Argued for the respondent—The main question was what would be best for the child—Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), section 5. There were here relevant averments of drunkenness and cruelty, and the child could not be handed over to the petitioner without inquiry—either in the present process or in the action of separation. Pending inquiry the child should remain with the respondent. It was most undesirable that he should be transferred back and forward from one spouse to the other. Further, the mother was the natural custodier of young children—*Reid* v. *Reid*, *cit. sup.* The petitioner had himself delayed to bring this petition and was not entitled to found on the respondent's delay in bringing her action of separation.

Lord Justice-Clerk—I do not think that this is a case in which we should pronounce such an order as the petitioner asks for. We have a statement by the respondent's counsel that he has advised his client as to proceeding with the action of separation and aliment, and that the action will be proceeded with as rapidly as possible. In these circumstances I think that it would be wrong to do anything on this petition in the meantime.

Lord Stormonth Darling and Lord Low concurred.

The Court sisted procedure *in hoc statu* and pending the action of separation and aliment raised by the respondent.

Counsel for Petitioner—F. C. Thomson. Agents—J. B. M'Intosh & Son, W.S.

Counsel for Respondent — Constable. Agents—Galbraith, Stewart, & Reid, S.S.C.

Saturday, July 13.

SECOND DIVISION.

[Sheriff Court at Oban.

JENKINS *v.* GASCOIGNE.

Sheriff—Lease—Summary Application—A. S. 10th July 1839, sec. 137—Repair of Fences—Circumstances of a Fugitive Character.

A lease of a farm was entered into for five years from Whitsunday 1904, with a mutual break at Whitsunday 1907. In April 1906 the tenant brought an action in the Sheriff Court against the landlord craving a remit to a man of skill to ascertain the condition of the fences. He averred that the landlord was under obligation to put them in a tenantable condition at entry, and had failed to do so.

In November 1906 the Sheriff-Substitute dismissed the action. The pursuer appealed to the Court of Session, and the case was not heard until July 1907. In the interval the landlord had availed himself of the break at Whitsunday 1907, and had terminated the lease as at that term. *Held* that in the circumstances the proposed remit to a man of skill was incompetent, and action dismissed.

The Act of Sederunt for regulating the form of process in Sheriff Courts, of 10th July 1839, sec. 137, provides—"In all cases which require extraordinary dispatch, and where the interest of the party might suffer by abiding the ordinary induciæ, application by summary petition may be made to the Sheriff, who on considering the petition may, if he see cause, order it to be served on the person complained of, and to be answered within such induciæ as the Sheriff in each case may think proper. And the procedure in such cases shall not abide the ordinary course of the court days, it being always competent to pronounce such *interim* order as the exigencies of the case require."

On 3rd April 1906 William Jenkins, farmer, Gartcharron, Craignish, Argyllshire, tenant of the farm of Gartcharron under missive letters dated in March 1904 which provided for a lease for five years from Whitsunday 1904 with a break at Whitsunday 1907, brought an action against Colonel Gascoigne of Craignish Castle, the proprietor, in the Sheriff Court at Oban. He prayed the Court, *inter alia*—"(*First*) To remit to a person of skill to visit the farm and lands of Gartcharron in the parish of Craignish and County of Argyll, as occupied by the pursuer as tenant under the defender, and to inspect the fences thereof, and to report to the Court the condition thereof, and whether they are in a properly tenantable, habitable, and sufficient condition, and fit for the purposes of the said farm, and, if not, what repairs, alterations, and works are necessary to put the said fences into said condition, and thereafter to ordain the defender to make and execute such repairs, alterations, and works on said fences, at the sight and to the satisfaction of an inspector to be appointed by the Court or otherwise, or failing the defender doing so within such period as the Court shall appoint, to grant warrant to the pursuer to make and execute said repairs, alterations, and works, at the sight and to the satisfaction of said inspector, and on the cost thereof being ascertained to ordain the defender to pay the same to the pursuer, including the costs of said report, and the expenses incurred to and by said inspector in the premises." Alternatively, the pursuer prayed the Court to ordain the defender to concur with him in entering into a reference to arbiters who should determine the question whether the defender had fulfilled his obligations with reference to said fences. There was a further prayer for damages in the event of its being found that the defender had failed to fulfil his said obligations.

The pursuer averred that at the date of the missive letters constituting the lease the fences were not in a tenantable condition owing to natural decay, that the proprietor was bound in terms thereof and at common law to put them in such a condition as at the term of Whitsunday 1904, that he had failed to do so and

consequently the pursuer had suffered and continued to suffer loss and damage.

On 7th November 1906 the Sheriff-Substitute (MACLACHLAN) dismissed the action, finding that the pursuer's tenancy was a continuance of his former tenancy, and that the clauses in the conditions of lease founded on did not apply and did not warrant the procedure craved.

The pursuer appealed to the Court of Session. Before the case came on for hearing the defender availed himself of the break in the lease to bring it to an end at Whitsunday 1907. At the hearing counsel for the pursuer stated that he insisted in the prayer of the petition only to the effect of asking for a remit to a man of skill.

Argued for the pursuer—The defender was bound to provide fences suitable to the farm and to put them into a tenantable condition. The state of the fences was a fugitive matter, and the pursuer was entitled to have a remit made to a man of skill to have their condition ascertained—*Gordon's Trustees* v. *Melrose*, June 25, 1870, 8 Macph. 906, 7 S.L.R. 574; *Dickson* v. *Graham*, May 12, 1877, 4 R. 717, 14 S.L.R. 471; *Barclay* v. *Neilson*, June 12, 1878, 5 R. 909, 15 S.L.R. 622; *Davidson* v. *Macpherson*, January 11, 1889, 30 S.L.R. 2, *per* Lord Justice-Clerk at p. 5; *Magistrates of Kilmarnock* v. *Reid*, January 22, 1897, 24 R. 388, *per* Lord President Robertson at p. 392, 34 S.L.R. 286. The pursuer had presented his case to the Court at the earliest opportunity and he should not be prejudiced either by the unavoidable delay which had taken place or by the fact that the defender had terminated the lease.

Argued for the defender—The proposed remit was incompetent — *Sutherland* v. *Squair*, February 25, 1898, 25 R. 656, 35 S.L.R. 512. If the defender had failed to fulfil his obligations the pursuer's remedy was an action of damages. If the pursuer wished to ascertain the condition of the fences he could have them examined by a man of skill on his own account. No doubt a remit was competent where it was desired to fix a fugitive state of facts. Here the important date was Whitsunday 1904, when the lease began to run. The application was thus three years too late—*Baird* v. *Mount*, July 3, 1874, 1 R. 1119, 11 S.L.R. 652.

LORD STORMONTH DARLING—This is an ordinary action in the Sheriff Court brought during the currency of a short farm lease in Argyllshire by a tenant against his landlord, the conclusions of which are to have the fences of the farm inspected and reported upon by a person of skill as to whether these fences are in a tenantable condition, and, if not, what repairs and alterations are necessary to make them so. There are also consequential conclusions to have the landlord ordained to make such repairs at the sight and to the satisfaction of an inspector to be appointed by the Court or otherwise, and failing his doing so, for warrant to the pursuer to make such repairs at the expense of the defender. The Sheriff-Substitute has dismissed the petition with expenses, finding that certain conditions of a former lease founded on by pursuer and not admitted by the defender are not applicable to the case and do not warrant the procedure craved. It is admitted that since this interlocutor was pronounced on 7th November last the situation has changed, because the landlord has availed himself of a break in the lease and brought the tenancy to an end, and the pursuer is no longer in occupation except of a small portion of the arable land. Any question which still remains to be decided between the parties must necessarily therefore be simply a claim of damages. In these circumstances the question arises whether this is a proceeding with any sort of application to the pursuer's case. I humbly think not. An inspection by a man of skill would not serve any useful purpose, for his report would not settle anything conclusively, and it would not be competent for us to delegate to him the right of ordering repairs and compelling their execution. Cases were cited to us in some of which use had been made of the summary procedure allowed by the Act of Sederunt of 10th July 1839, which relates to "cases requiring extraordinary dispatch, and where the interest of the party might suffer by abiding the ordinary induciæ." There are cases like *Baird* v. *Mount*, 1 R. 1119, in which Lord Ardmillan admitted the competency of such application with regard to buildings, fences, drains, and the like, where it is important to preserve evidence of their condition *at the time*, but in that case the petition was thrown out because it was six months too late. Of the same class was the case of *Gordon's Trustees* v. *Melrose*, 8 Macph. 906, in which it was held competent for a landlord to present a petition of this summary kind at the tenant's outgoing to have the state of the fences reported on in order to determine, under reservation of all pleas of parties, a question of the tenant's liability under the lease. In the *Kilmarnock* case, 24 R. 388, to which we were referred, Lord President Robertson conceded the competency of application "in cases of a somewhat limited class," where the facts to be ascertained were of a fugitive nature — to use Lord Neaves' expression in *Gordon's* case—but he held such an application quite inappropriate to the case before him. I say the same here. I do not see of what use to either party an inspection by a skilled reporter would be, and I therefore agree with the Sheriff-Substitute that the petition is inapplicable to the circumstances—in fact, even more so than when the Sheriff's interlocutor was pronounced—and accordingly that the petition should be dismissed.

LORD LOW and the LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal.

Counsel for the Pursuer—Crole, K.C.—Ballingall. Agent—William B. Rainnie, S.S.C.

Counsel for the Defender—Cullen, K.C.—Hon. W. Watson. Agents—J. & A. F. Adam, W.S.