Lord President—This is a point of some delicacy, but at the same time I think we should grant the relief asked by Messrs Blyth & Cunningham.

The reclaiming-note against Lord Adam's interlocutor was sent to the roll on 12th May, and that interlocutor of Lord Adam was a final judgment of which extract could of course be obtained. But that reclaiming-note brought the process here, and nothing could be done till that reclaiming-note was disposed of if the effect of the reclaiming-note was to bring here as respondents both sets of defenders. But it rather appears to me that, taking the title of the reclaiming-note, it is one in which the reclaimers represent the Messrs Adams as respondents and Messrs Blyth & Cunningham as defenders and not respondents. Now, taking that along with the letter written by the pursuers' agents to the agents for Blyth & Cunningham, we must hold that the reclaiming-note is one in which the pursuers do not seek to object to that part of the interlocutor which assoilzies Blyth & Cunningham with expenses. I do not see why Blyth & Cunningham should not be entitled to proceed under that part of the interlocutor which is not to be challenged, and which allows them to give in an account of expenses, and remits to the Auditor to tax and report. That is just what Blyth & Cunningham did, for they lodged an account and then asked the Auditor to fix a diet for taxation. That was done, and the pursuers in accordance with what appears to be their intention from the reclaiming-note and from the title to which I have alluded, attended the audit, and with effect, for they got £50 struck off the account. Then the Auditor reports to the Lord Ordinary, and quite rightly, for it was by the Lord Ordinary that the remit was made, and the Lord Ordinary, on Blyth & Cunningham's motion, approves of the account and decerns for the amount as taxed.

The difficulty of the extractor is that the process is here and not in the Outer House; but that is only a technicality, and does not avail in the circumstances of the case. The real question is, whether in the position of the process on 27th June the Lord Ordinary had jurisdiction to pronounce this interlocutor. I think that he had, and that the course we should follow is, on Mr Murray's motion to authorise the extractor to extract this decree.

Lords Deas and Mure concurred.

Lord Shand—I think it right to say that although I concur with your Lordships, in order to remove the practical difficulty which has arisen, I am not prepared to say that such an order as we are now to pronounce is necessary.

I think that the Lord Ordinary is the person to say whether a cause is properly before him or not; and if, as frequently happens, having the cause before him as regards one set of defenders he gives decree, it rather seems to me that it is the extractor's duty to respect that decree, and that the mere circumstance of the process being in the Inner House for one purpose should not affect the extractor in the discharge of his duty.

I concur with your Lordships, as the difficulty has arisen, that relief should be granted in the circumstances. I only wish to guard against saying anything that might indicate that I considered such an order necessary.

The Court pronounced this interlocutor:—

"The Lords on the motion of the defenders Messrs Blyth & Cunningham, upon the report of Lord Lee, authorise the extractor to proceed with extracting the interlocutor of Lord Lee for Lord Adam, of date 27th June 1883.

Counsel for Messrs Blyth & Cunningham—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 20.

FIRST DIVISION.

(Before the Whole Court.)

[Sheriff of Lanarkshire.

EWING *v.* COCHRANE.

Process—Appeal—Appeal for Jury Trial—Proof—Judicature Act (6 *Geo. IV. cap.* 120), *sec.* 40.

When an action is brought up from a Sheriff Court by appeal under sec. 40 of the Judicature Act, and the Court is satisfied that questions of fact involved in it ought to be determined by proof rather than by jury trial, the proof can competently be taken in the Court of Session, the effect of the appeal being altogether to remove the cause from the Sheriff Court.

This action was raised in the Sheriff Court of Lanarkshire. The pursuer William Cochrane, a stockbroker in Glasgow, claimed £2500 as damages said to have been caused to him by the actings of the defender Archibald Hunter Ewing, who was also a stockbroker in Glasgow, and was a member of the Stock Exchange there. It appeared from the averments and admissions of the parties that between the years 1876 and 1879 the pursuer had been employed by the defender as a clerk, and that their connection was continued under a new arrangement for three years from 1st January 1879. The pursuer alleged that the reason of their arrangements taking the form which they did was that the rule of the Glasgow Stock Exchange forbade the defender to have as a partner a person not himself a member of that Stock Exchange (which the pursuer was not), and also averred that one of the conditions of the arrangement was that after he had received a certain sum as salary he should be remunerated by a share in the defender's business profits.

In 1878 a person named Robertson was engaged by the defender to act as "accredited" or Stock Exchange clerk. It was admitted that Robertson while so engaged entered into considerable speculations on his own account. The pursuer alleged that this conduct of Robertson was unknown to him, and that when the transactions turned out well he got no benefit from them, but that when they turned out ill they were carried into the defender's suspense account, with the effect that the proportion of profits falling to him under his own engagement was much diminished. He also averred that the defender showed gross negligence in not putting a stop to these operations by Robertson when he discovered them; that he refused to dismiss him, but,

on the contrary, re-employed him after he had been obliged to leave the business for a time. It was admitted that when Robertson left the business for a time he paid a sum of £921 as in satisfaction of his defalcations. The pursuer averred that this was far insufficient, and should not have been accepted by the defender. The defender's books were balanced by a Mr Kerr as at 31st December 1880, at the request of both parties. Mr Kerr also made up a further balance as at 31st December 1881. The pursuer alleged that these balances were incorrect, and did not agree with the balances he had had made by another accountant. He averred that by the manner in which the business was carried on his interests were sacrificed, and he suffered loss and damage to the amount sued for.

The defender pleaded that the action was irrelevant, and that the pursuer was barred by his own conduct from challenging the balances.

The Sheriff-Substitute (GUTHRIE) allowed a proof.

The defender appealed to the First Division of the Court of Session, and moved the Court to appoint the pursuer to lodge issues for the trial of the cause by jury. The pursuer maintained that the action was unsuited for trial by jury. The Court were of opinion that trial by jury was an unsuitable mode of disposing of the case, and that a proof ought to be led, but a question arose as to whether the action ought to be remitted to the Sheriff that proof might be led, or whether it ought to be led in the Court of Session. The question between the parties thus was—"When the Court is satisfied that an action appealed from a Sheriff Court, under the 40th section of the Judicature Act, is not suited to be tried before a jury, and is of opinion that the questions at issue (so far as consisting of matters of fact) ought to be ascertained by a proof, whether the proof can be competently taken in the Court of Session, or whether the case must be remitted to the Sheriff." The pursuer maintained that the Court were, on a sound construction of the Act, bound to send the cause back to the Sheriff Court that the proof might be taken there. The defender maintained that the cause having been competently appealed to the Court of Session was now a cause depending in that Court as if it had been originally brought in it, and that the Court were bound to exercise their jurisdiction, and try the cause there.

The 40th section of the Judicature Act is as follows:—"That when, in causes commenced in any of the courts of the sheriffs, or of the magistrates of burghs, or other inferior courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords, in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury finally and conclusively fixing the several facts specified in the interlocutor: Provided, however, that, except in consistorial causes, the Court of Session shall, in reviewing the sentences of inferior judges, have power to send to the jury court such issue or issues, to be tried by jury, as to them shall seem necessary for ascertaining facts which may not have been proved to their satisfaction by the evidence already taken, or which may have been omitted in the cause, the verdict to be returned to the Court of Session to assist that Court in the determination of the cause; and the said Court shall also have power to remit the whole cause for trial to the Jury Court; and in neither of these cases shall it be necessary to have the consent of the parties to the cancelling of the depositions already taken in the cause before proceeding to jury trial, but the Court of Session shall have power to give such directions with regard to the proof already taken, or with regard to any part or parts thereof, as to them shall seem just; to which effect the provision in the foresaid Act of the fifty-ninth year of His late Majesty, in so far as the consent of the parties to the cancelling of the depositions already taken is thereby required, shall be, and the same is hereby, repealed; and further, the Court of Session shall have power to remit the cause with instructions to the Inferior Court, if that course shall appear to them the most just and expedient in the circumstances of the case; but it is hereby expressly provided and declared that in all cases originating in the inferior courts in which the claim is in amount above forty pounds, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation, which shall be passed at once without discussion and without caution; and in case no such bill of advocation shall be presented, and the parties shall proceed to proof under the interlocutor of the Inferior Court, they shall be held to have waived their right of appeal to the House of Lords against any judgment which may thereafter be pronounced by the Court of Session, in so far as by such judgment the several facts established by the proof shall be found or declared."

The Court appointed the parties to lodge mutual minutes of debate in order that the opinions of the whole Judges might be obtained.

The appellant (defender) in his minute of debate argued—The power to remit to the Inferior Court was not general, but limited to causes appealed to the Court of Session after final judgment. In causes not advocated until after final judgment in the Inferior Court, the Court of Session had power to direct "such issue or issues to be tried by jury" as they might think necessary for ascertaining facts which might not have been proved to their satisfaction "by the evidence already taken." It had the same power with reference to facts which had been omitted in the cause. It was also enacted that "the said Court shall also have power to remit the whole cause for trial to the Jury Court." And then came the power already referred to, to remit the whole cause to the Inferior Court. But for the

powers so conferred the Court of Session would be bound to deal with these causes, and to decide them upon the facts as stated and proved in the Inferior Court. These powers were thus given only with reference to causes which had been brought into the Court of Session for the purpose of reviewing the judgment of an Inferior Court proceeding upon facts already ascertained or proved. No such power was conferred with reference to causes which might formerly have been advocated (and are now appealable) to the Court of Session under the 40th section when a proof has been allowed, if the right of appeal was exercised at that stage. The difference in the language employed as to the two classes of actions was striking, and the consequences were different. It appeared plain from the language of this section that the Legislature contemplated the propriety of certain cases being remitted to the Inferior Court, and provided that in certain cases this should be done. It was, however, noteworthy that the power to remit was not conferred in reference to another class of cases referred to in the same section; and the direct permission or power to remit in the one class of cases operated as an exclusion of the power to remit in the other. *Expressio unius exclusio est alterius.* This was not an enactment declaring that the cause must be tried by a jury. All it said was that it should be competent to either party who may conceive that the cause ought to be tried in that way to "remove" it to the Court of Session. The party might be entirely in error in his conception; but his right to remove the cause, if it were of a value exceeding £40, was undoubted if he thought it was one suited for trial by a jury. The case could not be remitted to the Inferior Court, because one of the parties had exercised his statutory right and removed it to the Court of Session, and such cases could not be remitted. The right of the party was not one of appeal but of removal, and the right was conferred to enable a defender summoned to an Inferior Court to take his cause to the Court of Session. The same word "remove" is also used in two recent statutes—first, in the Act of 1877 giving to the Sheriff a limited heritable jurisdiction; and second, in the Employers Liability Act of 1880. The ground of removal was that a better tribunal was available for ascertaining the facts and applying the law. When the Judicature Act became law all advocations had to pass through the Bill Chamber; no objection could be taken to their competency. All that was required was that the motion should be made at the proper stage. From all this it appeared that while causes appealed from an Inferior Court after final judgment might be remitted, actions removed to the Court of Session under sect. 40 of the Judicature Act could not be so dealt with. It was clear that the court could deal with a cause thus removed as if it had originated in the Court of Session. In the case of *Sands* v. *Meffan*, January 20, 1829, 7 S. 290, the following sentence occurred in the opinion of Lord Gillies:—"When, however, a party advocates, it is not imperative on this Court to send it to the Jury Court. Accordingly the statute does not say that it must be sent to the Jury Court. If it had meant that it should be sent there, the statute would have said so. The case is now in this Court—it has been advocated; and when once here the Court may dispose of it on legal grounds. In short, we must deal with it just as if the process had been raised here originally. The party conceived that it should be tried by a jury, and therefore made this application; but his conception may have been wrong; and if we are of that opinion we are not bound to send it there." *Band* v. *Officer*, June 9, 1830, 8 S. 893; *Campbell* v. *Campbell*, November 21, 1846, 9 D. 135; *Watson* v. *Seafield*, February 23, 1870, 7 Scot. Law Rep. 327; *Andrew* v. *Henderson & Dimmack*, February 24, 1871, 9 Macph. 554—*rev.* 11 Macph. (H. L.) 13; *Dennistoun* v. *Rainey, Knox, & Company*, May 16, 1871, 9 Macph. 739; *Chisholm* v. *Marshall*, January 17, 1874, 1 R. 388; *Laidlaw* v. *Wilson and Armstrong*, November 24, 1874, 2 R. 148; *Clydesdale Banking Company* v. *Beatson*, November 3, 1882, 10 R. 88. If the Court refused to send the case to a jury, and remitted it to the Sheriff to take a proof, the appellant would thereby be deprived of his appeal to the House of Lords if the judgment was against him upon the facts. The appellant had used his powers under the Judicature Act to secure this right, and he submitted that he was entitled to have the case tried in the Court of Session by such mode of trial as the Court thought proper.

The respondent argued in his minute of debate—The case was ill suited for jury trial; the matters of fact to be cleared up were complicated; and the defence turned upon the legal bearing and significance to be attributed to facts which were not in dispute between the parties. The action, though nominally one of damages, really was one of count, reckoning, and payment, and being such was unsuited for jury trial. The appeal under the 40th section of 6 Geo. IV. cap. 120, was improperly taken, and the cause ought to be sent back to the Sheriff Court. The respondent, as pursuer in the action, was entitled to choose his tribunal, and the effect of the present appeal, whether the cause is thought suitable for jury trial or not, ought not to be to entitle the appellant to have it retained in the Court of Session, as the procedure in the Inferior Court would entail much less expense. The object aimed at by the 40th section of the Judicature Act, upon the terms of which the present question undoubtedly turned, was to prevent Sheriff Court causes being carried by appeal to the House of Lords on matters of fact, but power was given to either of the parties, if they thought the case suitable for trial by jury, to remove the cause to the Court of Session, as that was the only Court in which a remit to the Jury Court could be obtained; but it was not intended to authorise Sheriff Court causes to be removed to the Court of Session so as to permit an appeal to the House of Lords on matters of fact, which it was the very object of this section to prevent. The only purpose for which removal of a cause from the Sheriff Court was competent was for jury trial. If the cause turned out to be unsuitable for jury trial the only competent course was to remit it to the Sheriff Court. No analogy could be drawn from procedure in questions of relevancy, title to sue, and the like, for all such questions fell to be decided upon a motion to send a case for trial by jury, or upon the adjustment of issues. An examination of the authorities on the question (*supra cit.*) showed that whenever strict attention

was paid to the construction of section 40 of the Judicature Act it had always been construed as contended for the respondent, and that he was entitled to have the case sent back for proof to the Sheriff Court as the tribunal which he had selected.

The following opinion was returned by the consulted Judges:—"We are of opinion that the proof can competently be taken in the Court of Session. We think that by the appeal the case is removed from the Sheriff Court, and that it may be dealt with in the same manner as if it had originated in the Court of Session."

Lord Adam was absent.

At advising—

Lord President—This decision will put an end to a diversity of practice as to appeals under the 40th section of the Judicature Act. I should not have been unwilling to be guided by the opinion of the great majority of my colleagues without further comment, except for the first sentence of the judgment. With reference to that I must say, speaking for myself, and I think I can say on this point I represent the opinion of the other Judges who have agreed with me—none of us put our opinion on the ground of incompetence, but rather, we thought, to allow a proof in such circumstances was contrary to the spirit and intention of the 40th section of the statute. The result on the whole matter is that so far as I am concerned I am quite willing to adopt the opinion of the consulted Judges.

Lord Deas—Referring to the case of *Dennistoun* v. *Rainey & Co.*, I observe I expressed myself very much in the same way as your Lordship did—not on the ground of its being incompetent to allow a proof in this Court, but that the course we there pursue was more in accordance with the fair construction of the clause. It is our duty to give fair interpretation to this section of the Judicature Act. It is intended to shorten litigation. It just comes to this, that either one course or the other may be taken to be quite competent, according to circumstances. Either Division can take the course that that Division thinks best.

Lord Mure—My opinion is that the decision of the consulted Judges should be given effect to. Jury trial has been to a certain extent modified by recent statutes and proof substituted for it. It seems fair that the procedure suited for jury trials should be applied to proofs which have been to some extent substituted for them.

Lord Shand—The opinion which has been given by the consulted Judges expresses exactly and shortly the view that I entertain and have always entertained on this question.

The Court pronounced this interlocutor:—

"Having resumed consideration of the cause with the opinions of the consulted judges, remit to Lord M'Laren Ordinary to allow the parties a proof of their averments in terms of "The Evidence (Scotland) Act 1866," and to proceed further as shall seem just: Reserve all questions of expenses."

Counsel for Appellant—M'Kechnie. Agents—Smith & Mason, S.S.C.

Counsel for Respondent—Jameson. Agents—J. & J. Ross, W.S.

Friday, July 20.

SECOND DIVISION.

(Before Whole Court).

CALDWELL (INSPECTOR OF POOR OF PARISH OF AYR) *v.* DEMPSTER (INSPECTOR OF POOR OF CITY PARISH OF GLASGOW).

Poor—Settlement—Desertion by Parent of Pauper Pupil Child.

Held by a majority of the whole Court (*diss.* Lords Justice-Clerk, Young, Craighill, and Fraser — Lord Adam being absent), that an illegitimate pupil child born in Scotland, and deserted and left destitute by its mother (who had no settlement in Scotland) in another parish than that of its birth, was chargeable during its pupillarity to the parish in which it was found destitute, and not to that of its birth—*the minority holding* that the birth parish was liable.

In this case David Caldwell, Inspector of Poor of the parish of Ayr, sued Archibald Dempster, Inspector of Poor of the City Parish of Glasgow, in the Sheriff Court at Glasgow for a sum of £11, 15s. for past, and a further sum of £58, 13s. 4d. for future, aliment of a pupil child, William M'Culloch or M'Pherson, who had become chargeable to the parish of Ayr, and of liability for whose support that parish contended that the City Parish of Glasgow was bound to relieve it.

The admitted facts were as follows—The child in question was born in the City Parish of Glasgow on the 29th day of April 1874. It was the illegitimate child of a woman named Janet M'Culloch, who was born in the year 1845 in Ballymuir Parish, in Larne Union, County Armagh, Ireland. Janet M'Culloch never had a settlement in Scotland. On 21st January 1882 she deserted the child, and left it destitute (along with two others) in a dwelling-house in the parish of Ayr. Her place of residence at the time of this action was unknown. Since the date of its mother's desertion the child had been maintained at the expense of the parish of Ayr, and the question was whether that parish, as the parish where the child was found destitute, or the City Parish, as the parish of its birth, was liable.

The Parish of Ayr pleaded—"(2) Neither the child nor his mother having a settlement in the parish of Ayr, the pursuer is entitled to be relieved of the past and future maintenance of the child as claimed. (3) The child being illegitimate, his mother having no settlement in Scotland, and having deserted him, the defender, as representing the parish of the child's birth settlement, is bound to relieve the pursuer, and to make payment of the sums craved in name of past and future aliment."

The City Parish pleaded—"(3) The pauper's mother being alive and having a settlement in Ireland, and the pauper being an illegitimate pupil, the defender is entitled to absolvitor with expenses; or alternatively, (4) The pauper having a derivative birth settlement in Ireland, the defender is entitled to absolvitor with expenses."

The Sheriff-Substitute (Guthrie) pronounced