

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