be proved by parole at all. I have no difficulty in agreeing with your Lordship that the case cannot be changed from that stated upon record to that stated in argument, counsel having chosen not to amend the record. Taking the record as it stands, I think the Sheriff's judgment ought to be affirmed. I should like to add, that even if the case argued to us had been that set out upon record I should have more than doubted the relevancy of it, if it were admitted that no previous case could be found in which the Court had ordered a master to grant a certificate of attendance to a boy or man, or anybody else in his service, where there was no written contract. But we do not require to consider that here, it being sufficient for judgment that the case as presented on record has not been supported in argument.

LORD TRAYNER—I think that the pursuer cannot get decree in terms of the conclusion of his action. It was admitted at the bar that the pursuer never was an apprentice; and therefore we cannot give a decree ordaining the defenders to give a certificate (contrary to the fact) that the pursuer has served them in that character.

LORD MONCREIFF—I concur. I think that the contract put forward in the conclusion of the action and on record is a contract of apprenticeship, although the pursuer seeks to import a term or condition said to be constituted by custom. A contract of apprenticeship can only be constituted and proved by writing, although custom—supposing it to be competent to import it into a written contract if one existed—might be proved by parole. But there is no writing here, and the pursuer is conscious of the difficulty in which he is placed, because he now seeks to make out that the contract which he entered into was not a contract of apprenticeship. I think it is too late for him to take up that position.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for Pursuer—Shaw, Q.C.—W. D. Murray. Agents — Shiels & Macintosh, S.S.C.

Counsel for Defenders—Salvesen—Cook. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Wednesday, November 3.

FIRST DIVISION.

[Sheriff of Fife and Kinross.

M'INTOSH *v.* COMMISSIONERS OF LOCHGELLY.

Process—Appeal—Appeal for Jury Trial.

Where the subject-matter of a Sheriff Court action, appealed for jury trial to the Court of Session, is such that if the action had originated in the Court of Session it would naturally go to a jury, the Court will send the case to a jury.

This rule applied in an action for payment of £100 as damages for personal injury, where the defender contended that the determination of the cause depended upon the construction of an intricate series of statutes, that the action was of a trivial and purely local character, and that therefore it should be sent back to the Sheriff.

Adam M'Intosh, newsagent, Kirkcaldy, raised an action in the Sheriff Court at Kirkcaldy against the Commissioners of the burgh of Lochgelly for £100 damages for personal injuries sustained by him. He averred that on 2nd September 1896, while walking along a footpath within the burgh of Lochgelly after dark, his foot came in contact with a large flat stone opposite a shop door, in consequence of which he fell and struck his face against the stone and was thereby injured. He further averred —(Cond. 4) "The said footpath is under the charge and control of the defenders, and is looked after and attended to by their employees. They were bound to have it in a safe condition for foot-passengers both at common law and under statute, and in particular under the Burgh Police (Scotland) Act 1892, sections 128, 130, 141, and 142." He also averred that the night was very dark, and that (Cond. 5) "Notwithstanding the dangerous condition of the footpath owing to the position of said stone, the defenders, who have charge of the lighting of the streets of the said burgh, took no steps to light the place in question, and did nothing which would disclose to a passenger the presence of the said stone, or in any way warn him of the dangerous condition of the place. . . . The defenders were bound, both at common law and under statute, and in particular under section 99 of the Burgh Police Act 1892, to have the place where the said accident happened lighted at the said hour, and their failure to do so was gross fault on their part."

In answer to the pursuer's averments in Conds. 4 and 5, the defender denied that the footpath in question was looked after by their employees, and averred that the highway of which it formed part was vested in and maintained by the Kirkcaldy District Committee of the County Council of Fife, and that it had not been taken over by them under sections 141 and 142 of the Burgh Police Act 1892. They also denied that they were under any obligation to light the spot at which the accident happened, and explained that they had made provision for lighting the burgh in terms of the Burgh Police Act 1892, but that under the discretion which they were given by section 99 of that Act, the lamps in the burgh had not begun to be lighted for the season 1896-97 on the night of the accident.

The defenders pleaded that the case was irrelevant.

The Sheriff - Substitute (GILLESPIE) allowed a proof before answer, and the pursuer appealed for jury trial.

Argued for the defenders—There was no averment of responsibility for the condition of the footpath having been incurred by the defenders under the statutes, nor was it averred that they were proprietors. In the absence of such averments the case was irrelevant either at common law (*Harris* v. *Magistrates of Leith*, March 11, 1881, 8 R. 613) or under the statute (*Baillie* v. *Shearer's Judicial Factor*, February 1, 1894, 21 R. 498). As to lighting, there should have been specific averments of want of lighting known to the commissioners and wrongfully neglected. The only question was as to the construction of statutes—General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. cap. 101); Roads and Streets in Police Burghs (Scotland) Act 1891 (54 and 55 Vict. cap. 32); Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sections 141 and 142. Such a question should not be tried by a jury but by a judge. The case was of a trivial nature, and the inquiry was local; it should therefore be sent back to the Sheriff—*Bethune* v. *Denham*, March 20, 1886, 13 R. 882.

Argued for the pursuer—Responsibility for the condition of the footpath was sufficiently averred in Cond. 4. Section 128 of the Burgh Police (Scotland) Act 1892, made no distinction between carriageways and footpaths. Sections 141 and 142 merely provided methods of dealing with footpaths. Even assuming that the defenders were not responsible for the condition of the footpath, their duty to light it and their failure to do so were relevantly averred in Cond. 5. The question whether their discretion under section 99 of the Act of 1892 was rightly exercised was one for a jury. Triviality was no ground for sending a case to be tried by a judge instead of a jury.

LORD PRESIDENT—The Court, especially in recent years, when dealing with appeals for jury trial, have, so far as my recollection goes, decided thus — If the subject-matter of the action is such that if it were a Court of Session action it would naturally go to a jury, then to a jury it shall go. The present case is an action of damages for injury to the person, and that raises *prima facie* a jury question. It is pointed out to the Court that the liability of the defenders will depend, largely at least, upon the just construction of certain statutory enactments, and these matters are matters of law. But then I suspect that the true answer to that is that these will be questions for the judge at the trial, the jury remaining masters of the true issue within their province, namely, the question of fact. I quite concede that questions of law, especially on the construction and comparison of intricate and sometimes not well-considered provisions in a statute may render the duty of the judge a somewhat difficult one, and may introduce accordingly a slight measure of uncertainty into the trial. At the same time I do no think that a legitimate reason for departing from what I hold to be the settled rule, and I hope and assume that those questions of law, arising at the time, will be properly disposed of at the trial. Certainly that is the theory, and I have no doubt also the practice, according to which these matters are remitted to jury trial. I am therefore constrained to think there is here no ground for departing from what I hold to be the long course of practice in disposing of actions of damages for injury when brought into this Court by appeal.

LORD ADAM concurred.

LORD M'LAREN—I agree with the statement of the decisions regulating this branch of practice. Where a case is not appealed for review, but, in the strict sense advocated, removed to a superior court for further procedure, it becomes a Court of Session case, as if originated by a summons.

The practice has been to treat such cases as those originating in our own Courts. If the case is one which seems not suited for jury trial, instead of sending it to a Lord Ordinary it has been not unusual to send it back to the Sheriff, especially if it is on a subject with which the Sheriff is more familiar than we are. But I see no reason why this case should not be treated as a jury case.

LORD KINNEAR concurred.

The Court ordered issues.

Counsel for the Pursuer—Watt—Findlay. Agents—Dalgleish & Dobbie, S.S.C.

Counsel for the Defenders—Shaw, Q.C.—Fleming. Agents—Wallace & Begg, W.S.

Tuesday, November 9.

FIRST DIVISION.

LOGAN, PETITIONER.

Minor and Pupil — Tutor — Authority to Sell Heritage.

Circumstances in which the Court *granted* authority to a father as administrator-at-law to his pupil son to sell his son's heritable estate.

A petition was presented by Mr Alexander Logan, administrator-in-law to Oliver Purves Logan, his pupil son, craving the Court for authority to sell the main-door dwelling-house and area flats No. 17 Union Street, Edinburgh, to which the pupil had succeeded as heir-at-law to his uncles John Hendrie and W. N. Hendrie, tobacconists, Edinburgh. The Court remitted to Mr Dangerfield, S.S.C., to inquire into the facts and circumstances set forth in the petition, and to state his opinion as to the value of the subjects, &c. Mr A. O. Mackenzie, advocate, was appointed *curator ad litem* to the pupil, and stated no objections to the remit.

The following extracts from Mr Dangerfield's report sufficiently indicate the circumstances giving rise to the petition:—"The said property is burdened with a