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

heritable bond of £600 granted by the now deceased James Hendrie, tobacconist, No. 4 Catherine Street, Edinburgh, father of the said John Hendrie and W. N. Hendrie, in favour of John Latta, residing at No. 11 Calton Street, Edinburgh, dated 15th May and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh 29th August 1878. The sum at present due under this bond, including interest, feu-duty, and expenses is £687, 2s. 1d. The said John Hendrie acquired the said subjects in 1893 under burden of the said bond, and died on 10th May 1897 survived by the said W. N. Hendrie, his heir-at-law, who died a week or so later. The said John Hendrie died insolvent, and the amount of his unsecured liabilities is £1072, 5s., while his free moveable estate is only sufficient to pay about 16s. per £ on this sum. Any surplus from the said heritable estate will thus fall to be divided between the unsecured creditors. The said Oliver Purves Logan and his sister and heir-at-law Mary Elizabeth Logan are also two of the next-of-kin of the said James Hendrie, who died on 12th April 1897 leaving moveable estate to the value of £24, 3s. 11d. Of this sum one-sixth or £4, 0s. 8d. falls to the said Oliver Purves Logan. The said James Hendrie was personally liable for the said bond of £600, and if the said heritable subjects are insufficient to meet the burdens upon them, the said James Hendrie's estate will have to be applied in making up the deficiency. The petitioner sets forth that the said property has been valued by Messrs James Galloway & Sons of Leith at £750, and Messrs Stevenson & M'Lean, Leith, at £700. The total rental of the property, of which the principal part, viz., the main-door house, is at present unlet, is £54, and the feu-duty £9, 10s., with a casualty of a year's rent falling due in 1900. Your reporter has carefully considered these valuations and other information supplied to him by the petitioner, and is humbly of opinion that the value of the said subjects does not exceed £700 sterling, being the sum which Messrs Stevenson & M'Lean state in their valuation 'would be the utmost got for it.' This being so, it appears to your reporter that not only will there be no surplus over after paying off the bond and expenses, to divide among the unsecured creditors of the said deceased John Hendrie, but that in all probability the moveable estate of the said deceased James Hendrie will be consumed in making good any deficiency, leaving no surplus of any kind for the said Oliver Purves Logan. In these circumstances it humbly appears to your reporter that the persons who have the real interest in the sale of the said subjects are the bondholders and the unsecured creditors of the said John Hendrie, and while your reporter has no doubt of the expediency of selling the said subjects in the manner proposed, he has considerable difficulty in stating to your Lordships that this is a case of such necessity or advantage to the pupil as would warrant your Lordships in granting the powers craved. . . . If your reporter's view of the value of the said subjects is correct, or even should they fetch the larger sum of £750 indicated by the petitioner, the pupil cannot in the present case derive any advantage from the proposed sale, or in the best view for him his interest seems only to be the foresaid sum of £4, 0s. 8d. While therefore your reporter has no doubt whatever upon the expediency of carrying through the sale in the method proposed, as it would probably save expense to the bondholders and to the unsecured creditors on the said deceased John Hendrie's estate, he has thought it right to bring before your Lordships the doubts which have arisen in his mind regarding the necessity of the application or the advantage to the pupil of granting the powers craved."

As illustrating the principles on which the Court would grant authority the reporter referred to the cases of *Lord Clinton*, October 30, 1875, 3 R. 62; *Colt* v. *Colt and Others*, November 6, 1800, M. 16,386; *Campbell*, June 26, 1880, 7 R. 1032.

Argued for petitioner—If authority for the sale were not granted the creditor would adjudicate. Accordingly there was "necessity" for selling the estate in order to pay the debts in the cheapest possible way. The Court would consider whether there was necessity for or high expediency in the course proposed, rather than whether it would result in advantage to the pupil's estate—*Lord Clinton* (*supra*); *Mackenzie*, January 27, 1855, 17 D. 314.

LORD PRESIDENT — The considerations which the reporter has brought before us with great clearness show that this case is very near the border line. But on the whole it would appear that there is at all events some chance of advantage resulting to the pupil's estate from the proposed sale, and the circumstances are such that I think authority should be granted.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court granted authority.

Counsel for the Petitioner—Cook. Agents—Beveridge, Sutherland, & Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, November 15.

(Before Lord M'Laren.)

H.M. ADVOCATE *v.* M'LAREN.

Justiciary Cases — Indictment — Rape — Alternative Verdict — Criminal Law Amendment Act 1885 (48 *and* 49 *Vict. cap.* 69), *secs.* 4 *and* 9.

Under the provisions of section 8 of the Criminal Law Amendment Act 1885 it is competent, under an indictment for rape, for the jury to convict the panel of the statutory offence of un-