LORD JUSTICE-CLERK—In this case we have had an opportunity of consulting our brethren of the other Division, and are of opinion, that, without trenching upon the judgment in the case of *Stirling Maxwell*, the Judge in the Outer House having applied his mind to a question which had not been previously considered, viz., the modification of expenses, the reclaiming-note is competent and must go to the roll.

LORD YOUNG—Our decision is put entirely upon the ground of the modification of expenses, but it must be understood this reclaiming-note brings up all previous interlocutors.

LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court sent the case to the roll.

Counsel for the Reclaimer — Wallace. Agent—Geo. M. Wood, S.S.C.

Counsel for the Respondent—C. K. Mackenzie — Peddie. Agents — Macandrew, Wright, & Murray, W.S.

Saturday, October 21.

SECOND DIVISION.

[Sheriff of Ayrshire.

CUNNINGHAM *v.* THE AYRSHIRE FOUNDRY COMPANY, LIMITED.

Process—Appeal for Jury Trial—Reparation—Wrongous Dismissal—Discretion of Court—Judicature Act (6 *Geo. IV. cap.* 120.)

A servant dismissed by his employers sued them in the Sheriff Court for the balance of a year's wages, alleging that he had been engaged for that term. The defenders alleged that the engagement was weekly, and that the pursuer had failed to do his work properly. The action was removed to the Court of Session for jury trial under the 40th section of the Judicature Act.

The Court in the exercise of their discretion (*dub.* the Lord Justice-Clerk) refused to send the case to a jury, and remitted it to the Sheriff Court for proof, on the ground that the question was not assessment of damages, but only of resting-owing.

In April 1893 James Cunningham, a steel smelter in Glasgow, brought an action in the Sheriff Court of Kilmarnock, against the Ayrshire Foundry Company, Limited, for two sums of £220 and £30, being respectively the balance of an alleged yearly engagement and the rent of a house. He averred that he had been in the defenders' service at a wage of £4, 10s. a-week and left it, and that upon 22nd November 1892 a director and over-manager for defenders requested him to "return to their employment, and offered in that event to give him a year's fixed engagement with a salary of £5 per week of six shifts upstanding, *i.e.*, whether there was work for him or not;" that this director agreed to pay the rent of a house at Stevenston, where the defenders' works were situated; and that this engagement was agreed to by the defenders. He accordingly went back to Stevenston and worked there till 10th January 1893, when he was dismissed. The defence was a denial of the yearly engagement, and averments that the engagement was weekly, and that the pursuer had been discharged for gross carelessness in allowing the steel furnace to get into a disgraceful state.

The Sheriff-Substitute (HALL) allowed parties a proof of their respective averments. The pursuer appealed to the Court of Session for jury trial under the 40th section of the Judicature Act. Issues for the trial of the case were ordered.

The respondent now objected to the case being sent to jury trial, and argued—This was not a proper case for jury trial. There was no question of assessment of damages. It was simply a question whether the pursuer had done his work properly.

The appellant argued—This was a case where the appellant had suffered damage through breach of contract, and such cases were always sent to jury trial. The sum at stake was much larger than was usual in cases of damages, but the principle was that where damage had resulted the pursuer was entitled to jury trial—*Groom* v. *Clark*, May 18, 1859, 21 D. 831.

At advising—

LORD YOUNG—It was formerly an important question whether in appeals from the Sheriff Court under this section with a view to jury trial, the Court had a discretion to refuse to send any individual case for trial by jury, and might, if it thought that was the proper course, send it back to the Sheriff Court for proof; that was an important question, but it has been settled in both Divisions that the Court has such a discretion and that we are bound to exercise our discretion in each case.

We have usually exercised our discretion by sending the case for jury trial, but several times we have used it exceptionally, when we thought that it was not a proper case for jury trial, by sending it back for proof in the Sheriff Court. In my opinion we should properly exercise our judgment by sending this case to the Sheriff Court for trial. In England this discretion is expressly given by statute. It is a right given by statute that a case begun in the County Court may be appealed to the High Court of Justice, but there is a discretion given to the High Court if, they think any individual case to be more fit for trial in the County Court, to send it there for trial. Therefore the discretion we have got by construction of the statute is expedient, and is in accordance with the statutory discretion given to English Judges.

If we should adopt the other view, I think it is plain enough that every domestic servant who thinks he or she has been wrongously dismissed might bring an action in the Sheriff Court for the amount of his

or her wages, and have it brought here for jury trial, the question in each case being whether he or she had done their duty properly or not. I do not think that is a proper question for a jury trial. It is said that the sum here is a large one, but I do not think the case is made exceptional because the pursuer had £5 a-week. It is a larger sum than usual, but it does not make me change what would be my opinion if the sum were smaller. The only question in the case is whether the pursuer had performed his duty in such a manner as to entitle his master to dismiss him?

LORD TRAYNER—It having been now determined, contrary I admit to what was my opinion, that the Court has a discretion whether to send a case to jury trial or to refuse to do so, I cannot doubt that this is a case which we should refuse to send to a jury. This is not properly an action to assess damages at all; it is really a question of resting-owing as I pointed out during the discussion. The pursuer says he was engaged for a certain time at a certain wage, that his services have been dispensed with, and that his wages are due. The answer is that he was not engaged for that time, and that his wages are not due. That is simply a question whether any money is due to the pursuer. In reading this case I do not see what is the question in it appropriate for jury trial—in fact I see no question that would not be more appropriately tried by the Sheriff.

LORD JUSTICE-CLERK—I concur in holding that we have the discretion to send this case to jury trial or to proof before the Sheriff. My only doubt is whether we should exercise that discretion by sending this case back to the Sheriff. There may be a very considerable sum found due in certain supposable circumstances, amounting to more than £200, and I have doubts whether such a case should be withheld from a jury, but as your Lordships have a clear view that the case ought to be sent back to the Sheriff I do not dissent.

LORD RUTHERFURD CLARK was absent.

The Court remitted the case to the Sheriff Court for proof.

Counsel for the Appellant—Sym—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for the Respondents—W. Campbell. Agents—Carmichael & Miller, W.S.

Thursday, July 6.

SECOND DIVISION.

PETERS *v.* MAGISTRATES OF GREENOCK.

Process — Superfluous Procedure — Petition to Apply Judgment of House of Lords Affirming Interlocutory Judgment.

The defender of an action reclaimed against an interlocutor of the Lord Ordinary which was not final. The Inner House adhered. The defender appealed to the House of Lords, who affirmed the judgment appealed against, and ordered the defender to pay the costs of the appeal. The costs of the reclaiming-note and of the appeal were paid by the defender. Thereafter a petition presented by the pursuer, praying the Court to apply the judgment of the House of Lords, to find the defender liable in the expenses of the application, and to remit to the Lord Ordinary to proceed further in the cause, *dismissed* as unnecessary without expenses to either party—*diss.* Lord Young, who was of opinion that the defender should be found entitled to the expenses incurred by them in appearing to oppose the petition.

This case is reported *ante*, vol. xxix. p. 507, and 19 R. 643, and *ante*, vol. xxx. p. 937.

This was an action raised by the Rev. David Smith Peters against the Magistrates of Greenock to have it found and declared that the defenders were bound to furnish him with a competent and legal stipend, and to have the defenders decerned and ordained to make payment to him of a certain sum as arrears of stipend prior to Martinmas 1890, and also of the sum of £400 per annum, or such other sum as should appear to the Court as competent and legal stipend from and after the said term.

On 23rd June 1891 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Finds, declares, and decerns in terms of the first declaratory conclusion of the summons: *Quoad ultra* appoints the cause to be enrolled that parties may be heard as to the petitory conclusion, and reserves all questions of expenses: Grants leave to reclaim."

Against this interlocutor the defenders reclaimed, and on 16th March 1892 their Lordships of the Second Division pronounced the following interlocutor—"Refuse the reclaiming-note and adhere to the interlocutor reclaimed against: Find the pursuer entitled to expenses from the date of said interlocutor: Remit to the Auditor to tax the same and to report: *Quoad ultra* remit the cause to the Lord Ordinary to proceed therein as accords, with power to decern for the taxed amount of the expenses now found due."

The expenses found due to the pursuer were taxed at £68, 10s. 1d., for which sum the Lord Ordinary pronounced decree by interlocutor dated 28th May 1892.