upon the facts, after these have been ascertained.

The LORD PRESIDENT and LORD ADAM concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor of new: Repel the first plea-in-law for the defenders; also repel their second plea-in-law; and remit to the Lord Ordinary to allow parties a proof of their respective averments and to the pursuers a conjunct probation," &c.

Counsel for the Defenders and Reclaimers—Salvesen, K.C.—Younger. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Pursuers and Respondents—Wilson, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Friday, June 10.

FIRST DIVISION.

[Sheriff Court of Lothians and Peebles at Linlithgow.

JACK *v.* SMITH.

Process—Appeal—Proof or Jury Trial—Action of Damages for Breach of Promise of Marriage—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *secs.* 28 *and* 40—*Evidence Act* 1866 (29 *and* 30 *Vict. c.* 112), *sec.* 4—*Court of Session Act* 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 49.

In an action of damages for breach of promise of marriage, which had been appealed from the Sheriff Court, the defender moved the Court to send the case back to the Sheriff Court for proof, on the ground that the financial circumstances of the parties were such that the expenses of a jury trial should not be incurred. The sum sued for was £500, and on record the defender tendered £50. The Court *refused* the motion and ordered issues.

Georgina Jack, Parkhead Cottage, Bathgate, brought an action in the Sheriff Court of the Lothians and Peebles at Linlithgow, against Alexander Murray Smith, Sanitary Inspector, Linlithgow, for breach of promise of marriage, concluding for £500 in name of damages.

The defender on record tendered to the pursuer the sum of £50 with expenses to the date of lodging the defences.

The Sheriff-Substitute (M'LEOD) allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

In the Single Bills the defender moved that the case should be sent back to the Sheriff Court for proof.

Argued for the defender—The course to be followed in a case of this kind was entirely in the discretion of the Court. The financial circumstances of the parties were narrow, and such that it was not in their interest that the expense of a jury trial should be incurred.

Argued for the pursuer—Actions for damages on account of breach of promise of marriage were enumerated in section 28 of the Judicature Act 1825 as appropriate for jury trial, and there was no instance of jury trial being refused in such an action. The financial position of the parties was not a relevant consideration. The Evidence Act 1866, section 4, contemplated the withdrawal of cases from jury trial only "if both parties consent" or "if special cause be shewn." Neither of these elements was present in this case. By his tender of £50 the defender had estimated the value of the suit as being in excess of the statutory minimum for jury trial—*Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279, 20 S.L.R. 842; *Mitchell* v. *Urquhart*, February 9, 1884, 11 R. 553, 21 S.L.R. 348; *Trotter* v. *Happer*, November 24, 1888, 16 R. 141, 26 S.L.R. 79; *Cowie* v. *Diez*, July 17, 1903, 5 F. 1173, 40 S.L.R. 868.

LORD ADAM—This is an appeal under section 40 of the Act of 6 Geo. IV, cap. 120, with a view to jury trial. As to the competency of the appeal there is no question. But we are met with a motion that the case should be remitted to the Sheriff Court for proof. The defender says this is entirely in our discretion. To a certain extent this is true because we have power to do as the defender asks. But our discretion is not entirely unlimited, because the Act of Parliament says that actions for breach of promise of marriage are appropriate for jury trial. I am also myself of opinion that this case is one of a class which is most appropriate for jury trial. I therefore think this is not a case for a proof.

But it is said that in the interests of both parties—they being in somewhat poor circumstances—the case ought to be sent back to the Sheriff Court. Now it may be supposed that the parties know their own interests best, and the pursuer says that it will not be her interest to have the case sent back to the Sheriff Court, and that she wishes it sent to jury trial. Therefore we cannot say that both parties are agreed as to their interests in this respect.

But then it is said that the financial circumstances of the parties are such that the expenses of a jury trial should not be allowed to be incurred. As I said in the case of *Trotter*, I do not think the financial position of the parties is a relevant consideration. A poor man is just as much entitled as a rich man to have his case tried in what Court he pleases; and so I decline to consider the circumstances of parties to be a relevant consideration. The question I think comes to be what is the true value of the cause. I agree that we are not bound in estimating the value of the cause by the amount which the pursuer claims. A pursuer may conclude for £1000 although in truth and substance the case may be a very trumpery one. And so we have frequently sent cases back to the

Sheriff Court although larger sums were concluded for. But in this case we have a tender of £50. That is a material assistance to us in estimating what is the true value of the cause. It seems to me that where the Act of Parliament says that cases of the value of £40 can in the discretion of either party be brought here for jury trial, we have no unlimited discretion to send this case back simply because we think the Sheriff Court might deal with the matter in a cheaper way. In my opinion we must keep the case here and send it to jury trial in the ordinary way.

LORD M'LAREN—I agree with all that Lord Adam has said, except that I am not prepared to affirm in the same unqualified sense that the circumstances of the parties are not to be taken into account. I agree that we need not take account of the circumstances of the pursuer, for a pursuer though poor is entitled with the necessary assistance to bring his case before any ompetent court. The hardship is to the defender, as in the case where a rich pursuer may oppressively bring him into the Supreme Court for a small claim.

Also I think that the circumstances of the defender may be considered to this extent, that they are an element in estimating the true value of the action. In this case we may fairly take it that the value of the action is above £40, as a tender has been made of a sum exceeding that limit.

In regard to the statutory provisions, Mr Munro in his careful survey of the Acts of Parliament has omitted to note that Lord Moncreiff's Act (13 and 14 Vict. c. 36), sec. 49, while making it competent, as regards certain of the enumerated causes in the Judicature Act, to take the evidence by commission, expressly excepted an action "for libel or nuisance or properly and in substance an action of damages." Now, this action is "properly and in substance an action of damages." I have always held, though I think judicial opinion has fluctuated in the matter, that under sec. 40 of the Judicature Act and sec. 73 of the Court of Session Act 1868 we have power to send back to the Sheriff any case which in our opinion is not suitable for jury trial. We have not merely the formal power to do so, but we have a real discretion which I hope may be exercised more freely in the future than it has been in the past. But as to this case I agree with Lord Adam that it must go to a jury, because it is properly and in substance an action of damages.

LORD KINNEAR—I concur. It must be borne in mind that the procedure contemplated by section 40 of the Judicature Act is not so much a process of review as a process for removing to the Court of Session actions which have been originated in the Sheriff Court. I do not see therefore that any point can be taken against the appellant on the ground that he had himself chosen the Sheriff Court as suitable for this action, because the Legislature contemplated that cases for jury trial might properly be brought in the Sheriff Court although the trial itself cannot be taken there, and therefore the case must be brought into this Court before it can be sent to a jury. But when a case is brought here under that statute by advocation, or according to the present practice by appeal, I do not doubt that the Court must consider whether it is right or not to follow the procedure that the avocator desires should be adopted. And I agree with your Lordships that in deciding that question we must take into consideration what the legislature has provided as to the class of cases which are appropriate for jury trial. Now, in the present case the consideration that is almost conclusive to my mind is that this is an action for breach of promise of marriage, and that is one of the class of cases that is appropriated by statute for jury trial, and I agree that had it originated in this Court it is a case which we would have thought it right to send for trial before a jury.

I also agree with Lord Adam that the question of the position of the parties is a very difficult one to deal with at this stage. Except that the circumstances of this young man are somewhat narrow, we have nothing to go on except the conflicting statements of counsel. But we have before us one most important fact, which is, that the defender has himself estimated the value of the suit by his tender of £50, and as that exceeds by £10 the limit of value for jury trials I am satisfied that this case must be sent before a jury.

The LORD PRESIDENT was absent.

The Court ordered issues.

Counsel for the Pursuer and Appellant—Munro. Agents—Macdonald & Stewart, S.S.C.

Counsel for the Defender and Respondent—Dove Wilson. Agents—Cornillon, Craig, & Thomas, S.S.C.

Tuesday, June 14.

OUTER HOUSE.

[Lord Kyllachy.

THE PALL MALL BANK (LIMITED) *v.* PHILP.

Contract—Loan by Money-Lender—Excessive Interest—Harsh and Unconscionable Transaction—Money-Lenders Act 1900 (63 *and* 64 *Vict. cap.* 51), *sec.* 1.

A firm of money-lenders on 18th December 1903 lent £600, to be repaid, with £100 of bonus or interest, £50 on 18th of each month commencing with January and until and including July 1904, and the balance of £350 on the 19th of that month, with further interest on arrears of payments at 30 per cent. per annum.

Held in the circumstances of the case that the rate of interest was not exces-