Tuesday, March 20.

FIRST DIVISION.

[Sheriff of Mid-Lothian.

HAMILTON *v.* HAMILTON.

Appeal — Competency — Act of Sederunt 1828, *sec.* 5.

Held that an appeal against a judgment of the Sheriff on a question of aliment at the rate of 2s. 6d. a-week for a man of 66 years of age, did not fall within the provisions of the 5th section of the Act of Sederunt of 11th July 1828.

Aliment—Parent and Child—Relevancy.

A father brought an action for aliment against one of four children. The defender pleaded that the other children ought to have been called. The Court *repelled* the plea, on the ground that the defender did not state that the other children had a superfluity of means, in which case alone they could be held bound to aliment their father.

This was an action for aliment, at the rate of 2s. 6d. a-week, by William Hamilton senior against William Hamilton junior, his son. The defender stated that the pursuer had three other children, but he made no averment as to their means. He also stated that his own wages were 21s. a-week, and that he had a wife and two children dependent on him for support.

The defender pleaded—"(1) The pursuer's other children not having been called along with the defender, the action ought to be dismissed. (2) The pursuer being able to earn his own livelihood, and being possessed of means of his own, is not entitled to support from the defender. (3) The defender's wages being barely sufficient for the proper maintenance of himself, his wife, and family, he is not liable to support the pursuer."

The Sheriff-Substitute sustained the defender's first plea in law, and dismissed the action, adding the following note:—

"*Note.*—The pleadings not having been revised, the pursuer had not an opportunity of answering the defender's first statement. But the debate was taken on the footing that the pursuer has other children than the defender. It was contended that, like an inspector of the poor seeking to relieve the rates, a father suing an action of aliment against his children is entitled to choose his victim.

"It is thought that this contention, for which there was no authority cited, involves a material error. There is no real analogy between the cases. An inspector of the poor is a public officer, not supposed to know anything of the arrangements *intra familiam*, and on whom it would be manifestly inexpedient and absurd to impose the burden of seeking out all the supposed pauper's children before he could sue any one of them for relief given by him to their parent. The father himself is in a quite different situation. He knows who his children are, and what is their condition in life. To let him select one of them as his legal debtor would be to sanction manifest injustice. All must be called in order that the burden incumbent upon all may rightly be distributed among them, the same legal *nexus* being laid upon each. (See *Laidlaw* v. *Laidlaw*, July 3, 1832, 10 S. 745.) If all do not reside in the same sheriffdom, then the Court of Session becomes the proper forum."

The pursuer appealed to the Sheriff (DAVIDSON) who recalled the Sheriff-Substitute's interlocutor and repelled the first plea in law for the defender.

The defender appealed, and the pursuer contended that the appeal was incompetent under the 5th section of the Act of Sederunt of 11th July 1828.

At advising—

LORD PRESIDENT—I am quite satisfied that the appeal is competent, and that the 5th section of the Act of Sederunt of 1828 does not apply. That clause was intended to apply to the case where the claim was not simply pecuniary, so that it could not appear on the face of the bill that it was not above £40. It appears to me that this claim is simply pecuniary, and that a claim of £5 a year of aliment for a man of 66 years of age is a claim for more than £40. Upon that I can have no doubt, and I am therefore of opinion that the appeal is competent.

With regard to the first plea in law for the defender, I should have thought it worthy of consideration if it had been supported by a relevant statement of fact. If it was to be maintained that other children should be called, it was necessary not only to aver that there were such children, and that they were in a position to support themselves, but also to state that they were possessed of such a superfluity of means as would enable them to contribute to the support of their father.

In order to support a claim of a father, two things are necessary,—1st, that the father should be indigent, and 2d, that the children should have a superfluity after providing for the maintenance of themselves and their own families; unless both these circumstances occur the father has no claim. The allegation here is, that the defender is possessed of an income of 25s. a week, and that may raise a nice enough question—whether this is such an income as will enable him to contribute to his father's support after providing for his own family. But that question is not now before us and therefore I shall say nothing about it. There is no statement here with regard to the other children, and it is not therefore plain whether or not they can contribute to the support of their parent.

I think the Sheriff is right.

LORDS DEAS, MURE, and SHAND concurred.

Judgment of Sheriff affirmed.

Counsel for Pursuer—Mair. Agent—William Officer, S.S.C.

Counsel for Defender—Rhind. Agent—P. B. Hogg, L.A.