Wednesday, February 22.

FIRST DIVISION.

MORRISON AND OTHERS, PETITIONERS.

*Process—Sisting New Party to Petition—*44 *and* 45 *Vict. c.* 47 (*The Presumption of Life (Scotland) Act* 1881), *sec.* 9.

The Presumption of Life (Scotland) Act 1881 provides (section 9) that "Any number of persons entitled to succeed as aforesaid may be conjoined in one petition relating to the estate of the same absent person; and any person having a limited right of succession may appear as petitioner to the effect of having such right made effectual, subject to the provisions of this Act." In a petition under section 4 of the said Act, at the instance of three persons, who were respectively the father, brother, and sister of a fourth person who had disappeared, for authority to make up title to his moveable estate, after advertisement of the petition and proof taken on commission, the Lords *sisted* another brother as a party to the petition on his presenting a minute craving to be so sisted with a view to getting his share of the said estate.

Counsel for Minuter—R. V. Campbell. Agent—R. W. Wallace, W.S.

Friday, February 24.

FIRST DIVISION.

[Sheriff of Perthshire.

HAY *v.* HAY.

Sheriff—Jurisdiction—Husband and Wife—Aliment.

The Sheriff can only award aliment to a wife *ad interim* and in cases of immediate necessity.

Application of this rule in a case where the husband and wife had been judicially separated, and an award of aliment had then been made for the wife's support, the new application being for the maintenance of a child born after the separation.

In February 1881 Mrs Jessie Adam or Hay brought an action of separation and aliment against her husband James Hay, in which Lord Adam issued an interlocutor granting separation, and aliment at the rate of £40 per annum, and reserving to either party to apply to the Court for any further or other orders which might become necessary. On the 29th of March following Mrs Hay gave birth to a child, and in July she presented a petition in the Sheriff Court of Perthshire at Dunblane praying the Court "to grant a decree ordaining the defender to pay to the pursuer (1) the sum of £10 stg. of inlying expenses in connection with the birth of the said child, with interest thereon at the rate of 5 per cent. from 29th March 1881 till payment; and (2) the sum of £12 per annum for the period of ten years from said 29th March 1881 as ordinary aliment for said child."

The defender pleaded—That the action was incompetent, on the ground that it was only under the Court of Session action of separation and aliment already raised at the pursuer's instance, and the reservation contained in the Lord Ordinary's decree which followed thereon, that the pursuer's present claims could now be competently made.

The Sheriff-Substitute (GRAHAME) repelled this plea, and held that not only was it competent to the wife to bring an action for inlying expenses in the Sheriff Court, but that this was the only course by which her claims could be enforced, as the alimentary conclusions of the Court of Session action were limited to the personal aliment of the pursuer. The Sheriff (MACDONALD) adhered to this judgment, and on the 28th October 1881 the Sheriff-Substitute issued the following interlocutor:—Finds in point of fact that the pursuer gave birth on or about 29th March 1881 to a child of which the defender must be held to be the father: Finds in point of law that the pursuer's inlying expenses and the aliment of said child fall to be paid by defender; fixes the amount of the pursuer's inlying expenses at £4 with interest, as craved in the prayer of the petition, and the amount of aliment for said child at £12 per annum, with interest as craved."

Against this interlocutor the defender appealed to the Court of Session, and argued—Such an action in the Sheriff Court was without precedent and incompetent—Dove Wilson's Sheriff Court Practice, p. 346; *M'Donald* v. *M'Donald*, May 25, 1875, 2 R. 705. The Sheriff was wrong in holding that there was no difference in a question of his jurisdiction between an ordinary case of filiation and the claim of a married woman for the aliment of her children—*Corrie* v. *Adair*, 22 D. 897. The father might claim the custody of the child before the ten years were out—*per* Lord Kinloch in *Nicolson* v. *Nicolson*, July 20, 1869, 7 Macph. 1118; *Bourne* v. *Bourne*, December 8, 1880 (unreported); *Lang* v. *Lang*, January 30, 1869, 7 Macph. 445.

The pursuer argued—In the circumstances the action was competent—*Jackson* v. *Jackson*, March 3, 1825, 3 S. 610, 11 Geo. IV. and 1 Will. IV. c. 69, sec. 32; 1 Sheriff Court Reports, p. 154. Where a consistorial question did not arise, the Sheriff could give aliment to a wife—Fraser, Parent and Child, p. 117. No such question arose here, because separation had been granted to the wife, and therefore the action was competent.

At advising—

LORD PRESIDENT—The circumstances of this case are peculiar. On the 17th of February 1881 Lord Adam issued an interlocutor in the action of separation brought by Mrs Jessie Adam or Hay against James Hay, in which he "finds it proved that the defender James Hay has been guilty of grossly abusing and maltreating the pursuer, his wife; ordains the said defender to separate himself from the said pursuer *a mensa et thoro* in all time coming; ordains the said defender to make payment to the pursuer of the sum of £40 yearly of aliment to her; reserving to either party to apply to the Court for any further or other orders which may become necessary." Very soon after the decree was pronounced the respondent (the pursuer of that action) gave birth to a child on the 29th March 1881, and as that was a fact not

before the Lord Ordinary the maintenance of the child did not enter into his consideration. The respondent maintains that she is entitled to aliment for this child, and as a general proposition it is difficult to resist that claim, because additional expense has been caused to the respondent, but the mode of enforcing this claim raises a question of nicety. She resorted to the Sheriff and asked an award of aliment at the rate of £12 a-year for ten years from the date of the child's birth, and the Sheriff-Substitute issued a decree which is said to be in terms of the prayer of the petition. Whether he intended to do so admits of doubt; but I do not think that in any view we can adhere to the interlocutor as it stands. He fixes the inlying expenses at £4, and so far there cannot be any complaint, but the amount of aliment he gives for the child is £12 per annum with interest, and he decerns against the defender "as craved." Do these words "as craved" apply to the interest only or to the whole prayer of the petition? I think they must have been intended to apply further than the interest, because the prayer is that the said sum shall be paid monthly, and the Sheriff ordains that the aliment he allows shall be paid monthly just as the prayer demands, and if the words "as craved" must be held to apply to that, there is good reason for saying that they must be held also to apply to the term of ten years mentioned in the petition. However that may be, the Sheriff ought not to have granted aliment for ten years. His position in regard to jurisdiction involves a delicate question as to his judicial functions. No doubt one difficulty common in such cases is absent here, for separation has been granted by the proper consistorial Court. But still there is a difficulty in the Sheriff's dealing with the matter except as an interim arrangement, for in all questions between husband and wife the consistorial court is the proper *forum*, and the Sheriff can only interfere in cases of immediate necessity. The necessity in this case is limited to this, that some small sum should be awarded to let the wife maintain the child, but that may be liable to be interfered with by circumstances. Any alteration in the father's circumstances would be a ground of interference. So would an application on his part for the custody of the child. It is indispensable that every decree of this sort should bear on the face of it that it is merely *ad interim*, and a decree for ten years is not so, and I think that no term should be fixed but this, that aliment shall go on for the meantime but be terminable by any event which shall take the burden off the mother in any way. In regard to the amount, I think the Sheriff has been too extravagant. The wife has been already granted £40 per annum out of her husband's income which is little more than £100 a-year. Now, I am disposed to deal with this as an application for aliment additional to the allowance already granted in respect of the birth of the child rather than as an entirely separate action. Looking at it in that view, I think £7 per annum in addition would be a fair amount.

Lord Deas—It is an important fact that the wife got a judgment finding her entitled to separation foom her husband, for she thereby stands in such a position that there is no obstacle to this action in connection with the fact that she is his wife. I agree that the main construction of the Sheriff's power of awarding aliment to the child is that it is only *ad interim* so long as there is no change of circumstances calling for interference. For if it were to happen that the child could be claimed by the father, or if there were any alteration in the father's circumstances, then the decree would cease to be operative. In the meantime, although in this case the Sheriff has a right to interfere, he has only the right to interfere *ad interim*. He cannot fix a sum to be payable for a term of years. That would be adding materially to the provision already made, and I agree with your Lordship that the wife has substantial aliment from the husband already.

Lord Mure and Lord Shand concurred.

The Lords pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 28th October 1881: Decern against the defender for £4 sterling, as the amount of the pursuer's inlying expenses: Further decern against the defender for payment of aliment for the child borne by the pursuer at the rate of £7 per annum, payable monthly in advance, and beginning the first monthly payment on the 29th March 1881, with interest at the rate of 5 per cent. on each monthly payment from the time when the same falls due till payment is made, but declaring that the said decree for aliment is *ad interim*, subject to recal or rearrangement by this Court when any alteration of circumstances arises; find the pursuer entitled to expenses in this Court and in the Sheriff Court."

Counsel for Appellant — Guthrie Smith — Pearson—Kennedy. Agent—John Gill, S.S.C.

Counsel for Respondent—Brand—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Friday, February 24.

FIRST DIVISION.

[Dean of Guild of the Royal Burgh of Dundee.

RUSSELL *v.* COWPAR AND ANOTHER.

Property—Restriction—Servitude—Clause.

A restriction on a right of property will not be inferred, but must be clearly expressed; and where a clause may fairly bear either of two interpretations, that will be most readily adopted which is in favour of a proprietor's free use of his property.

Subjects in a town were held under a disposition which declared "that the said R and his heirs and assignees shall not be allowed to erect any buildings on any part of the said yard so as in any way to prejudice the lights of the other storeys of the said feutenement, but to use the same for a garden only." The proprietor having proposed to erect certain buildings thereon was opposed by the owners of the "other storeys." The Dean of Guild, himself an architect, being of opinion that the proposed buildings would