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-

sive, nor the transaction harsh and unconscionable within the meaning of section 1 of the Money-Lenders Act 1900.

On 18th December 1902, the defender Mrs Philp, who was the managing directress of the Cockburn Hotel, Limited, Glasgow, with a considerable interest in the business, borrowed from the pursuers, a firm of money-lenders registered under the Money-Lenders Act 1900, the sum of £600, which she, by indenture of that date, bound herself to repay with the sum of £100 as bonus or interest by the following instalments, viz., £50 on the 18th of every month, commencing on 18th January 1903 until and including 18th July 1903, and the balance of £350 on 19th July. It was further agreed that in case any one or more of the instalments should not be paid on the day appointed for payment, and so long as such instalment or instalments should remain unpaid, she should pay interest thereon at the rate of 30 per cent. per annum. In security the defender assigned to the pursuers a policy of assurance on her life, originally for the sum of £1000 but subsequently reduced to £252, the surrender value as the time being £103, 4s. Towards repayment of the sum of £700 the defender paid three sums of £50 each, on 20th January, 20th March, and 21st May 1903 leaving a balance of £550. The defender paid interest on arrears only down to 18th May 1903, leaving a further balance due by her of £47, 10s. In the present action the pursuers sued her for these two sums. The defender having become bankrupt after the raising of the action her trustee sisted himself in her room.

The defender pleaded, *inter alia*—(1) The bonus or interest charged by the pursuers under the indenture libelled being excessive they are not entitled to decree. (2) The terms of the said indenture being harsh and unconscionable by reason of the bonus or interest charged against the defender being excessive, the pursuers are not entitled to decree. (3) The defender is entitled, in terms of section 1 of the Act of 63 and 64 Vict. cap. 51, to have the terms of said indenture, as regards the bonus or interest payable by her altered and modified.

The following cases were cited—*Young* v. *Gordon*, January 23, 1896, 23 R. 419; *Wilton & Company* v. *Osborn* (1901), 2 K.B. 110; *Ex parte the Debtor* (1903), 1 K.B. 705; *Levene* v. *Greenwood*, March 21, 1904, 20 T L.R. 389.

The Lord Ordinary after proof granted the pursuers decree, being unable to hold that in the circumstances the rate of interest was excessive or the transaction harsh or unconscionable.

Counsel for the Pursuers—C. K. Mackenzie, K.C.—Thomson. Agents—R. & R. Denholm & Kerr, S.S.C.

Counsel for the Defender—T. B. Morison—Wark. Agents—J. & J. Galletly, S.S.C.

Friday, June 17.

SECOND DIVISION.

[Sheriff Court at Dumfries.

EDGAR *v.* JOHNSTON.

Poor's Roll—Reporters Equally Divided in Opinion as to Admission of Applicant to Poor's Roll.

Where the appellant in a Sheriff Court appeal applies for the benefit of the poor's roll and the reporters are equally divided in opinion, *held* (*diss.* Lord Young) that the rule is settled that the Court will not admit the applicant.

Ormond v. *Henderson & Sons*, January 23, 1897, 24 R. 399, 34 S.L.R. 323, *followed.*

An action was raised in the Sheriff Court of Dumfries and Galloway at Dumfries by *poor* Margaret Little Simpson Edgar, domestic servant, 3 Old Well Road, Moffat, against Robert Johnston, shoemaker, Gowan Cottages, Buccleuch Street, Moffat.

After a proof the Sheriff-Substitute (CAMPION) on 15th March 1904 granted decree against the defender.

The defender appealed to the Court of Session, and made application for admission to the poor's roll.

The defender's application was remitted in ordinary form to the reporters on *probabilis causa litigandi*, and they reported that they were equally divided in opinion as to whether the applicant had or had not *probabilis causa litigandi.*

The defender presented a note to the Lord Justice-Clerk praying his Lordship to move the Court to find him entitled to the benefit of the poor's roll and to remit the case to a counsel and agent to conduct.

At calling of the note in Single Bills, counsel for the pursuer moved the Court to refuse the application, relying on the case of *Ormond* v. *Henderson*, January 23, 1897, 24 R. 399, 34 S.L.R. 323.

Argued for the applicant—When the reporters were equally divided in opinion, the admission or non-admission of the applicant was a question for the Court, and the applicant was entitled to the benefit of any doubt—*Marshall* v. *North British Railway Company*, July 13, 1881, 8 R. 939, 18 S.L.R. 675.

At advising—

LORD JUSTICE-CLERK—The question in this case is whether an applicant for the benefit of the poor's roll can be successful where the reporters on *probabilis causa* are equally divided. The question has in my opinion been already settled by decision, and the unanimous judgment in the case of *Ormond*, 24 R, definitely disposed of the question. My opinion therefore is that the note presented for admission must be refused.

LORD YOUNG—I am unable to regard the decision to which your Lordship has referred upon such a question as this as