tion. I think it plain on the evidence that what the old gentleman had in view was that on his death, if he had not devised the money otherwise, the sums in the deposit-receipts should be taken by the pursuers. But there was nothing to prevent him making a will and providing that the pursuers should not get the sums in question. But a will would not affect a donation *mortis causa*.

I am therefore of opinion that the Sheriff-Substitute has come to the right conclusion in deciding that there is no evidence on which the Court can find that donation *mortis causa* or otherwise has been proved.

LORD TRAYNER—I am also of opinion that the Sheriff-Substitute's judgment is right. There have been a good many points touched on by Mr Kennedy on which I do not think it necessary to express any opinion. It is enough for the decision of this case to hold, as I do, that the appellants have failed to show that the deceased made the donation in their favour on which their claim is based.

LORD MONCREIFF—I am of opinion that the Sheriff-Substitute has come to a sound conclusion. I think that it is unnecessary in this case to decide whether delivery is essential in order to constitute *donatio mortis causa*. The decisions on the point are not uniform, and any judgment in regard to it would require careful consideration. Even assuming that delivery is not necessary, I think it plain that there must be clear and complete evidence that the donor intended to make a donation *mortis causa*. I am of opinion that the pursuers have entirely failed to make that clear. On the evidence I am inclined to think that the deceased in acting as he did intended no more than to make bequests to the pursuers in such a way as to evade the Government duties on the legacies. He failed to carry out his intention, whatever it may have been, in such a way that legal effect can be given to it. He neither made a donation *mortis causa* nor bequeathed effectual legacies. The sums in the deposit-receipts must therefore go to his executor.

The Court pronounced this interlocutor—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Of new repel the claim for John Rose Mrs Mary Frank, and William Cameron, and rank and prefer the claimant Donald Cameron, executor of the deceased Kenneth Cameron, to the whole fund *in medio*, and decern.

Counsel for the Claimants, the Pursuers and Real Raisers—W. Campbell, Q.C.—Kennedy. Agents — Ronald & Ritchie, S.S.C.

Counsel for the Defender and Claimant Kenneth Cameron's Executor — Dundas, Q.C. — Fleming. Agents — Mackenzie & Black, W.S.

Thursday, January 10.

FIRST DIVISION.

[Sheriff-Substitute at Wigtown.

POLLOCK *v.* MAIR.

Process — Appeal — Appeal for Jury Trial —Proof or Jury Trial—Remit to Sheriff Court for Proof.

In an action of damages for wrongous dismissal brought in a Sheriff Court by an agricultural labourer against his employer, the pursuer craved decree for £80 as damages for "loss of wages, and loss of character and reputation." He averred no separate or specific case of slander or defamation, but he made a detailed statement as to the wages which he would have earned had he not been dismissed, and which he alleged would have amounted to £56. The case having been appealed for jury trial, the Court, in respect that the pursuer's claim was mainly for loss of wages, and also in respect of the local character of the case, *refused* the appeal, and remitted the case for proof in the Sheriff Court.

James Pollock, yearlyman, Killantrae, Wigtownshire, brought an action of damages in the Sheriff Court at Wigtown, against John Mair, farmer at Killantrae, in which he craved decree for payment of £80.

In this action Pollock made the following averments—"(Cond. 1) Pursuer has been employed as a yearlyman by defender for some years back, and some time prior to Whitsunday 1900 he and defender entered into a verbal agreement whereby pursuer was to be engaged by defender as a yearlyman, to do all the work usually performed by yearlymen, from Whitsunday 1900 to Whitsunday 1901, and occupy a house at Killantrae. He was further bound to supply two milkers, one of whom—pursuer's cousin Elizabeth Pollock—was to be bound to do out-door work for the half-year ending 28th November next, and the other of whom (Janet Pollock) was to get constant day's work during the whole period to Whitsunday 1901 (the time occupied at harvest in each case not to be included). (Cond. 2) In return for these services defender bound and obliged himself to pay pursuer at the rate of 12s. 6d. per week, and further give him three tons of coal and two carts of potatoes. The wages to be given to his milkers were to be 3s. per week for milking, the said Elizabeth Pollock to get 7s. 6d. per week for out-door work, except during harvest, for which she was to get £3, and the said Janet Pollock was to get 1s. 3d. per day for each day she was engaged, except during harvest, for which she was to get £3, 10s. (Cond. 4) On Friday 21st September while pursuer, the said Elizabeth Pollock, and Janet Pollock were all busily engaged in the stackyard at Killantrae aforesaid, at harvest work, the defender approached them, and without

justifiable cause of any kind, illegally, unwarrantably, and in breach of his contract, dismissed them from his service, and ordered them to refrain from further work and leave his stackyard. Although he was thereupon informed that they desired to fulfil their engagement, he persisted in ordering them away and forced them to leave, and they have thus suffered and will suffer loss and damage to the extent claimed, through loss of wages, and loss of character and reputation. Pursuer has always been willing to perform the contract entered into by him with defender. (Cond. 5) Pursuer is entitled at anyrate under the contract condescended on to the sums in the subjoined account, being the wages payable for the period of engagement and unpaid by defender :—

Sum of wages due from 28th May 1900 to 17th September at 12s. 6d. per week	£10	0	0			
Deduct £8, being sum lifted at the rate of 10s. per week	8	0	0			
				£2	0	0
Wages due from 17th September to 28th May 1901, at the rate of 12s. 6d. per week				23	2	6
3 tons of coal (24 cwt.) at 26s. per ton (20 cwt.)	£4	13	2			
Deduct 1 ton coal ..	1	11	2			
				3	2	0
2 carts potatoes (32 bus.) at 1s. 3d. per bus.				2	0	0
					£30	4 6
Harvest wages				..	1	10 0
					£31	14 6
Janet Pollock.						
Wages due from 3rd September to 28th May 1901, at 1s. 3d. per day	£14	12	6			
Deduct one-half on account of wet weather and want of work	7	6	3			
				£7	6	3
Wages for milking due from 15th September to 28th May 1901, at 3s. per week				5	11	0
Harvest wages				3	10	0
1½ days' work at steam-mill as agreed..				0	3	0
					16	10 3
Elizabeth Pollock.						
Wages due for harvest as agreed ..	£3	0	0			
Wages due from 22nd September to November 1900, at 7s. 6d. per week				3	7	6
Wages due for milking from 15th September to 28th November 1900, at 3s. per week				1	10	0
1½ days' work at steam-mill as agreed..				0	3	0
					8	0 6
James and William Pollock.						
1 day at steam-mill, at 1s. 6d. each					0	3 0
					£56	8 3"

The defender averred that the dismissal was justifiable.

On 20th November 1900 the Sheriff-Substitute (WATSON) allowed a proof. Pollock appealed to the Court of Session for jury trial.

Argued for the respondent—the case should be sent back for proof in the Sheriff Court. There was no doubt that the Court had the power to send it back—(*Tosh* v. *Ferguson*, October 27, 1896, 24 R. 55), and this was eminently a case in which that power should be exercised—*Bethune* v. *Denham*, March 20, 1886, 13 R. 882: *Mitchell* v. *Sutherland*, January 23, 1886, reported in a note to *Bethune*.

Argued for the appellant—The case was one suitable for a jury. When an appeal was made from the Sheriff Court for jury trial, it should be considered as if the action had been commenced in the Court of Session—*Crabb* v. *Fraser*, March 9, 1892, 19 R. 580, *per* Lord President. So regarded there was really no reason for refusing jury trial except that the sum claimed was small. That was not a sufficient ground—*Willison* v. *Petherbridge*, July 15, 1893, 20 R. 976; *Mackintosh* v. *Commissioners of Lochgelly*, November 3, 1897, 25 R. 32; *Jamieson* v. *Hartil*, February 5, 1898, 25 R. 551.

LORD PRESIDENT—There is no doubt that this Court has power, when a case is appealed for jury trial, to send it back for proof in the Sheriff Court if that appears to be the most expedient way of dealing with it, and this certainly does seem *prima facie* to be a case which ought not to be sent to a jury. In one sense it is an action of damages, because it includes a claim for "loss of character and reputation," but there is no separate or specific case of slander or defamation stated, and in substance it is a claim by a servant against his master for loss of wages through wrongful dismissal. The pursuer seems to recognise that the measure of the damages must be the wages which he has lost, because after making a general claim he says, in condescendence 5, that he is in any event entitled to the sums subjoined, being the wages due for the period of his engagement. He is thus really claiming for loss of wages; whether he did obtain work elsewhere, or could have obtained it for the unexpired period of his employment, we of course cannot tell at this stage. The question is eminently suited for trial in the Sheriff Court. The bulk of the evidence will be of local witnesses, and in a case where the gross claim is for £80, and the real damage apparently £56, it would be very inexpedient to allow the case to be tried by a jury, implying the necessity of bringing the local witnesses here. Again, the case may involve the consideration of local customs, of which the Sheriff-Substitute is likely to be the best judge. On the whole, I think we should refuse the appeal and send the case back to be tried in the Sheriff Court.

LORD ADAM—As I understand the law, even in a proper action for damages, that is, in an action for a random sum for injury sustained, the party has not an absolute right to jury trial. The law is that such a case goes before a jury unless the party who objects to that course shows some good reason why it should not. That rule applies to a case of this kind, which is brought here from the Sheriff Court by an appeal for jury trial. I agree that the smallness of the amount claimed as damages is not in itself a sufficient reason for not sending a case before a jury. But that is not the present case. Here there is sufficient reason for not sending it to a jury in the fact that the damages claimed are to be ascertained by calculating the

amount of wages which the pursuer would have earned had he remained in the defender's service, and also that the whole evidence will be that of local witnesses.

LORD KINNEAR—I am of the same opinion, and adhere to the opinion of this Division as expressed by the Lord President in *Tosh* v. *Ferguson* (24 R. 55)—"At this time of day it is of course impossible to dispute that the Court has power to send back to the Sheriff Court for trial there a case appealed under the 40th section of the Judicature Act. But then it is necessary to observe that that has only been done where circumstances could be pointed to which rendered the Sheriff Court peculiarly appropriate as a tribunal for ascertaining the facts"—and also agree with the remark made by Lord Adam that the smallness of the sum claimed is not a reason for refusing jury trial, because the minimum sum for appeal has been fixed by the Legislature and we have no power to increase it. The question must depend on the circumstances of the particular case. The appeal will not be refused unless the circumstances render the Sheriff Court a better tribunal than a jury, but I have no doubt that in this case the Sheriff Court will be the better tribunal, and that a proof there will be more satisfactory and less expensive than a jury trial here.

LORD M'LAREN was absent.

The Court refused the appeal, and remitted the case to the Sheriff-Substitute to proceed in terms of his interlocutor of 20th November.

Counsel for the Pursuer and Appellant—M'Lennan. Agent—Robert Broatch, L.A.

Counsel for the Defender and Respondent—Craigie. Agents—John C. Brodie & Sons, W.S.

Saturday, January 12.

FIRST DIVISION.

WATSON *v.* NORTH BRITISH RAILWAY COMPANY.

Process — Proof — Jury Trial—Motion for New Trial — Essential to the Justice of the Case — Juryman in Employment of Successful Party—Jury Trials (Scotland) Act 1815 (55 *Geo. III. c.* 42), *sec.* 6.

In the trial of an action of damages against a railway company, at the instance of the widow and daughter of a man who had been accidentally killed on the line, G. D., who was in the employment of the defenders, served on the jury. His duties had no connection with anything which was said to have caused the accident, or with the place where it happened. The jury returned a unanimous verdict for the defenders. In a motion for a new trial, where it was not alleged that the verdict was contrary to evidence, and where the judge who had tried the case intimated that he agreed with the jury, *held* that the fact of G. D. having served on the jury did not make it "essential to the justice of the case," under section 6 of the Jury Trials (Scotland) Act 1815 (55 George III. cap. 42), that there should be a new trial.

The Jury Trials (Scotland) Act 1815 (55 George III. cap. 42) enacts (section 6)—"That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial, on the ground of the verdict being contrary to evidence, on the ground of misdirection of the judge, on the ground of undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case."

Mrs Helen Strang Nash or Watson, Slamannan, widow of James M'Ghie Watson, insurance agent there, and Miss Ruth Watson, his daughter, brought an action against the North British Railway Company concluding for payment of £2000 as damages for the death of the said J. M. Watson.

They averred that Mr Watson was run over and killed at Slamannan station, and that the accident was due to the defective lighting of that station.

The case was tried before the Lord President and a jury, and the jury returned a unanimous verdict for the defenders.

One of the jurymen who tried the case was George Deans, Wellington Street, Portobello, who was in the employment of the North British Railway Company. The pursuers and their counsel and agents, and the counsel and agent for the defenders, were not aware of this at the time of the trial. Deans was employed in the engineer's department of the company, and his duties were mainly to check gas and water meters. He had nothing to do with Slamannan Station, which is lighted by oil-lamps. The number of persons employed by the North British Railway is about 18,500.

The pursuers moved the Court to grant a rule for a new trial on the ground that Deans had served on the jury.

The Court granted a rule.

Argued for the pursuers—It was essential to the justice of the case that there should be a new trial. No juryman could sit in a case in which he had an interest—*Bailey* v. *Macaulay and Others*, July 11, 1849, 19 L.J. Q.B. 73. The disqualification of a juryman was a sufficient ground for setting aside a verdict — *Bailey, supra; Sutherland* v. *Prestongrange Coal Company*, March 2, 1888, 15 R. 494. At common law the relationship of master and servant was sufficient to disqualify. Coke upon Littleton 157, cited in Chitty's Archbold's Practice, 14th ed. i, 619, where it is laid down by Lord Coke that it is a ground of challenge *propter affectum*. The defenders were not