the matter was really one for his decision, and as he has reported that the charges are proper and moderate, I think they should be allowed.

LORD KYLLACHY—I am of the same opinion. The Act of Sederunt plainly does not apply. We are consequently thrown back upon the rule which would have applied if the Act of Sederunt had not been passed; and the only such rule of which I know is that a successful litigant who is found entitled to expenses shall get the expenses incurred by him according to what is just and reasonable in the circumstances. I think therefore the Auditor in this case was quite entitled to allow such payments as he thought just and reasonable for expert witnesses.

LORD KINCAIRNEY—I entirely concur, and I adopt your Lordship's opinion.

LORD STORMONTH DARLING—I concur.

The Court sustained the pursuer's objections.

Counsel for the Pursuer — Macmillan. Agents—Davidson & Syme, W.S.

Counsel for the Defenders — M'Clure. Agent—Thomas Hunter, W.S.

Tuesday, May 23.

FIRST DIVISION.

[Sheriff Court at Glasgow.

SHARPLES *v.* WALTER YUILL & COMPANY.

Process—Appeal for Jury Trial—Proof—Jury Trial—Right to Jury Trial—Method of Inquiry—Judicature Act (6 *Geo. IV. c.* 120), *sec.* 40—*Court of Session Act* 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 73.

Held, after consultation with the Judges of the Second Division, that when a case is appealed for jury trial under the Judicature Act, section 40, the Court is not bound to grant such trial, but (*a*) may decide the case on any legal ground which is capable of disposing of the case without inquiry, or (*b*) may order inquiry by some other method than jury trial if it considers jury trial unsuitable. Such inquiry may be either by proof before a judge in the Court of Session or by proof before the Sheriff; and in deciding between these two methods the Court will keep in view, in relation to the nature of the case, that the one course will, and the other will not, allow of ultimate appeal to the House of Lords on the facts.

Process—Appeal for Jury Trial—Proof—Jury Trial—Criteria of Suitability for Jury Trial—Trifling Nature of Case—Special Cause—Judicature Act (6 *Geo. IV. c.* 120), *sec.* 40—*Court of Session Act* 1868 (31 *and* 32 *Vict. c.* 100, *sec.* 73).

Held, after consultation with the Judges of the Second Division, that, where a case is appealed for jury trial, the Court in deciding whether the case is or is not suitable for jury trial will apply the same criterion as it does in cases raised before itself. The Court will consider whether the action is of the class specially appropriated by statute to jury trial, and if so, whether there is any special cause for not so trying it; and, as to amount, the Court will be guided by the standard fixed by the Legislature, viz., £40, so that unless the action on the face of it discloses a claim which in the opinion of the Court could not reasonably be entitled to a verdict amounting to £40, the Court will not refuse a jury trial to an otherwise appropriate case.

Cecilia Sharples, laundry worker, residing with her father Thomas Sharples, iron turner, 12 Water Row, Govan, with his consent raised an action in the Sheriff Court at Glasgow against Walter Yuill & Company, proprietors of the Victoria Laundry, Windsor Street, Govan. In it she sought to recover £100 at common-law, or alternatively £39 under the Employers' Liability Act 1880, and averred:—"(Cond 3) On the morning of 15th November 1904, and at or about 6 a.m. the pursuer was proceeding to her work at the Victoria Laundry and Dye Works, Windsor Street, Govan, and, as was her usual custom and also the custom of the other workers, entered by the gate leading to said works. Pursuer had just entered by the gate when she fell into a hole which the pursuer believes and avers was excavated on or about 14th November 1904. The hole in question was of considerable depth, and the pursuer sustained serious injuries by reason of falling."

On 9th February 1905, the Sheriff-Substitute (BOYD) allowed a proof. The pursuer appealed for jury trial. When the case appeared in the Single Bills the defenders moved that it should be dismissed as irrelevant or at least sent back to the Sheriff in respect of its trifling nature. The Court put out the case for discussion on the question of sending it back to the Sheriff

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 73, enacts:—"It shall be lawful by note of appeal under this Act to remove to the Court of Session all causes originating in the inferior courts in which the claim is in amount above £40, at the time and for the purpose and subject to the conditions specified in the 40th section of the Act 6 Geo. IV, c. 120, and such causes may be remitted to the Outer House."

6 Geo. IV, c. 120 (The Judicature Act), section 40, contains this proviso—"But it is hereby expressly provided and declared that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof *in retentis* or granting diligence for the recovery and production of papers), it shall be compe-

tent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation, which shall be passed at once without discussion and without caution, and in case no such bill of advocation shall be presented, and the parties shall proceed to proof under the interlocutor of the inferior court, they shall be held to have waived their right of appeal to the House of Lords against any judgment which may thereafter be pronounced by the Court of Session in so far as by such judgment the several facts established by the proof shall be found and declared."

Argued for the defenders—This was a case which should be sent back to the Sheriff in respect of its trifling nature. If a case was not suitable for jury trial that was the proper course—*Dennistoun* v. *Rainey & Knox*, May 16, 1871, 9 Macph. 739, 8 S.L.R. 501—It was true that the case of *Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279, 20 S.L.R. 842, decided that a case brought into the Court of Session under the Judicature Act, sec. 40, was to be treated in the same manner as if it had originated in the Court of Session, but that only meant that it was competent so to do. It did not exclude the alternative mode of treating it. It was therefore still competent to send a case back—*Tosh* v. *Ferguson*, October 27, 1896, 24 R. 54, 34 S.L.R. 46; *Pollock* v. *Mair*, January 10, 1901, 3 F. 332, 38 S.L.R. 250; *Dunn* v. *Cuninghame*, July 9, 1902, 4 F. 977, 39 S.L.R. 755—and that on the ground of unsuitability owing to the small amount at stake—*M'Nab* v. *Fyfe*, July 7, 1904, 6 F. 925, 41 S.L.R. 736; *Jack* v. *Smith*, June 10, 1904, 6 F. 811, 41 S.L.R. 620; *Kane* v. *Singer Manufacturing Company*, May 21, 1904, 6 F. 658, 41 S.L.R. 571; *Nicol* v. *Picken*, January 24, 1893, 20 R. 288, 30 S.L.R. 342; *Bethune* v. *Denham*, January 6, 1886, 13 R. 882, 23 S.L.R. 456. The true test was the value of the case in the opinion of the Court—*Dickie* v. *Scottish Co-operative Wholesale Society, Limited*, November 17, 1903, 6 F. 112, 41 S.L.R. 64.

Argued for the pursuer—In this case the right to appeal for jury trial under the Judicature Act was good under the common law claim although the claim under the Employers' Liability Act was there and under £40—*Paton* v. *Niddrie & Benhar Coal Company*, January 14, 1885, 12 R. 538, 22 S.L.R. 345. The cases which had been sent back had always been complicated by some unsuitability, or they amounted to an abuse of the right to appeal as in *M'Nab* v. *Fyfe*, *supra*.

LORD PRESIDENT — This is an action raised in the Sheriff Court of Lanarkshire by Cecilia Sharples, sometime a laundry worker, against the proprietors of the Victoria Laundry, Govan. It concludes for damages for injuries received by her through falling into a hole in the defenders' premises as she was going to work. The damages claimed are put at £100, or alternatively at £39, according as the liability may be found to exist at common law or under the Employers' Liability Act.

A proof was ordered in the Sheriff Court, whereupon the pursuer appealed to the Court of Session under the provisions of section 73 of the Court of Session Act and section 40 of the Judicature Act.

The respondents' counsel, on the case being called in Single Bills, asked that it should be dismissed as irrelevant, or otherwise, in respect of the trifling nature of the case, that it should be remitted to the Sheriff Court. The pursuer asked for an issue with a view to the case being tried by jury.

As regards the relevancy I have no doubt. The averment is that an open and unguarded hole was left in the passage through which the girl usually obtained access to her work. That this is a good averment of fault is beyond question, though there may be a good defence on the facts stated by the defenders, who say that that passage was at the time shut up and the girls warned to go another way. But the motion to remit the case to the Sheriff on the ground that it is a case of a trifling character is a motion which recently has been frequently made, and it seemed to us that the matter should be thoroughly discussed with a view to laying down the general rules which will guide this Division of the Court in dealing with such applications. The matter has been dealt with in many decisions, which are in some cases not at first sight very consonant, and which should be referred to some general rule.

An application to this Court for jury trial from the Sheriff Court at the stage at which proof has been ordered in that Court has its origin in the 40th section of the Judicature Act of 1825. That section provided primarily for the finality of findings in fact pronounced by a Division of this Court in cases originating in inferior Courts; and permitted further appeal to the House of Lords only on questions of law, the facts as found by this Court being given the effect of a special verdict of the jury.

The section was in its primary aspect discussed and elucidated by the House of Lords in two cases, viz.—*Mackay* v. *Dick & Stevenson*, 8 R. (H.L.) 37, and *Shepherd* v. *Henderson*, 9 R. (H.L.) 1. It, however, concludes with the following proviso:—"But it is hereby expressly provided and declared that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation, which shall be passed at once without discussion and without caution, and in case no such bill of advocation shall be presented, and the parties shall proceed to proof under the interlocutor of the inferior court, they shall be held to

have waived their right of appeal to the House of Lords, against any judgment which may thereafter be pronounced by the Court of Session, in so far as by such judgment the several facts established by the proof shall be found and declared." This shows that it is not competent to refuse the appeal on the ground that the case is not suited for trial in the Court of Session. It is imperative that the case is to be removed into the Court of Session, and then the question arises, what is to be done with it.

Now, the first question that would naturally arise on this proviso would be whether a remit to the Jury Court (for at this date the Jury Court was a separate Court) was a matter of statutory right as soon as the case had been advocated, or whether the Court of Session were entitled to consider whether the cause was truly suitable for jury trial. Accordingly we find that this question was raised in two cases very soon after the passing of the Act, in both of which it was held that a remit to the Jury Court was not imperative —*Sands* v. *Meffan*, 7 S. 290; *Baird* v. *Officer*, 8 S. 893.

The case of *Sands* was a case which was obviously unsuited for a jury but where there were previous interlocutors which the Court held to be wrong, and they accordingly remitted to the Lord Ordinary (advocations at that time being dealt with by the Lord Ordinary) to dispose of these interlocutors. The question of inquiry therefore did not arise. But in *Baird's* case the point did arise for discussion, how inquiry should be directed—upon the assumption that the case was unsuited for jury trial—and the Lord President and Lord Gillies gave the opinion that if proof was necessary it must be taken in the Court of Session and could not be remitted to the Sheriff as Sheriff, and accordingly the Division recalled the interlocutor of the Lord Ordinary, who had remitted the case *simpliciter*, and ordered him to proceed in the advocation.

That this view remained the view of the Court for some time may be gathered from the fact that this opinion in *Baird* v. *Officer* is stated as the law in Mr Macfarlane's work on Jury Trial (published 1837), p. 38, and is repeated in Shand's Practice (published 1848), p. 458.

Neither of these works cite any case trenching on the authority of *Baird*. At the same time it can hardly be held to have been authoritatively settled, and accordingly we find it treated as a moot point in the next case which I have been able to discover on the subject, viz., *Harrington* v. *Richardson*, 16 D. 368. This case contains an instructive judgment by Lord Ivory on the points arising out of the 40th section. On p. 371 he further says—"whether—the competency being sustained —other questions connected with the future course of procedure may not as in *Sands'* case arise will be for after consideration."

Lord Rutherfurd took occasion to reaffirm the principle that the removal under the 40th section gave the Court the right to refuse a jury trial and to give effect to prejudicial pleas, but he did not touch on the method of proof, if proof were necessary, but the case was unsuited for jury trial.

The books are silent on the point till we come to the case of *Dennistoun* v. *Rainey & Knox*, 9 Macph. 739, which was the first case cited at the bar. It may be noted that the case of *Campbell* v. *Campbell*, 9 D. 135, which in this and several of the subsequent cases is cited as an authority, has really nothing to do with the point, being an advocation under 50 Geo. III, c. 112, sec. 36. By this time (1871) the Court of Session Act of 1868 had been passed, which abolished advocations and instituted appeals, and specially dealt with advocation under the 40th section of the Judicature Act by section 73, which is in these terms—[*Quoted supra*]. *Dennistoun's* case was therefore the first-considered judgment under the new Act. It was an action of interdict at the instance of a riparian owner against certain operations in the bed of a stream. The petitioner appealed for jury trial, but on the appeal being called asked that the case should be tried by a judge without a jury. The Court (First Division) refused the motion as being against the spirit of the 40th section, in respect that to allow a proof before a judge would get rid of the finality of facts provisions. As a matter of fact they ordered an issue, but indicated notwithstanding in their opinion that failing an issue—that is to say, if the case had been unsuitable for a jury—the proper course would be to remit to the Sheriff to proceed with the proof already ordered.

And accordingly they did take that course in the case of *Chisholm* v. *Mitchell*, 1 R. 388. The opinion of Lord President Inglis is short and explicit—"This is a matter on which I have no doubt. The defender is the person who has brought the case here, and he has been quite consistent all through in asking for an issue, but there can be no question that if we find that the case is not one which can be properly sent to a jury there is no obligation on us to send it there. Failing that, there are only two courses open to us, either to order the proof to be taken here, or to send the case back to the Sheriff. The case of *Dennistoun* v. *Rainey*, 16th May 1871, 9 Macph. 739, shows that it would be a plain violation of the spirit of section 40 of the Judicature Act to have the proof taken here, and so we must send it back to the Sheriff, before whom the proof will be taken."

In the case of *Watson* v. *Earl of Seafield*, only reported in 7 S.L.R. 327, in 1870, the Second Division had sent a case unsuitable for jury trial to proof before one of themselves, and notwithstanding the decision in *Chisholm's* case the same Division in the next year, finding a case which they considered unsuitable for jury trial, ordered a proof before one of themselves—*Laidlaw* v. *Wilson*, 2 R. 168. Lord Neaves' remarks on the change of circumstances since 1825 are instructive. Lord Ormidale dissented, holding that such a course was contrary to what had been settled in *Dennistoun's* case. *Chisholm's* case does not seem to have been cited.

Following on this case a diversity of practice arose between the two Divisions—the First Division following *Chisholm's* case and remitting in all cases where they thought jury trial unsuitable to the Sheriff, the Second Division appointing proof before one of their own number or a Lord Ordinary. The competency of this latter course being doubted by the First Division, they took advantage of the case of *Cochrane* v. *Ewing*, 10 R. 1279, to send the question to the whole Court. The unanimous opinion of the Consulted Judges was as follows:—"We are of opinion that the proof can competently be taken in the Court of Session. We think that by the appeal the case is removed from the Sheriff Court, and that it may be dealt with in the same manner as if it had originated in the Court of Session."

This case then only dealt with and confirmed the competency of proof before a judge; it did not deal with or touch the competency as an alternative method of remitting to the Sheriff as had been done in *Chisholm's* case. The first attempt to have a case remitted to the Sheriff and a jury refused on the sole ground of the trifling nature of the action seems to have been made in the subsequent year in the case of *Mitchell* v. *Urquhart*, 11 R. 553. This case also seems to have escaped notice. It was not cited in the discussion, and is not referred to in subsequent decisions, but it is very important, because the report bears that it was advised by the First Division after consultation with the Judges of the Second Division. The judgment of the Lord President is as follows:—"We are of opinion, after consulting with the other Judges, that this case being in its nature one appropriate for jury trial, and the sum at issue being above the limit fixed by the statute, there is no reason why the party appealing should not have the case so tried."

The next case in which a remit was made was the case of *Bethune* v. *Denham*, 13 R. 882, and the case of *Mitchell* v. *Sutherland*, mentioned in the note. In the argument in *Denham's* case the expression "trifling" is used; but the ground of judgment was the unsuitability of the case in itself for trial by jury.

This was followed by the case of *Nicol* v. *Picken*, 20 R. 288. The rubric in this case is obviously wrong, and is probably answerable for some of the false ideas that followed. But the same view as had prevailed in *Mitchell* v. *Urquhart* was again affirmed by the First Division, the next year in *Willison* v. *Petherbridge*, 20 R. 976, and reaffirmed the succeeding year in *Johnstone* v. *Hughan*, 21 R. 777.

We do not propose to go though in detail the causes in which since that date remits have been made to the Sheriff. They are perhaps not altogether consistent. But nearly all can be properly referred to the opinion that the cases were in themselves unsuitable for jury trial. Many of them were in fact trifling; and that circumstance, helped by the erroneous rubric in *Nicol* v. *Picken*, has probably given rise to the idea which is embodied in the motion now made before us, that because a case is small in its amount it ought to be remitted to the Sheriff. And at least in some of them the idea is actively contested, as, for example, in the judgment of Lord Adam in the case of *Dickie* v. *The Scottish Co-operative Wholesale Society, Limited*, 6 F. 112—"In this case the sum claimed is £50, so that *ex facie* this is a perfectly competent appeal under the Judicature Act. But a motion has been made by the defenders that the case should be remitted back to the Sheriff-Substitute in Glasgow, to be tried in the Sheriff Court there, on the ground that it is of such a trifling nature that it would be more appropriately dealt with in that manner. Now, as to the competency of such a course of action there can be no doubt. It is perfectly competent for us to send the case to a jury, to try it ourselves, or to remit it back to the Sheriff-Substitute. But when the Judicature Act has definitely fixed the sum to entitle the pursuer to a jury trial at £40, I do not think it right that we should fix it at any other figure. At the same time I quite admit that if it had appeared on the face of the pleadings that the case was in reality a trumpery case, and that the sum sued for had been raised to £40 merely for the purpose of bringing it within the provisions of the Act, I should not in such a case hesitate to send it back to the Sheriff Court, even though the sum sued for were very much larger than the statutory amount. Now, the test that must be applied is just this: Are the facts as pleaded such that no jury could be reasonably expected to award so large a sum of damages as £40? I cannot say that that appears to be the nature of the case now before us. Here we have a young man meeting with an accident and suffering an injury to his foot, which resulted, after a few weeks' treatment, in partial amputation. So this is the case of a young man who has been permanently mutilated, and I cannot say that I consider a case such as that a light one. If a jury saw fit to assess the damages at £40, I would not be prepared to say that that must of necessity be an unreasonable verdict. Such, then, being the circumstances of the case now before us, I cannot see my way to hold that it ought to be sent back to the Sheriff."

The principles to be deduced from the authorities are clear, and may be summarised thus—(1) When a case is appealed for jury trial the Court is not bound to grant a jury trial, but may either (*a*) decide the case on any legal ground which is capable of disposing of the case without inquiry, or (*b*) order inquiry by some other method than jury trial, if it considers jury trial unsuitable. Such inquiry may be either by proof before a judge in the Court of Session or by proof before the Sheriff; and in deciding between the two methods the Court will keep in view, in relation to the nature of the case, that the one course will, and the other will not, allow of ultimate appeal to the House of Lords on the facts. (2) In deciding whether a case is or is not

suitable for jury trial it will apply the same criterion as it does in cases raised before itself. That is to say, it will consider whether the action is of the class specially appropriated by statute to jury trial, and if so, whether there is any special cause for not so trying it. And further, as to amount, it will be guided by the standard fixed by the legislature, viz. £40, so that unless the action on the face of it discloses a claim which in the opinion of the Court could not reasonably be entitled to a verdict amounting to £40, it will not refuse a jury trial to an otherwise appropriate case.

The application of these views to the present case is that we shall allow an issue with the view of the case being tried by jury.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR, concurred.

LORD PRESIDENT—That is the judgment of the Court; and the Second Division Judges have been consulted and concur in the opinion.

The Court allowed an issue.

Counsel for the Pursuer and Appellant—R. L. Orr, K.C.—A. A. Fraser. Agents—Struthers, Soutar, & Scott, Solicitors.

Counsel for Defenders & Respondents—G. Watt, K.C.—A. M. Hamilton. Agents—Sharp & Young, W.S.

Wednesday, May 24.

SECOND DIVISION.

[Lord Low, Ordinary.

PATTERSON *v.* LANDSBERG & SON.

Sale—Rescission—Misrepresentation—Res ipsa loquitur.

Circumstances in which (*affirming* the judgment of Lord Low) the sale of certain articles made up by the seller to look like antiques was rescinded on the ground of misrepresentation.

Opinion by Lord Kyllachy that the appearance of age and other appearances presented by the articles constituted by themselves misrepresentations—in short, that the case was really one of *res ipsa loquitur*.

Agnes Greenoak Patterson, dealer in engravings, 54 George Street, Edinburgh, brought this action against H. Landsberg & Son, diamond merchants, 52 Hatton Garden, London, concluding for the rescission of the sale of certain articles sold to her by the defenders and for the repayment of the purchase prices.

A proof was led before the Lord Ordinary (LOW). The facts of the case are sufficiently set forth in the opinions of the Lord Ordinary and of the Judges of the Second Division.

On 17th January 1905 the Lord Ordinary pronounced an interlocutor finding the defenders bound to accept return of the articles in question, with the exception of the "engraved emerald" brooch, and to make repayment of the sums paid by the pursuer to them in respect thereof.

Opinion.—"The pursuer is a dealer in engravings, curios, and the like in Edinburgh, and the defenders are diamond merchants in London. The object of this action is to have the sale of certain articles of jewellery, which the defenders made to the pursuer, set aside, on the ground that she was induced to make the purchases by false representations on the part of Mr Louis Landsberg, the only member of the defenders' firm.

"One branch of the defenders' business consists in designing and making (or having made for them) articles of jewellery in imitation of ancient jewels or of jewels having a historical interest attached to them. Three of the articles to which this case relates are of that kind. One is a necklet and pendant in the fashion of the eighteenth century, the pendant containing a picture of a lady who is supposed to represent Flora Macdonald. Of course what the jewel suggests, and was intended to suggest, is that it is an old jewel, in some way connected with, or commemorative of, the romantic friendship between Flora Macdonald and Prince Charles Edward. The second article is a miniature of Queen Victoria enamelled upon gold, and set with pearls and diamonds. The portrait, which appears to have been taken from a painting, represents the Queen as a very young woman and in coronation robes, and the pearls with which the miniature is set are of the yellowish tinge which apparently old pearls assume. Here again the suggestion is that the jewel was made about the time of, and to commemorate, the coronation of the late Queen. The third article is a brooch containing an enamelled picture of the Duke of Albemarle. On the back is a coat of arms and the date 1650. This article was intended to represent an old trinket commemorative of the elevation of General Monck to a dukedom, although the date (1650) is ten years before that event occurred.

"Mr Salvesen argued that this branch of the defenders' business was necessarily a dishonest one, as the very object of making such articles was to deceive. I should not like to go so far as that, although the dealing in such articles, if not conducted with great care, lends itself to dishonesty. If, however, such articles are sold by the maker without any representation being made in regard to them, the purchaser buys at his own risk, and he will not be entitled to rescind the contract on the ground that he made the purchase in the belief that the articles were in fact what their appearance, workmanship, and design suggested them to be. In order to succeed in this action, therefore, the pursuer must establish that she was induced to purchase the articles in question by false representations by the defenders.

"The Flora Macdonald ornament was the first of the articles which the pursuer purchased. She says that the defender Mr