dition of his obtaining *cessio*.

Now, the emoluments of this gentleman are very small. I do not think that they can be taken as being more than £100, and certainly that sum does not leave him much room for assigning anything to his creditors consistently with his living at all in the manner becoming a parish minister.

Looking to what has been done in previous cases, I do not think that he can assign more than £20 out of the £100, leaving £80 at the disposal of the minister. I think therefore that we should remit to the Sheriff in order that he may give effect to this, and find the petitioner entitled to the benefit of *cessio* on his assigning to his creditors £20 of his salary. Nor do I see any reason for saying that this is a proceeding in any way incompetent in a process of *cessio*. There is direct and clear authority in the judgment of the House of Lords in the case of *Scott* v. *M'Donald*, 1 Sh. App., and there are other authorities of an analogous kind, all of which go to show that though a person's means are derived from the emoluments of an office, or from an annuity, he is not thereby exempt from the claims of his creditors, but that some reasonable proportion of his means must be assigned to them as the condition of his obtaining the benefit of *cessio*.

That was what the Court did in the case of *Scott*, and we shall in the present case adopt the course which was there followed. The Sheriff-Substitute seems to think that the recent Cessio Acts have to a certain extent altered the law in this matter, but I can only say that I have not heard anything cited from these Acts which can in any way bear out the suggestion.

Lord Mure concurred.

Lord Shand—I agree with what your Lordship proposes in both cases.

Upon the 16th of July, when this poinding was sisted by the interlocutor of the Sheriff-Substitute of that date, the appellant had presented a report of the poinding which had followed upon a decree of the Court containing a warrant to poind. The appellant craved a warrant of sale, but this the Sheriff-Substitute refused, assigning as a reason that the respondent had applied for the benefit of a *cessio*. In the case of such applications the debtor is generally notour bankrupt, but if he is not the process of *cessio* makes him so. But in such cases the poinding creditor is entitled to go on with his diligence unless something illegal is being done in the course of it. The rights of the other creditors are fully preserved, as even in the event of a sale of the poinded effects they are entitled to step in and claim a share in the proceeds.

But the mere circumstance that the debtor had applied for *cessio* did not entitle the Sheriff to interrupt the diligence of the poinding creditor, for there was nothing here of the nature of a competition of diligence, but merely a conveyance by the debtor of his property to a trustee for behoof of his creditors. Nor was any good reason assigned by the Sheriff-Substitute for stopping the creditor in the carrying out of her diligence. Nor could the debtor assign any lawful cause why this should be done. Nor do I agree with the reasons assigned by the Sheriff for affirming the Sheriff-Substitute's interlocutor of 16th July. He may have a discretion, but no good reason was suggested why that discretion should be exercised on the present occasion.

As regards the *cessio*, we are asked to construe the clause at the end of the interlocutor of 31st July, which allows extract of the decree to go out upon caution being found. Now, I agree with what your Lordship has said, that an interlocutor allowing extract of the decree before the usual period must be rigidly construed, and I also agree with the interpretation which your Lordship has put upon this clause, and think that what the Sheriff-Substitute really meant by these words was that caution was to be found before this decree was extracted. I also agree with your Lordship as to the competency of dealing with a salary or stipend in a process of *cessio*, and I think that the respondent here should be ordained to assign £20 per annum of his stipend to his creditors as the condition of his obtaining the benefit of *cessio*. I do not think that a gentleman in a position of this kind should be left in possession of an income utterly unfit to maintain the office he holds, and I therefore think that at present, and looking to the amount of his emoluments, a larger sum should not be demanded from him. When, however, the respondent comes to ask his discharge another and a different question may arise, because he has prospects, and it might fairly be urged then that a larger sum should be provided in view of his income being certainly increased in the event of his surviving the present incumbent.

Lord Adam was absent from illness.

The Court sustained the appeals, and remitted to the Sheriff-Substitute to grant warrant of sale in the poinding, and to grant *cessio* on condition of the respondent assigning to his trustee £20 per annum of his stipend.

Counsel for the Appellant—Galbraith Miller. Agent—R. D. Ker, W.S.

Counsel for the Respondent — Sir Charles Pearson—Law. Agents—Reid & Guild, W.S.

Saturday, November 24.

FIRST DIVISION.

[Lord Fraser, Ordinary.

TROTTER *v.* HAPPER.

Reparation—Breach of Promise of Marriage—Proof before Lord Ordinary — Jury Trial —Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 28—*Court of Session Act* 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 49—*Evidence* (*Scotland*) *Act* 1866 (29 *and* 30 *Vict. c.* 112), *sec.* 4.

The Judicature Act 1825, sec. 28, provided *inter alia*, that all actions for damages on account of breach of promise of marriage or on account of seduction should be held as causes appropriated to jury trial. The Court of Session Act 1850, sec. 49, limited the class of cases appropriated to jury trial to actions for libel, or for nuisance, or pro-

perly in substance actions of damages. The Evidence (Scotland) Act 1866, sec. 4, provides that if both parties consent, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof by evidence led before himself in any cause in dependence before him notwithstanding the provision of the Judicature Act 1825 and the Evidence (Scotland) Act 1866.

In an action of damages for breach of promise of marriage and seduction and aliment, the Lord Ordinary allowed the parties a proof of their averments, and to the pursuer a conjunct probation; but the Court (*dis.* Lord Shand) in respect that the pursuer did not consent to this mode of proof, and that no special cause was shown, remitted the cause to the Lord Ordinary for jury trial.

Jane Trotter, daughter of William Trotter, Greenlaw, Berwickshire, raised an action of damages for breach of promise of marriage and seduction against George Happer, tailor there, concluding for payment of £300. The summons also contained a conclusion for aliment at the rate of £8 sterling per annum for a period of thirteen years. The defender denied that he ever made any promise of marriage to the pursuer; he admitted that he had connection with her, and he offered to aliment her child at the rate and for the period allowed in the Sheriff Court of Berwickshire.

The Lord Ordinary (Fraser) on 18th October 1888 allowed the parties a proof of their averments and to the pursuer a conjunct probation.

The pursuer reclaimed, and argued that by the Evidence (Scotland) Act 1866, sec. 4, she was, in the absence of any consent to a proof, or of any special cause being shown, entitled to have the case sent to a jury.

The defender argued that owing to the rank of life of the parties neither was able to afford a jury trial, and that that was a sufficient special cause; besides, there was in such cases less likelihood of a miscarriage of justice if the case was tried by proof before the Lord Ordinary.

At advising—

Lord President — I am afraid that we have no alternative open to us but to follow the Act of Parliament. The Judicature Act 1825 appointed this class of case to jury trial, and so for a long period it was impossible that they could be tried in any other way. The Act of 1850 first made some slight relaxation of this rule with regard to certain enumerated cases; and now we have the Act of 1866. It relaxes the rule still further, and provides that if both parties consent, or if special cause is shown, it shall be competent to the Lord Ordinary to take the proof in the manner provided by the first section of the statute. But the condition of the competency of a proof before the Lord Ordinary in such cases is (1) consent of both parties, or (2) special cause shown. Now, the only special cause shown here is, what was suggested by the respondent, that this class of case was not suited to jury trial, but that to my mind is a general and not a special cause. A special cause would be one which was peculiar to the case before us, and nothing of that nature was even attempted to be shown. I think therefore that we are bound by the statute, and that this interlocutor should be recalled and the case sent back to the Lord Ordinary for jury trial.

Lord Mure—Until 1866 such a case as this could not have been tried otherwise than by a jury, but with the Evidence Act of that year a change was made in the law; and with the consent of parties, or upon special cause shown, the case might be tried by a proof before the Lord Ordinary. In the present case there is no consent of parties, and I agree with your Lordship that no special cause has been shown, so that we have no alternative but to remit the cause to the Lord Ordinary to be tried by a jury.

Lord Shand — I have great difficulty in differing in this case from the Lord Ordinary. The statute says that upon special cause shown the case may be tried otherwise than by a jury, and the specialty here is, that besides this being an action of damages for seduction there is also a conclusion for aliment. If the rule be adopted that such cases are only to be tried by a jury we shall be flooded with cases of this kind which should undoubtedly be disposed of in the Sheriff Court. Looking to the rank in life of these parties as set out on record, I should be disposed to hold that quite a sufficient cause has been shown for trying this question by means of a proof before the Lord Ordinary. I am therefore for adhering to this interlocutor.

Lord Adam—If this question was open I should be prepared to send the case to be tried by proof before the Lord Ordinary, but I fear we are not free in the matter, but are tied down by the statute. The pursuer is entitled to have her case tried by a jury unless special cause can be shown to the contrary. It has been urged that the eloquence of counsel appealing to the feelings of a jury often results in a miscarriage of justice. But the result of such an argument, if given effect to, is, that no cases of this kind should ever go before a jury. But the statute says exactly the opposite. It was further urged that the position in life of these parties rendered such a mode of trial undesirable, but I can see nothing in this record to exclude the pursuer from the right which the statute gives her.

The Court recalled the interlocutor and remitted to the Lord Ordinary to proceed with the adjustment of issues and the trial of the cause by jury.

Counsel for the Pursuer (Reclaimer)—C. N. Johnston. Agent—Andrew Wallace, Solicitor.

Counsel for the Defender (Respondent)—Gunn. Agents—Whigham & Cowan, S.S.C.