Friday, November 20.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

OGG *v.* SCOTT.

***Process — Sheriff — Removal to Court of Session for Jury Trial—Remit to Sheriff —Unsuitable Case—Sheriff Courts (Scotland) Act* 1907 (*7 Edw. VII, cap.* 51), *sec.* 30.**

The pursuer, a domestic servant, in an action of damages for breach of promise of marriage brought in the Sheriff Court at Aberdeen against a farmer's son aged twenty-one, required the case, under section 30 of the Sheriff Courts Act 1907, to be remitted to the Court of Session for trial by jury. The Court in respect of the small character of the case, the position of the defender, and the expense involved in bringing the witnesses to Edinburgh, *refused* the application and remitted the case back to the Sheriff.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30, enacts—"In cases originating in the Sheriff Court . . . where the claim is in amount or value above fifty pounds and an order has been pronounced allowing proof . . . it shall, within six days thereafter, be competent to either of the parties who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff. . . ."

Lilias Nicol Ogg, domestic servant, Nelson Street, Huntly, *pursuer*, brought an action in the Sheriff Court at Aberdeen against George Scott, farmer's son, Drumblade, Aberdeenshire, *defender*, for payment of £100 for breach of promise of marriage.

The pursuer averred that she was a domestic servant, twenty-five years of age, and residing in Huntly, and that the defender was a farmer's son, twenty-one years of age, and residing at the farm of Woodbank, in the parish of Drumblade, Aberdeenshire, in the management of which he assisted his mother. She further averred that while she was employed as a domestic servant at the farm of Comalegy, in the parish of Drumblade, an intimacy sprang up between her and the defender, which ultimately developed into a regular courtship, that on several occasions he expressed a desire to marry the pursuer and that she agreed to accept him, and that subsequently, after she had informed him that in consequence of illicit intercourse with him she had become pregnant, he declined to fulfil his promise, giving as his reason that his mother withheld her consent.

On 17th April 1914 the Sheriff-Substitute (YOUNG) allowed a proof. The pursuer thereupon required the cause to be remitted to the Court of Session with a view to trial by jury.

When the case was called in the Summar Roll counsel for the defender moved the Court to remit it back to the Sheriff as unsuitable for jury trial in terms of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 30, and cited *Barclay* v. *T. S. Smith & Company*, 1913 S.C. 473, 50 S.L.R. 308; *M'Laughlan* v. *Clyde Valley Electrical Power Company*, November 17, 1905, 8 F. 131, 43 S.L.R. 25; and *Sharples* v. *Yuill & Company*, May 23, 1905, 7 F. 657, 42 S.L.R. 538.

Counsel for the pursuer opposed the motion and cited Fraser on Husband and wife, 2nd ed., p. 497.

LORD JUSTICE-CLERK—This case follows upon the case of *Barclay* v. *Smith & Company*, 1913 S.C. 473. In that case I quoted an expression of the Lord President (Kinross) in the case of *M'Nab* v. *Fyfe*, 6 F. 925, 41 S.L.R. 736—"On the face of the record this is a small case and more suitable for proof in the Sheriff Court than for jury trial in the Court of Session. Proceeding upon that view we have remitted other similar cases to the Sheriff Court for proof. I am of opinion that this would be the proper course to follow in the present case." That is the opinion I have formed in this case, and I simply repeat what I said in *Barclay* v. *Smith & Company*, namely, that it is plain that one of the purposes of the Sheriff Courts Act of 1907 is "to save the enormous expense incurred in the trial by jury of very small cases, especially where witnesses have to be brought from a long distance." I also concur in what Lord Guthrie said in that case, and it directly applies to the present case—"The witnesses are all in Aberdeen and much additional expense would be incurred by bringing them here if the case were tried before a jury." I am satisfied that we are carrying out the provisions of the statute in a reasonable way by sending a case of this kind back to the Sheriff Court for proof.

LORD SALVESEN—I entirely agree. I think this is a small case within the meaning attributed to the word by Lord Kinross in the case your Lordship has just cited. In the ordinary case the means of the defender are perhaps of not so much importance in judging as to whether a case is a small one or not. But that is not true of a breach of promise case, because the loss of marriage, which forms the ground of action, will be greater or less according to the position of the defender. Here the defender is in a very humble position in life. According to the pursuer's own statement, he is merely a farmer's son—that is to say, he is not himself a person of means but is working on a farm that belongs to his widowed mother. Obviously the expectations that the pursuer might reasonably have had in respect of such a marriage if it had been carried out would be very much less than if he had been a person of means and substance.

In such a case too the expense of trying the action is also of paramount importance, because if the expenses which are accumu-

lated in the course of the proceedings—which I assume would be successful so far as the pursuer is concerned—are heavy, there will be great difficulty in recovering them from a person who has no capital but is dependent for his subsistence upon his own labour. Accordingly I think that that is an element we are entitled to take into consideration here, and that we are entitled to follow the course which your Lordship in the chair has proposed, of remitting the case back to the Sheriff Court, where I think it will be as well tried and much more cheaply tried than it could possibly have been tried by a jury sitting in Edinburgh, to which place the witnesses from the neighbourhood of Huntly would all have to be brought.

LORD GUTHRIE—I agree. I think, as we held in the case of *Barclay*, that the Legislature did not mean to confine the Court to the one question of the amount that would probably be required, but intended that we should take the whole circumstances into consideration. In doing so I am quite clear that the course proposed by your Lordships is the right one.

LORD DUNDAS was sitting in the Extra Division.

The Court remitted the cause to the Sheriff.

Counsel for the Pursuer—Armit. Agent—William Geddes, Solicitor.

Counsel for the Defender—Mitchell. Agents—Mackay & Hay, W.S.

Saturday, November 21.

FIRST DIVISION.

[Bill Chamber.

BOARD OF AGRICULTURE *v.* CATHCART.

Process—Landlord and Tenant—Reclaiming Note—Competency—Opinion of the Lord Ordinary Obtained in an Arbitration—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 49), *sec.* 7 (11) *—Agricultural Holdings (Scotland) Act* 1908, *Second Schedule, Art.* 9.

The Small Landholders (Scotland) Act 1911, sec. 7 (11), which allows in certain circumstances the question of compensation on the creation of small holdings to be decided by arbitration, provides—"Provided that . . . the Second Schedule to the Agricultural Holdings (Scotland) Act 1908 shall apply to any such arbitration . . . with the substitution of the Lord Ordinary for the Sheriff." . . . The Agricultural Holdings (Scotland) Act 1908, Second Schedule, Art. 9, enacts that "the arbiter may at any stage of the proceedings . . . state in the form of a special case for the opinion of the Sheriff any question of law arising in the course of the arbitration." *Held* that the opinion of the Lord Ordinary so obtained was final, and accordingly that a reclaiming note to the Inner House was incompetent.

The Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49), sec. 7 (11), is quoted *supra in the rubric.*

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), Second Schedule, "Rules as to Arbitration," Art. 9, enacts—"The arbiter may, at any stage of the proceedings, and shall, if so directed by the Sheriff—which direction may be given on the application of either party—state in the form of a special case for the opinion of the Sheriff any question of law arising in the course of the arbitration."

In an arbitration under the Small Landholders (Scotland) Act 1911, sec. 7 (11), between Dame Emily Eliza Steele Gordon Cathcart, wife of Sir Reginald Archibald Edward Cathcart of Carlton, Bart., proprietrix of Ormiclate, Bornish, and Milton Farms, South Uist, *respondent*, and the Board of Agriculture for Scotland, *reclaimers*, for the purpose of determining the amount of compensation due in respect of the formation of small holdings and enlargements of holdings on the said farms of Ormiclate, Bornish and Milton, James Forbes, M.V.O., Eallabus, Bridgend, Islay, arbiter in the reference, at the request of the Board, stated a Special Case for the opinion of the Lord Ordinary on the Bills.

The Lord Ordinary (DUNDAS) having on 28th July 1914 answered the question of law contained in the Special Case in favour of Lady Cathcart, the Board reclaimed to the First Division of the Court of Session.

The respondent objected to the competency of the appeal, and argued—The reference to the Lord Ordinary was merely consultative. The intention was to obtain his opinion, and not his judgment, in the strict sense—*Macdougall and Others*, July 4, 1869, 7 Macph. 976, 6 S.L.R. 620. The wording in section 19 of the Arbitration Act 1889 (52 and 53 Vict., cap. 49) was similar to that in the section under consideration, and it had been held that under that section there was no appeal—*in re Knight and Tabernacle Permanent Building Society*, L.R. [1892] 2 Q.B. 613, Lord Esher (M.R.) at 617. In any event it could not have been intended to allow an appeal here, for the Small Landholders (Scotland) Act 1911 (1 and 2 Geo. V, cap. 49) stopped short of importing section 11 (3) of the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) where an appeal was expressly provided for in certain circumstances, and Schedule 2 of the Act could not be held to override such provision.

Argued for reclaimers—Any interlocutor of the Lord Ordinary was appealable, the reason being that historically the Outer House was identical with the Inner House, the whole forming the Court of Session. The Lord Ordinary's judgment was merely an opinion, the judgment being given only in the Inner House—*Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees*, March 20, 1906, 8 F. 731, Lord President at p. 750,