and, at the same time, sent to each of them a letter in the following terms:—

"Sir,—I beg to send you annexed scheme of locality of the stipend of the minister of the parish of Linlithgow, which has been approved of by the Lord Ordinary as an interim rule of payment of the augmented stipend, and has been allowed to be seen and objected to as a final locality.

"You are requested to examine the scheme, and to lodge any objections you may have thereto on or before the 20th day of July next. If no objections be lodged, I will proceed without delay to take the necessary steps to have the interim scheme declared final.—I am," &c.

Now I should imagine that so far nothing irregular was done either by the Lord Ordinary or by the common agent, but the latter goes on to say:—

"The common agent at the same time sent to each heritor in the parish a memorandum which he had prepared as to a decreet of valuation of certain lands in the parish, dated 3d February 1714. By this decreet the lands belonging to thirty-eight different proprietors were valued, and as there were several portions of the valuation which did not appear to be claimed by any heritor, either in the current or in any of the recent processes of locality of the parish, he considered it well to call the attention of the heritors, and more especially of the smaller ones, to the valuation.

"No formal objections (with the exception of those for Mr Milroy, to be afterwards adverted to) have been lodged in process, but the common agent has had a good deal of communication with several of the heritors as to the amount of the teind of the lands belonging to them, and as to the stipend payable therefrom. In several cases it has appeared to him that the statement originally made upon these points requires to be altered, and in the subjoined state he has given effect to the views of these heritors, so far as it appeared to him that they were in the right.

"The common agent has also ascertained that various changes have occurred in ownership since the date of the interim scheme, and in the subjoined state he has also given effect to them. . . . .

"In consequence of claims which have been advanced by various heritors that the teinds of the lands belonging to them are valued by the said decree of valuation of 3d February 1714, and of some of the remaining heritors having maintained that they are entered in the interim scheme of locality as liable for the stipend of various parcels of land, which do not now, and never did, belong to them, the common agent has had occasion to make a most careful and exhaustive examination of all the previous processes of augmentation and locality of this parish, and he has found that in some of the older processes the authors of some of the present heritors were entered as having their lands included in the said decree, while in later processes this has apparently been lost sight of, and the proprietors of the lands in question entered as if the teinds of their lands were unvalued. The common agent has accordingly drawn the attention of these heritors to this point, and has requested them to send their title-deeds to him for examination, if it appears to them that the teinds of their lands are included in this valuation. Several of the heritors have not, however, done so."

Now it may be that what the common agent did was not in strict conformity with the Act of Sederunt, but still it is impossible to read his statement and not see that he is only doing his duty in trying to simplify these proceedings as much as possible, and the only way he could do so was by preparing this document and giving effect to the heritors' corrections. Surely when the common agent has made all these painful investigations, reaching back to all the earlier processes of locality, it is desirable that the scheme should be put in a shape conform to the result of these investigations, and then let everyone who has an interest object afterwards. If the delay and neglect of these heritors has caused the necessity of a rectified scheme of locality, the Lord Ordinary will lay the expense of that on them, but I cannot see what interest the reclaimers have to object to this interlocutor. It may be that the strict terms of the Act of Sederunt have not been followed, but I am certainly not disposed to interfere with a well-established practice, even though it be not in strict conformity with an Act of Sederunt.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutors reclaimed against; find the Common Agent (respondent) entitled to additional expenses; allow an account thereof to be given in, and remit to the Auditor to tax the same and to report."

Counsel for Reclaimers—Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Common Agent—Solicitor-General (Watson) and Mackintosh. Agent—D. L. Shand, W.S.

Monday, November 23.

SECOND DIVISION.

SPECIAL CASE—WALKER AND OTHERS (GILES' TRUSTEES).

Tutor incertus dari non potest.

A father appointed certain trustees by name, and the settlement contained a clause as follows:—"I hereby nominate and appoint my said trustees, named, or to be named or assumed, tutors and curators of such children as may be alive at my death." The trustees accepted office, and on the death of one of their number assumed two new trustees. *Held* that the original trustees alone were entitled to act as tutors and curators.

Mr James Giles, R.S.A., residing in Aberdeen, died on 6th October 1870, survived by his second wife, by one child of his first marriage, who attained majority, and by two children of his second marriage, both in pupilarity. Mr Giles left a trust-disposition and settlement, by which he conveyed his whole estates, heritable and moveable, to the trustees therein named. The settlements contained the following clause:—"I hereby nominate and appoint my said trustees, named or to be named, or assumed, and the survivors and survivor of them, tutors and curators, or tutor and curator, of such children of my present marriage as may be alive at the time of my death." The trust-estate is of the value of between £11,000 and £12,000. The trustees accepted office, and on the death of one of their number the survivors assumed two new trustees. A question arose as to whether the assumed trustees were, as such, tutors

to the pupil children of the truster along with the original trustees. The assumed trustees claimed to act as such tutors, but the original trustees denied their right to do so.

The questions submitted to the Court were:—"(1) Are the said George Walker, James Bruce and Alexander Ellis, as surviving trustees nominated by the said James Giles, sole tutors of Alexander Bruce Giles and Mary Giles, the pupil children of the said James Giles? or, (2) Are the said Alexander Stronach junior, and Henry John Gibson, assumed trustees of the said James Giles, tutors to the said children along with the said George Walker, James Bruce, and Alexander Ellis?"

At advising—

LORD NEAVES—The father alone can appoint a utor-nominate, and he cannot delegate his power of doing so. There is a distinct *delectus personæ* in the father; and there is no example of such a power as this being validly exercised. No authority has been cited on the point. The *dictum* of Paulus quoted is a good one against *uncertain* appointments "*Tutor incertus dari non potest.*" The law should stand as it is; it is *ultra vires* to let assumed trustees be assumed as tutors.

LORD ORMIDALE—The father, knowing the circumstances of his children, is the best judge of those who should be tutors to them, but the appointing of persons of whom he knew nothing may be an injustice to the children, and is not in accordance with law.

LORD GIFFORD—The father has a *delectus personæ* and must himself nominate, and cannot delegate his power of nominating.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"Find that George Walker, James Bruce, and Alexander Ellis, as surviving trustees nominated by James Giles, are sole tutors of Alexander Bruce Giles and Mary Giles, the pupil children of the said James Giles, and find both parties to the Special Case entitled to payment of their expenses out of the estate, and decern."

Counsel for the Original Trustees—J. D. Dickson. Agents—Bruce & Kerr, W.S.

Counsel for the Assumed Trustees—Lee. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, November 24.

SECOND DIVISION.

[Sheriff of Roxburgh.

LAIDLAW & SONS *v.* WILSON & ARMSTRONG.

Process—Jury Trial—Issues—Proof before Answer. In an action in the Sheriff-court the Sheriff allowed a proof before answer. The respondents appealed, and wished issues to be adjusted with a view to a jury trial. *Held* that, the case being one in which law and facts were both involved, the proper course was to allow a proof before answer.

Process—Proof before Answer—Act 6 *Geo.* IV., *c.* 120, ¿ 40—*Court of Session Act*, 1868—*Proof before one of the Judges of the Division—Remit to the Sheriff.* *Held* (*dis.* Lord Ormidale) that under Act 6 Geo. IV., c. 120, ¿ 40, it was equally competent for the Court to remit the case for proof before the Sheriff, and to order the proof to be taken either before one of the Lords Ordinary or before one of the Judges of the Division.

In this action the question which came before the Court arose out of the interlocutors pronounced respectively by the Sheriff-Substitute (RUSSELL) of Roxburghshire, and by the Sheriff-Depute (PATTISON) on appeal. These interlocutors were as follows:—

"*Jedburgh, 27th July* 1874.—Having again considered the closed record, after having heard parties' procurators on the question of the relevancy of the action, before answer Allows to the parties a proof of their respective averments, and to the petitioners a conjunct probation: Grants diligence against witnesses and havers, and appoints a meeting with parties' procurators on the 30th inst., in order to fix a time for taking the proof.

"*Note.*—While the essential facts are to a great extent disputed, the Sheriff-Substitute is of opinion the questions raised in the preliminary defences cannot be satisfactorily disposed of. On the face of the petition, read with reference to the admitted statements on the record, he does not find grounds on which the petition can be dismissed as incompetent. It is not unusual in similar petitions to crave alternatively either the delivery of a specific subject, or the payment of its value, as stated in the petition. The absence in the present case of any general claim for damages in the petition does not appear a good ground of objection to it. After the facts have been ascertained, it is quite possible that questions of some difficulty may arise for decision with reference to the cravings of the petition; but at present these cannot be determined. The petitioners appear entitled to obtain, with a view to their use in the proof, the documents described in the specification lodged by them, and the early production of them will greatly facilitate the proceedings at the taking of the proof. Unless the respondents produce these voluntarily, the Sheriff-Substitute will be prepared to grant a diligence for their recovery."

"*Edinburgh, 8th September* 1874.—The Sheriff having considered the appeal and reclaiming petition for the respondents, answers for the petitioners, closed record, and whole process, Repels the plea of incompetency maintained by the respondents Repels also the plea of irrelevancy and insufficiency of the statements in the petition, so far as maintained to the effect of dismissing the action; and with this addition adheres to the interlocutor reclaimed against.

"*Note.*—The plea of incompetency being in the Sheriff's opinion unfounded, and going to the very existence of the process, he considers it right that it should be repelled. The plea of irrelevancy generally is a defence on the merits, and it is not, except in some exceptional cases, advisable to dispose of it without a proof. It is generally best, as is done here, to allow a proof before answer. But when it is pleaded to the effect of craving a dismissal of the action, it falls within the same category as a plea of incompetency; and, so far as pleaded to that effect, requires to be repelled.

"The Sheriff observes that the respondents, in answering certain articles of the petitioners' condescendence, not only deny the statements, but call them irrelevant. Thus—'Not known, irrelevant