Agents for Mrs Irving—Richardson & Johnston, W.S.

Agents for the Second Party—Maitland & Lyon, W.S.

Thursday, February 23.

FIRST DIVISION.

M'INTOSH *v.* FRASER.

Aliment — Bastard — Presumption. Circumstances in which the father of an illegitimate child was assoilzied from a claim of aliment, at the instance of a party who had subsequently married the mother.

Observed that where an action is brought for aliment alleged to have been furnished to an illegitimate child above seven years of age, the burden lies on the pursuer to prove that he made the disbursements, the presumption being that the child is able to do something for its own support.

This was an appeal from the Sheriff-court of Sutherland and Caithness. Neil M'Intosh, fisherman at Pulteneytown, Wick, sued Norman Fraser, gamekeeper at Kildonan, for the aliment of an illegitimate child, of whom the defender was the admitted father, and whose mother had been afterwards married to the pursuer. The child was born in March 1854. Catherine Sinclair, the mother, was married to the pursuer in November 1860, and died in January 1869. The pursuer claimed (1) aliment at the rate of £5 a-year, due to Catherine Sinclair for the child, in respect of the time previous to her marriage, to which debt he had succeeded *jure mariti*, credit being given to the defender for £14 paid to Catherine Sinclair to account; (2) the sum of £8 a-year from December 1860 to December 1868, for aliment, books, and education alleged to have been furnished to the child during that period by the pursuer.

The defence was, that the defender had from time to time, during the first seven years of the child's life, contributed sums for its maintenance, amounting on the whole to more than £4 a-year, which was the usual rate payable by the father of an illegitimate child. In support of this statement receipts were produced, one signed by Catherine Sinclair for £13, and three others instructing payments to the amount of £10, not signed by the mother, but which the defender offered to prove were on her account. In addition to these the defender alleged that he had made further payments to the extent of £8, for which he got no receipts. In regard to the claim for aliment subsequent to that period, he averred that he had offered to take the child to his home and maintain him there; that the mother refused to part with the custody of the child, and consequently he pleaded that there was no further obligation on him to contribute to his support; *Adair*, 24th February 1860, 22 D. 897.

The Sheriff-Substitute (MACKENZIE) allowed parties a proof.

The pursuer stated in his evidence that his wife brought the boy to his house at their marriage; that during the time he lived in the house he did no work whatever, except for four weeks; and that with that exception his maintenance, clothing, and education had been entirely defrayed by the pursuer.

A number of letters were produced, written by the defender to Catherine Sinclair between March 1854 and November 1861. In these he expressed interest in the boy's welfare, begged her to treat him kindly and send him to school, referred to remittances which he had made through various channels, and frequently asked for receipts. The defender stated that soon after the birth of the child he had agreed with the mother that the aliment should be £4 a-year. Other evidence was led, more or less corroborating the defender's statement as to payments made to the mother. The evidence as to the defender's offer to take the child was not very distinct, but the letters showed that the mother was unwilling to part with the child. The boy himself was examined as a witness for the defender. He entirely contradicted the pursuer's statement that he had been at the sole expense of his upbringing from the time of his mother's marriage. The boy stated that for the first year of this period he had lived with his grandmother, and with regard to the rest of the period, he stated that his aunts had supplied him with clothing, and that from the age of nine he had earned considerable sums by his own industry.

The Sheriff-Substitute (MACKENZIE) sustained the defences, and assoilzied the defender.

The Sheriff (FORDYCE) altered, and found the defender liable for aliment at the rate of £5 a-year for the first period, and £6 a-year for the second period.

The defender appealed.

MACKINTOSH for him.

BUNTINE for pursuer.

At advising—

LORD PRESIDENT—I cannot concur with the Sheriff; and I am disposed to concur in the result arrived at by the Sheriff-Substitute. The claim divides itself into two parts, (1) aliment for the first seven years of the child's life; (2) aliment for the remaining period. It is a most remarkable circumstance that, though the mother was married in 1860, and survived till 1869, she never made any demand on the defender. The pursuer tells us in his evidence that his wife frequently asked him to prosecute the defender for the aliment of the child. Now, the wife died in January 1869, and this action was raised in March of that year. It is impossible to reconcile this fact with the pursuer's statement, that his wife was always urging him to prosecute the claim, and that he notwithstanding refrained. This gives a most unfavourable aspect to the pursuer's case in both its branches. I must hold it to be the fact, that during her life the wife not only never made, but never intended to make, any claim. As regards the first branch of the claim, I am not much concerned about the bargain said to have been made between the parents of the child, nor again about the exact sum of money that was paid by the defender. It is sufficient to find that during the seven years money was constantly and periodically passing between the defender and the mother, and that soon after the seven years the last payment was made, and no further payments made or demanded. The fair conclusion is, that the defender fulfilled his obligation of providing aliment for the child.

With regard to the second branch, the case is, if possible, still stronger against the pursuer. He claims for an account of £66, beginning with December 1860 and ending December 1868, for aliment, books, and education. This is a branch of the claim which the pursuer was bound to instruct

by evidence. He says that it cost him £10 a-year. He puts a brother fisherman into the witness-box, who estimated the outlay for a boy in that rank at £11 or £12 a-year. I can only say that if the son of a fisherman at Wick costs his father £11 or £12 a-year, fishing at Wick must be a much better trade than is generally supposed. But the claim for £66 is quite capable of probation, and requires probation. It was not to be presumed like the other. It was for the pursuer to show that he had disbursed the money for maintenance, education, and clothing of the boy. There is not a tittle of evidence for any of these items. The boy says that he was to a great extent able to maintain himself, and no attempt is made to shake his evidence. But this is not necessary for the defender's case, and I am willing to leave it out of account. The burden lay on the pursuer, and it is no very heavy burden, to prove that he made the disbursements. The presumption is the other way. It is natural to suppose that when the boy came to that age he was able to do something for himself.

LORD DEAS—I think that both parties behaved very well before they got into this unfortunate litigation. The letters of the defender are creditable to him, and, on the other side, the woman and her husband behaved well to the boy, and he seems to have got a very fair education. But this action cannot succeed. There is no doubt that £4 a-year is a reasonable aliment for the first seven years, and, moreover, I think that it was agreed on. When we come to the end of the seven years, there is not just the satisfactory proof of the defender's offer to take the child that might be desired. I think that the wife was unwilling to part with the child, and the husband, much to his credit, was willing to indulge her; and so the matter was allowed to drop.

LORD ARDMILLAN and LORD KINLOCH concurred.

Defender assoilzied.
Agent for Pursuer—J. A. Shield, S.S.C.
Agent for Defender—William Mitchell, S.S.C.

Thursday, February 23.

SECOND DIVISION.

YOUNG *v.* GUTHRIE.

Property—Gable—Conterminous Proprietor—Superior and Vassal. The superior of two conterminous feuars bound each of them to build a house within two years after acquiring the feu, and to gable together. *Held* that one feuar who had built a house had no right to compel his neighbour, who had not built a house, to pay half the expense of the mutual gable, and that the obligation to build was enforcible by the superior only.

This was an action by James Guthrie, builder in Stirling, against William Young, residing in Stirling, concluding for payment of £37, 18s. 2½d., being a half of the expense of the north gable of a dwelling-house, and of £7, 14s. 5½d., being a half of the expense of the garden wall running westward in a line with said gable, lying on the south side of Cowane Street in Stirling, both gable and wall having been built by the pursuer, and they and the relative ground being marked No. 40 on the plan of the lands there of Cowane's Hospital in Stirling, and belonging to the pursuer. The defender had acquired right to the piece of ground next to the pursuer's feu, but had erected no building upon it. The defender's author had acquired the piece of ground at a public sale from Cowane's Hospital, conform to articles of roup and minutes and additions thereto, in 1852. By these articles of roup and additions, and minute of sale annexed thereto, it was provided that a dwelling-house should be built on said lot within two years after, and it was also provided that the houses to be erected should gable together.

The Sheriff-Substitute (SCONCE) found—"That the pursuer's house is in the contemplated position, and that the defender is bound to gable with him; and further, that as by the articles the feuars are bound to gable together, and that as the pursuer has, in pursuance thereof, erected a mutual gable between the defender's lot and his, he has a good title to sue for half gable; that the conditions of sale being that the lots shall be sold for building purposes, and that the purchasers of lots shall erect dwelling-houses within two years; and the defender is now bound to pay the pursuer for the half of the said mutual gable. As to the half of the boundary walls claimed, that the fence stipulated in the articles and minutes, and even in the pursuer's own disposition, being a hedge, the defender is not liable to the pursuer in half of the expense of the walls which he has thought proper to build, and assoilzies the defender from the claim therefor."

The Sheriff (BLACKBURN) found—"That on a sound construction of the original articles of roup of 1802, as altered and added to by subsequent minutes, and in particular by the minute of roup of 11th February 1837, the defender is not bound to build on his said lot within any limited time, and therefore finds that he is under no special contract with the pursuer at present to pay for the said mutual gable; and to that effect and extent alters and recalls the interlocutor of the Sheriff-Substitute appealed against; and *quoad* the pursuer's present claim for payment of the half of the expense of the mutual gable, sustains the defender's appeal, and dismisses the action."

The pursuer appealed.

GUTHRIE SMITH and R. V. CAMPBELL for him.

SHAND and ASHER for respondent.

The following cases were referred to in the discussion:—*Earl of Moray*, 21 D. 33, Bell's Dec. (Ross), p. 403; *Wilson*, H. L., 12th July 1870; *Thorburn*, 10 S. 822; *Law*, 18 D. 125.

At advising—

LORD BENHOLME—Both the pursuer and defender may be stated to be conterminous feuars under a feuing plan granted by the patrons of Cowane's Hospital. This feuing took place under articles of roup in 1802, which contain the following condition in the 5th article—"That the purchasers shall be obliged within two years after their entry to build upon each of the lots feued by them respectively a neat dwelling-house, covered with Easdale slates, at least two storeys high, with hewn doors and windows, and to have entries through the middle of them to the ground behind, where all dung-steads are to be kept. That the houses shall be built fronting the street, and gabelling together agreeable to the plan; and failing of the feuars building a house upon each lot, and laying out the ground in manner foresaid, their lots shall revert to the hospital, and be at the disposal of the patrons, and