1066. (2) There was no relevant case, for the defenders were under no obligation to the pursuer's workpeople—*M'Gill* v. *Bowman & Company*, December 9, 1890, 18 R. 206, 28 S.L.R. 144; *Campbell* v. *Morrison*, December 10, 1891, 19 R. 282, 29 S.L.R. 251; *Caledonian Railway Company* v. *Mulholland*, November 26, 1897, L.R. 1898, Ap. Cases, 216, 25 R. (H.L.) 1, 35 S.L.R. 54; *Membery* v. *Great Western Railway Company*, 1889, L.R. 14 Ap. Cases, 179. A different case would have been disclosed if it had been averred that the defenders knew of the defect—*Heaven* v. *Pender*, 1883, L.R. 11 Q.B.D. 503; *Macdonald* v. *Wyllie & Son*, December 22, 1898, 1 F. 339, 36 S.L.R. 262.

Argued for the pursuers and respondents—(1) The pursuers had a good title. In Scotland a claim for damages could be assigned and the assignee could sue in his

own name. That proposition had been established in all cases of damages for breach of contract or injury to property—*Constant* v. *Kincaid & Company*, June 19, 1902, 4 F. 901, 39 S.L.R. 636; *Symington* v. *Campbell*, January 30, 1894, 21 R. 434, 31 S.L.R. 372; *Levett* v. *London and North-Western Railway Company*, July 17, 1866, 2 S.L.R. 207; *Caledonian Railway Company* v. *Watt*, July 9, 1875, 2 R. 917, 12 S.L.R. 592. The practice in shipping cases was an exception borrowed from England—*Simpson & Company* v. *Thomson, cit. sup.*; *King* v. *Victoria Insurance Company, Limited*, L.R. 1896, Ap. Cases 250. Injury to person was not to be distinguished but fell within the general rule—*Mein* v. *M'Call*, June 7, 1844, 6 D. 1112; *Milne* v. *Gauld's Trustees*, June 14, 1841, 3 D. 345; *Neilson* v. *Rodger*, December 24, 1853, 16 D. 325; *Thom* v. *Bridges*, March 11, 1857, 19 D. 721. The right to sue for damages was really an asset like a *spes successionis*, which could be sold and assigned—*Gardiner* v. *Main*, November 29, 1894, 22 R. 100, 32 S.L.R. 91; *Darling* v. *Gray & Sons*, May 31, 1892, L.R. 1892, Ap. Cases 576, 19 R. (H.L.) 31, 29 S.L.R. 910. Executry cases were not in point, but if it were necessary to take account of them, claims of damages for personal injury did pass to the executor if action had been begun—*Neilson* v. *Rodger*, *cit. sup.*, and if a bankrupt had already commenced or did commence such an action his trustee could continue it and reap the benefit—*Thom* v. *Bridges* and *Mein* v. *M'Call*, *cit. sup.*; *Jackson* v. *M'Kechnie*, November 13, 1875, 3 R. 130, 13 S.L.R. 65. If the question depended upon election, as it seemed in bankruptcy and executry, then here the election had been made by the assignation. It was further to be remarked that the widow's position in this case was stronger than in those cited, for she had a patrimonial interest because of the loss of her supporter as well as a claim for *solatium*, and where the two interests concurred the title to sue would be upheld—*Auld* v. *Shairp*, December 16, 1874, 2 R. 191, 12 S.L.R. 177; *Eistens* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, 7 S.L.R. 638. This was sufficient to distinguish *Bern's* case, *cit. sup.* (2) The case was relevant—*Heaven* v. *Pender*, *Macdonald* v. *Wyllie & Son*, *Caledonian Railway Company* v. *Mulholland*, *cit. sup.*

At advising—

LORD KINNEAR—The averments of fact upon which this case depends may be very shortly stated. The pursuers allege that John Gemmell, a stevedore in their employment, was killed in consequence of the breaking of a defective rope, that the defective condition of the rope was due to the fault of the defenders, who thus became liable in reparation to Gemmell's representatives; that the pursuers, who were in no way answerable for the accident, paid a sum of money to the widow and children, and that they in respect of that payment assigned to the pursuers all claims competent to them and all right of action for damages at their instance against the defenders. On this basis of fact the action concludes for payment to the pursuers of £247, 18s. 10d., the sum which the pursuers have paid to the representatives of the deceased workman, and which they allege to be a just estimate of the amount payable in reparation.

Assuming in the meantime the relevancy of the averment of fault, the first question is whether the assignation alleged is valid and effectual to confer on the pursuers a title to sue this action. It is not disputed, nor is it open to dispute, that by the law of Scotland—"differing," as the late Lord President has pointed out, "in that respect from some other systems of jurisprudence,"—an action of this kind is sustained at the instance of a wife for the death of her husband, and of a child for the death of his parent, when the death has been caused by *culpa* or delict. But it is maintained in the first place that actions *ex delicto* are not assignable but are purely personal and intransmissible. It may be convenient to observe that in this question we have nothing whatever to do with actions of assythment to which the defenders' counsel thought it apposite to refer. The only question is whether the ordinary action of damages for reparation of bodily injuries is or is not assignable by persons who are undoubtedly entitled to maintain it in their own right, and who have transferred it for a payment of money. The general rule of the law of Scotland is that personal rights are assignable. Mr Erskine gives a list of excepted cases in which rights by their nature or the terms of their constitution, or else, as he says, by "immemorial custom" are incapable of proper transmission. But among these exceptions neither rights of action in general nor the *actio injuriarum* in particular are to be found. Nor has other authority been adduced to show that in our law obligations *ex delicto* are distinguished in this respect from obligations *ex contractu*. On the contrary, the cases cited seem to me to establish that claims of the former kind are transmissible to the same effect as other personal rights. *Mein* v. *M'Call*, 6 D. 1112; *Thom* v. *Bridges*, 19 D. 721; and *Neilson* v. *Rodger*, are directly in point, and in the last-mentioned case Lord Wood—I need hardly say a very high authority—states the law in the very distinct language quoted by the Lord Ordinary—"It cannot be denied that when a claim for damages and *solatium* arises on account of bodily injury or from any other cause, that is a moveable claim and is assignable either by positive conveyance or implied legal assignation." It is said that *Neilson* v. *Rodger* was overruled in *Bern* v. *The Montrose Lunatic Asylum*. In that case it was held that executors have no title to institute an action of damages for personal injury to the defunct when he has raised no such action for himself during his life. But there is nothing in that decision to throw any doubt upon the authority of *Neilson* v. *Rodgers* in so far at least as regards the transmissibility of such a claim by express assignation, which is the only question with which we are

now concerned; and Lord M'Laren, in whose opinion the majority of the Judges concurred, is careful to point out the distinction, and cites in support of it the *dictum* of Lord Watson in *Darling* v. *Gray*, where his Lordship says—"It is in my opinion unnecessary to consider how far a bare claim in respect of personal injuries caused by the negligence of another constitutes a debt due to the party injured which will pass upon his death without having brought an action to his personal representatives. The law has been settled that when the deceased has instituted an action to enforce his claim his executor can take up and insist in the process to the effect of recovering the pecuniary demages to which the deceased was entitled." There is therefore the highest authority for holding that in our law the *actio injuriarum* is not so purely personal as to be intransmissible, and if the right by reason of its being transmissible passes to the executors, it must be capable of passing by the direct assignation of the injured person during his life. All that was decided in *Bern's* case is that if a person who has sustained bodily injury through the fault of another dies without taking any step to vindicate a right to reparation his executor cannot make a claim which during his life he abstained from making. This makes the title of a representative to sue depend upon the intention of the injured person himself to vindicate his right. But the institution of an action is not the only means of manifesting that intention. If the injured person assigns his right of action to one who has advanced the sum alleged to be payable by the wrongdoer that is just as plain an assertion of his right to demand reparation as if he had brought an action in his own name. Accordingly, in *Gardiner* v. *Main* Lord M'Laren assumes the law to be clear that although an employer who had compensated his workman for injuries sustained through the fault of a third person had no claim of relief on the mere fact of such payment, he might have made a perfectly effectual agreement with his injured servant to give him an assignation in respect of the sum paid to all claims of damages against the wrongdoer, or "in other words," his Lordship says the master may become an insurer of his workman's claim of damages. If that is his position he is entitled to the benefit of the remedy which the insured would have had. But in that view it is said, on the authority of a dictum of Lord Cairns in *Simpson* v. *Thomson*, that he cannot assert his right of action in his own name but only in the name of the person insured, and therefore it is said that the present action must be thrown out, even assuming that the pursuer might have raised an action in the name of the cedent. I do not understand the observation of Lord Cairns as laying down a doctrine of the law of Scotland. He was considering the right of underwriters of a ship that had been lost to sue for damages for the act which had caused the loss; and the purpose of the observation on which the defenders rely is to show that in such a case it is the personal right of action of the shipowners which is transferred to the underwriters. For that purpose his Lordship refers to a rule of English practice, but I am not persuaded that he intended to say that the practice of Scotland must be the same, or that he had thought it necessary to consider that question. At all events he does not lay it down as the law of Scotland that an assignee cannot sue in his own name but must always sue in the name of his cedent. There is no question as to the rights of an assignee in this respect. By the old style of assignations, as Mr Erskine explains, the assignee was made mandatory or procurator *in rem suam*. But the logical consequences of this method of regarding it were found to be so inconvenient that it has been long abandoned, and the assignation is no longer a mere mandate but a conveyance of the right, corporeal or incorporeal, which it purports to assign, so that the assignee, as fully vested in the subject, is entitled to vindicate his own right in person and name. On this first point therefore I agree with the Lord Ordinary. I do not think it necessary to consider the English authorities to which we were referred, because the law of England differs widely from our own both as to the conditions on which the *actio injuriarum* may be sustained and as to the assignability of rights of action in general. The cases cited were very interesting as illustrating these differences, but for that reason they are inapposite as authorities for a decision of this Court.

Assuming the validity of the assignation, the next question is whether there is a relevant averment of fault on the part of the defenders, and I agree with the Lord Ordinary that the case which the pursuers undertake to prove must be allowed to go to trial. The strength of the pursuers' case lies in their averment that the defective rope to which the accident is attributed was provided by the defenders and furnished to the stevedores' men for the special purpose of being used by them for unloading the ship; that they had failed to take reasonable care to see that the ropes were in a fit state to be used so as not to expose the men who used them to danger or risk not necessarily incident to the service in which they were engaged, and that the stevedores had no opportunity for examining or testing them for themselves. If all this can be made out it appears to me that the case may be brought within the rule of *Heaven* v. *Pender* as explained by Lord Herschell in *Caledonian Railway Company* v. *Mulholland*. The case as stated is entirely different from that to which it was likened—of a workman or his employer borrowing, on some casual necessity, apparatus or appliances which happens to be available but which was not specially provided for their use. I do not however desire to express a more definite opinion than that the pursuers' averments are sufficient to entitle them to a proof. I do not think it desirable to prejudge questions that may be raised

upon the facts, after these have been ascertained.

The LORD PRESIDENT and LORD ADAM concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor of new: Repel the first plea-in-law for the defenders; also repel their second plea-in-law; and remit to the Lord Ordinary to allow parties a proof of their respective averments and to the pursuers a conjunct probation," &c.

Counsel for the Defenders and Reclaimers—Salvesen, K.C.—Younger. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Pursuers and Respondents—Wilson, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Friday, June 10.

FIRST DIVISION.

[Sheriff Court of Lothians and Peebles at Linlithgow.

JACK *v.* SMITH.

Process—Appeal—Proof or Jury Trial—Action of Damages for Breach of Promise of Marriage—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *secs.* 28 *and* 40—*Evidence Act* 1866 (29 *and* 30 *Vict. c.* 112), *sec.* 4—*Court of Session Act* 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 49.

In an action of damages for breach of promise of marriage, which had been appealed from the Sheriff Court, the defender moved the Court to send the case back to the Sheriff Court for proof, on the ground that the financial circumstances of the parties were such that the expenses of a jury trial should not be incurred. The sum sued for was £500, and on record the defender tendered £50. The Court *refused* the motion and ordered issues.

Georgina Jack, Parkhead Cottage, Bathgate, brought an action in the Sheriff Court of the Lothians and Peebles at Linlithgow, against Alexander Murray Smith, Sanitary Inspector, Linlithgow, for breach of promise of marriage, concluding for £500 in name of damages.

The defender on record tendered to the pursuer the sum of £50 with expenses to the date of lodging the defences.

The Sheriff-Substitute (M'LEOD) allowed a proof.

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

In the Single Bills the defender moved that the case should be sent back to the Sheriff Court for proof.

Argued for the defender—The course to be followed in a case of this kind was entirely in the discretion of the Court. The financial circumstances of the parties were narrow, and such that it was not in their interest that the expense of a jury trial should be incurred.

Argued for the pursuer—Actions for damages on account of breach of promise of marriage were enumerated in section 28 of the Judicature Act 1825 as appropriate for jury trial, and there was no instance of jury trial being refused in such an action. The financial position of the parties was not a relevant consideration. The Evidence Act 1866, section 4, contemplated the withdrawal of cases from jury trial only "if both parties consent" or "if special cause be shewn." Neither of these elements was present in this case. By his tender of £50 the defender had estimated the value of the suit as being in excess of the statutory minimum for jury trial—*Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279, 20 S.L.R. 842; *Mitchell* v. *Urquhart*, February 9, 1884, 11 R. 553, 21 S.L.R. 348; *Trotter* v. *Happer*, November 24, 1888, 16 R. 141, 26 S.L.R. 79; *Cowie* v. *Diez*, July 17, 1903, 5 F. 1173, 40 S.L.R. 868.

LORD ADAM—This is an appeal under section 40 of the Act of 6 Geo. IV, cap. 120, with a view to jury trial. As to the competency of the appeal there is no question. But we are met with a motion that the case should be remitted to the Sheriff Court for proof. The defender says this is entirely in our discretion. To a certain extent this is true because we have power to do as the defender asks. But our discretion is not entirely unlimited, because the Act of Parliament says that actions for breach of promise of marriage are appropriate for jury trial. I am also myself of opinion that this case is one of a class which is most appropriate for jury trial. I therefore think this is not a case for a proof.

But it is said that in the interests of both parties—they being in somewhat poor circumstances—the case ought to be sent back to the Sheriff Court. Now it may be supposed that the parties know their own interests best, and the pursuer says that it will not be her interest to have the case sent back to the Sheriff Court, and that she wishes it sent to jury trial. Therefore we cannot say that both parties are agreed as to their interests in this respect.

But then it is said that the financial circumstances of the parties are such that the expenses of a jury trial should not be allowed to be incurred. As I said in the case of *Trotter*, I do not think the financial position of the parties is a relevant consideration. A poor man is just as much entitled as a rich man to have his case tried in what Court he pleases; and so I decline to consider the circumstances of parties to be a relevant consideration. The question I think comes to be what is the true value of the cause. I agree that we are not bound in estimating the value of the cause by the amount which the pursuer claims. A pursuer may conclude for £1000 although in truth and substance the case may be a very trumpery one. And so we have frequently sent cases back to the