

Tuesday, July 10.

JURY TRIAL.  
(Before Lord Jerviswoode.)

SOMERVILLE *v.* MACKAY.

*Reparation — Breach of Promise of Marriage.*

Verdict for the pursuer—damages £150.

In this case Margaret Somerville, residing at No. 6 Cavendish Street, Glasgow, was pursuer, and Wm. Gibson Mackay, foreman cutter and tailor, Dumfries, was defender.

The issue sent to the jury was in the following terms:—

“Whether, in or about the month of November 1862 the defender promised and engaged to marry the pursuer; and whether the defender wrongfully failed to perform his said promise and engagement—to the loss, injury, and damage of the pursuer?”

Damages were laid at £300.

Evidence was led to show that the pursuer and defender became acquainted with each other in September 1862; that in or about November of the same year the defender asked the pursuer in marriage, and that shortly afterwards, on his removal to Dumfries, he opened a correspondence with the pursuer, commencing in February 1863, and ending in September 1864. During that period he made frequent visits to the pursuer in Glasgow, and presented her with an engagement ring and other presents. The marriage was at first fixed to take place in June 1863, but was subsequently postponed by mutual consent till September of that year, in order to enable the defender to save a little money. After September 1864 the defender ceased to write to or visit the pursuer. In November 1865 the pursuer ascertained that the defender had married another woman.

The case for the defence was that there had been a mutual break-off between parties; that an apology was tendered by the defender; and that the damages claimed by the pursuer were exorbitant, considering the whole circumstances of the case and the position in life of the parties.

The jury after a short absence, unanimously found for the pursuer, with £150 damages.

Counsel for Pursuer—Cattanach. Agent—Alex. Wylie, W.S.

Counsel for Defender—Mackenzie. Agent—James Bell, S.S.C.

FIRST DIVISION.

LAWSON *v.* FERGUSON (*ante*, p. 69).

*Expenses—Tender.* In an action of damages for breach of promise of marriage in which the defender had tendered £52, 10s., and a jury returned a verdict for £50, circumstances in which expenses found due to neither party.

This case was tried before Lord Kinloch and a jury on 6th June last. A verdict was returned for the pursuer, and the damages were assessed at £50. The defender with his defences had lodged a tender of £52, 10s. But in his defences he pleaded that the pursuer's statements were unfounded, and that he was entitled to absolvitor.

When the verdict came to be applied, both parties moved for expenses. The pursuer moved alternatively that neither party should be found entitled to expenses. The Lord Ordinary (Kinloch) gave effect to this alternative motion, and explained his reasons in the following

*Note.*—The question of expenses is especially for the discretion of the Court, though this discretion must be governed by regard to general rules.

The defender contended that, because at the time of lodging the defences, he also lodged a tender of a sum of £52, 10s., in full of the claims under the summons, whilst the jury has only given a sum of £50, the pursuer should be found liable in expenses since the date of the tender. It appears to the Lord Ordinary that this result does not necessarily follow.

The Lord Ordinary was not moved by the statement (proposed to be proved by a certificate under the hand of a majority of the jury) that, in fixing the damages at £50, the jury intended to throw the expenses on the defender. If the jury did so, they were stepping entirely out of their province; for they have no right to deal with the question of expenses, which is exclusively for the Court. But the Lord Ordinary can give no countenance to any inquiry into what passed in the jury-room. His opinion in the matter of expenses is formed irrespectively of this statement, which it was irregular to make.

The present is an action of damages for breach of promise of marriage, and such an action is not to be dealt with as an ordinary case of breach of contract. The action has always been regarded as touching on character and feeling, and has been so dealt with by the Court. (*Sandilands v. King*, 29th May 1858, 20 D. 1005.)

Whilst making a tender of £52, 10s., the defender, in the defences simultaneously lodged, denied the alleged promise, and claimed absolvitor. His first plea in law is—“The pursuer's statements being unfounded, the defender ought to be assoilzied.” Consistently with this defence, the defender went to the jury for a verdict in his favour. He did not merely seek to keep down the amount of damage; he asked for a verdict out and out.

This was of a piece with his statement in the letter by which he broke off his correspondence with the pursuer, in which he said—“You never had any sanction to couple my name with yours; and the only time you did so in my hearing was to your sister, and then I told you that you were going too fast.”

The Lord Ordinary cannot in the circumstances regard the mere offer of money as a sufficient tender to satisfy the just interests of the pursuer as a woman deeply wronged. The defender admitted no wrong. On the contrary, he committed an aggravated injury on the pursuer by broadly stating that she was attempting to take advantage of him by trumping up a false story of a breach of promise of marriage, than which no statement can be more injurious to a woman's character and feelings.

The Lord Ordinary conceives that the pursuer was entitled, notwithstanding the tender, to go on to obtain a verdict. On the other hand, she must be held to have been wrong in seeking to aggravate the damages beyond the sum which the jury had awarded. And, on the whole matter, the Lord Ordinary thinks that he will rightly exercise his judicial discretion by finding expenses due to neither party.

W. P.

The defender reclaimed.  
MAIR for him (GIFFORD with him) argued—This was not an action for slander in which a pursuer is entitled to go to a jury notwithstanding of a tender of a sum of money, in order to vindicate his character; and the tender made having exceeded the sum awarded by the jury, the defender was entitled to expenses from the date of the

tender. He cited *Shaw v. Edinburgh and Glasgow Railway Company*, 1 Macph. 144; *Anderson* 14 S. 54; *Strachan v. Munro*, 7 D. 993; and *Muckarsie*, 11 D. 164.

MILLAR and BURNET for the pursuer were not called on.

The LORD PRESIDENT—This question is very much on the confines of two classes of cases. In the first place, the general rule is that where a person is claiming money compensation, no question of character being in issue, and a tender is made, the party making the tender gets his expenses if the tender exceeds the amount awarded by the jury. On the other hand, where character is involved, it is not enough always to tender money compensation. The party is generally allowed an opportunity of clearing his character. This case to a certain extent may involve character. I would be very far from laying down the general rule that expenses must always follow when a tender exceeds the sum awarded, and as far from laying it down that in all actions of damages for breach of promise of marriage, when there is such a tender made, expenses are never to follow. Much must depend on the nature of each particular case—the position of the pursuer—whether the breach and the reason alleged compromised her character, &c. We have not before us the evidence in this case, but the Lord Ordinary who tried the case having come to the conclusion that in the aspect of the evidence, as it presented itself to his mind, it did involve matter of character, I am not disposed to disturb his judgment. I think the Lord Ordinary has in his note put the matter too absolutely in his endeavour to discover a rule. I don't think this is a case for the application of a rule, but one to be decided according to its special circumstances.

Lord CURRIEHILL—I concur with your Lordship that there is no abstract rule in regard to this matter. Each case depends on its own circumstances. We would have been in a better position to judge of the circumstances of the present case had we heard the evidence as the Lord Ordinary did. But looking to the general features of the case, as stated in the Lord Ordinary's note, I think that if the pursuer had accepted the tender made by the defender, her character would have been compromised, because, simultaneously with the making of the tender, the defender lodged defences, in which he denied the engagement to marry. Now, if a young lady accepts a sum of money to silence her when she is alleging a promise to marry from a man who denies her statements, that would necessarily affect her character. Another circumstance in this case is that the engagement was broken off without any reason being assigned; and on the whole, I see sufficient here to justify the discretion which the Lord Ordinary has exercised.

Lord DEAS—I don't think that what the Lord Ordinary has done in this case interferes in any way with the general rule as to tenders, because he proceeds upon the special circumstances of this case, with which he was familiar. I don't think it was necessary for the defender to admit in his defences that he had done wrong, but he was not justified in denying facts. He does not admit the engagement. He denies having waited on the pursuer's parents, which he certainly did, as appears from his own letters. And then his plea-in-law is that, as the pursuer's statements are unfounded, he is entitled to be assolizied. That was certainly not putting matters on a satisfactory footing for the pursuer. I think it must be inferred that whatever reason the defender had for

not fulfilling his engagement, it was one which he could not justify, and he might have stated in his defence that no blame was imputable to the pursuer. But I look upon this case as quite special.

Lord ARMILLAN concurred.

The reclaiming note was therefore refused with expenses.

Agent for Pursuer—W. S. Stuart, S.S.C.

Agent for Defender—W. Officer, S.S.C.

URQUHART *v.* BONNAR (*ante*, vol. i. p. 217).

*Jury Trial—Special Jury.* Motion for a special jury on the ground that the case had been already twice tried by a common jury whose verdict was in each case set aside, *refused*.

This case has been already twice tried by a common jury, who on both occasions found for the pursuer. Both verdicts were set aside as contrary to evidence, and a third trial is to take place at the ensuing sittings.

MACDONALD and RHIND, for the defender, moved for a special jury. There had been already twice a miscarriage of justice, which it was desirable should not occur again.

J. C. SMITH, for the pursuer opposed the motion. His client was a poor man, and was entitled to have his case tried by his peers. The result of granting this motion would be to set class against class, which was contrary to the theory and spirit of jury trial.

The Court refused the motion.

Agents for Pursuer—Macgregor and Barclay, S.S.C.

Agent for Defender—Thomas Rankine, S.S.C.

Wednesday, July 11.

## FIRST DIVISION.

### KEITH'S TRUSTEES *v.* FALCONER AND OTHERS.

*Trust—Vesting.* Terms of a trust-deed under which held that the capital of legacy vested during the life of the liferentrix.

This was a competition betwixt Ardrian William Keith Falconer, Esq., only son of the late Hon. William Keith, and the marriage-contract trustees of Major Lockwood and his wife, the late Dora Keith Falconer, only daughter of the said Hon. William Keith, in regard to a sum of £6000, referred to in the following clause in the trust-disposition and settlement executed by the Ladies Maria and Catherine Keith, on 7th October 1839;—"In the third place, we direct and appoint our said trustees to hold the sum of £6000 of the trust means and estate hereby conveyed for the purpose of paying over, from the first term of Whitsunday or Martinmas after the death of the longest liver of us, to the Lady Mary Keith during her life, the yearly interest which they may draw for the said sum of £6000; and at the first term of Whitsunday or Martinmas after the death of the said Lady Mary Keith, the said sum of £6000 shall be paid over by our said trustees to the Hon. William Keith (their nephew), whom failing, to his children equally between them, share and share alike."

The last survivor of the two trusters died on 24th August 1851. Lady Mary Keith, the liferentrix of the sum in question, survived till 5th July 1864. Of the beneficiaries, the Hon. William Keith predeceased the two ladies, the trusters, and admittedly no right vested in him to the sum in question. His two children, Mrs Lockwood and Mr Ardrian Keith Falconer, survived both the