for what reason, if any. I must therefore order this summons to be of new served, and that in the old way by a messenger, and I will appoint a new diet of appearance; and I will do this in such a way as to render it unnecessary to send the case through the calling lists again."

Counsel for Pursuer—Lang. Agent—D. R. Grubb, Solicitor.

Tuesday, November 25.

OUTER HOUSE.

[Lord M'Laren.

BALLANTINE *v.* REDDIE.

Process—Remit—Reporter's Fee.

The accountant to whom a remit had been made in an action of accounting lodged his report without having received his fee. On his motion for payment—*held* that the parties to the action were jointly and severally liable for his fee.

This was an action of accounting. It was brought in May 1877 by William Wood, C.A., trustee upon the sequestrated estate of Andrew Fitzjames Cunningham Rollo Bowman Ballantine, Esq., against Charles Reddie, writer in Glasgow. The defender had been factor and law-agent for the bankrupt from June 1868 till his sequestration in December 1872. The pursuer alleged that a balance of at least £6000 in favour of the estate would be brought out on a just accounting. The defender denied this averment and stated he was willing to account. Accounts were lodged by him under an order from the Lord Ordinary.

On 20th November 1877 Mr Ballantine was discharged from the sequestration, and thereafter sisted as pursuer of the action. On 8th January 1878 Lord Curriehill remitted the accounts to Ebenezer Erskine Scott, C.A., Edinburgh, to examine and report upon them.

Mr Scott completed his report in 1883, and delivered it to the pursuer's agents. The case, which had fallen asleep, was wakened on 27th February 1884, and the report allowed to be seen. It was lodged on 29th February 1884, without Mr Scott having obtained payment of his fee as reporter. Objections were lodged by the defender, and the case stood in the roll for discussion.

Mr Scott thereafter, not having obtained from the parties payment of his fee, enrolled the case, and moved the Lord Ordinary for decree against the parties to the action for the amount of his fee.

The Lord Ordinary (M'Laren) issued the following interlocutor:—"The Lord Ordinary having heard counsel, decerns against the pursuer and defender jointly and severally for payment to Ebenezer Erskine Scott, C.A., Edinburgh, of the sum of two hundred and four pounds fifteen shillings sterling, being the amount of his fee for preparing the report under the remit to him of date 8th January 1878."

"*Opinion.*—My impression of the practice in cases of this kind is that decree is always given for the reporter's fee against the parties jointly and severally, leaving it to the reporter to recover one-half of the fee if he can from each party. In a recent case which went to the First Division I had found the parties liable jointly in payment of the reporter's fee, meaning in the special circumstances of that case that the liability was to be divided without relief; and the Lord President asked whether I meant the result to be as I have stated, or whether I meant only that the parties should be jointly responsible for the fee in the first instance. I understood from this that his Lordship considered that it was the ordinary practice to decern against the parties jointly and severally. With this recent case in view, I have no hesitation in finding the parties jointly and severally liable for the reporter's fee. With regard to the expenses of this application, I do not think that the reporter is entitled to them."

Counsel for Pursuer—Jameson. Agents—J. A. Campbell & Lamond, C.S.

Counsel for Defender—Nevay. Agents—J. & R. A. Robertson, S.S.C.

Counsel for Accountant—Pearson. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, November 25.

FIRST DIVISION.

[Sheriff of Ayrshire.

BELL *v.* REID.

Aliment — "Maintenance Money" — Compensation.

A father-in-law, who had become indebted to his son-in-law, conveyed all his property to him by an agreement which stipulated, *inter alia*, that the son-in-law should allow him £100 a-year for "maintenance." Thereafter a litigation between them took place, in which the son-in-law was successful, and was found entitled to expenses. *Held* that he could not set-off these expenses against the claim for maintenance, that being as between them an alimentary fund.

Question—Whether it would have been held an alimentary fund in a question with the other creditors of the father-in-law?

Thomas Reid, farmer, was tenant of the farms of Monktonmiln, Fairfield Mains, and others, in the parish of Monkton and county of Ayr, and he resided on one of these farms. In 1878, Reid, who had had certain transactions and litigations with Finlay Bell his son-in-law and the defender of this action, entered into an agreement, dated 1st and 4th February of that year, with Bell, whom he was at the time debtor to the extent of £8384, 4s. 3d.

The substance of the agreement was that Reid was to assign his leases and other property to Bell, who in return was to make him an annual allowance of £100. The third article of the agreement, which is the only one of importance in the present question, provided that . . . "the first party" (Bell) "shall pay the second party" (Reid) . . . "after the signing of this agreement, and until Martinmas 1893, a sum of £100 sterling for maintenance, payable half-yearly. . . . and declaring that in the event of

the death of the second party before the expiry of the leases, the first party shall pay Mrs Agnes Reid or Elliot, daughter of the said second party, the sum of £25 a-year until the said term of Martinmas 1893, if and so long as she remained unmarried." . . .

On 13th February 1884 Reid raised an action against Bell in the Sheriff Court at Ayr for £50 in name of aliment and maintenance-money due to him upon 4th February 1884.

Bell defended the action. He stated that in January 1882 the pursuer had raised an action against him in the Court of Session founded on the same agreement, and that in that action he (defender) had got decree for £6, 6s., as the one-half of the fee for an accountant's report which he had paid, and that he (defender) had been eventually successful in that action, and held a decree for £133, 7s. 2d., as the taxed amount of his expenses. These two sums he claimed to be entitled to set-off against pursuer's demand.

On 25th March 1884 the Sheriff-Substitute pronounced the following interlocutor:—"Finds in law that the defender is not entitled, in respect of the debts found due to him by the pursuer under the decrees, Nos. 7 and 8 of process [being those just mentioned], to plead compensation as a defence to the pursuer's claim for the half-yearly payment of £50 due under the agreement at 4th February 1884, 'for maintenance' to the pursuer: Therefore decerns in terms of the prayer of the petition: Finds the pursuer entitled to expenses, &c.

"*Note.*—The effect to be given to the clause in the agreement binding the defender to pay to the pursuer, 'until the term of Martinmas 1893, a sum of £100 sterling yearly for maintenance, payable half-yearly,' may involve a variety of questions of much nicety.

"The only question raised in the present action is, whether the defender, who came under this obligation, is entitled to apply the sum so agreed to be paid for pursuer's 'maintenance' to compensate a non-alimentary debt since incurred to himself by the pursuer?

"Looking to the age [above 70] and circumstances of the pursuer, and the dependence on him of his widowed daughter (for whom provision is made in case of his death), this sum which the defender, who is pursuer's son-in-law, bound himself to pay for pursuer's maintenance is a reasonable and proper provision necessary for pursuer's subsistence, and it is thought that the defender is not entitled to divert the sum so destined and specially appropriated to the pursuer's maintenance to payment of an ordinary debt incurred to himself.

"The question whether this provision is protected from creditors, who are third parties, may depend upon two considerations,—in the first place, whether although in substance alimentary, being for 'maintenance,' it is sufficiently expressly declared to be alimentary; and in the second place, whether the transaction under which the provision was made can be held to constitute a reservation by the pursuer of part of his effects to himself for his alimony (Ersk. iii. vi. 7) or a purchase for himself of an alimentary annuity.

"If the statement of the defender be correct, that the liabilities of the subjects transferred under the agreement are twice as great as their value, this payment undertaken by him, although arising out of an onerous transaction, would seem to be of the nature of a grant (repayable in a certain contingency) which he had power to qualify with such a restriction as should exclude creditors.

"Assuming this provision to be protected from the pursuer's other creditors, the passage quoted by Professor Bell (Com. i. p. 125, 7th edn.) from Pothier's Treatise on Obligations, i. 314, as one that 'might stand as a passage in a "Book of Scottish Law," would be directly applicable to the present case,—'A debt' (says Pothier) 'which is given or bequeathed to me to serve for my aliment, with a provision that it shall not be seized by my creditors, is a debt against which no compensation can be opposed. For as this clause is effectual to prevent it from being seized by a third party and applied in payment of my debt, so must it also for the same reason be effectual to prevent it from being applied by means of compensation in payment of what I owe to the debtor in it.'

"But apart from the question whether this fund is effectually protected from the pursuer's other creditors, the Sheriff-Substitute is inclined to think that the defender, by specific appropriation of it, inconsistent with the compensation claimed, has precluded himself from applying it to a debt due to himself not incurred for pursuer's maintenance."

The defender appealed to the Court of Session.

Before the appeal came on for hearing Reid (the pursuer in the Sheriff Court) died; his daughter, Mrs Elliot, was sisted in the action as his executrix.

Argued for the appellant—Supposing the £100 was alimentary, it ceased to have that character on Reid's death. On the general question, the word "alimentary" was essential in deeds of this kind, if the provision was to have that character attached to it. Here the word was "maintenance;" that differed from aliment. The provision was not fenced with such an expression as "not attachable for debt," or the like—Bell's Com. p. 125; *Irvine* v. *M'Laren*, Jan. 24, 1829, 7 Sh. 317; *Smith* v. *Earl of Moray*, Dec. 13, 1815, F.C. This claim was personal to Reid, and ended with his death.

Authorities—*Drew* v. *Drew*, Nov. 17, 1870, 9 Macph. 163; *Muirhead* v. *Miller*, July 19, 1877, 4 R. 1139; *Gordon*, M. 10,394; *White* v. *Duffus*, June 1, 1877, 4 R. 786.

Argued for respondent—The word "alimentary" was not indispensable—the Court could inquire into the whole circumstances of the agreement, and consider the true character of the provision. In this case "maintenance" was equivalent to "aliment."

Authorities—*West-Nisbet* v. *Morrison*, M. 10,368; *Dickson* v. *Broadfoot*, M. 10,396; *Dick* v. *Dick*, M. 10,387; Fraser on Husband and Wife, vol. i. p. 768.

At advising—

Lord Shand—The respondent here is designed as Thomas Reid, residing at West Orangefield, Monkton, but it appears that he has died since the application was presented in which the interlocutor now under review was pronounced. Reid presented an application in the Sheriff Court of Ayrshire, in which he prayed that decree should

be granted against Finlay Bell, flesher in Glasgow, residing at Monkton, in Ayrshire, for a sum of £50 in name of aliment, or maintenance-money, which became due to the pursuer on 4th February 1884, under an agreement which was recited in the record in the Court below. The defence was, that as the pursuer owed the defender certain sums of money, the defender was entitled to plead compensation against the pursuer's demand. The first of the sums was one of £6, 6s. for expenses in an action between the parties, and for which sum interim decree had been granted against the pursuer; the other, amounting to £133, 7s. 2d., was also made up of expenses occurring in a litigation, and for which the defender had obtained decree. It was stated to us during this discussion that the decree for this latter sum was dated some time after the present application was presented; but the appellant's explanation obviates any obligation of this kind, and makes it quite clear, I think, that the account of expenses, although not taxed and decerned for, had yet been found due, prior to the 4th February 1884.

The Sheriff-Substitute has held that the defender was not entitled in respect of the debts found due to him to plead compensation as a defence against the pursuer's claim, and he has placed his judgment upon the ground that the defender was not entitled to apply a sum destined and appropriated by him for the pursuer's maintenance in payment of an ordinary debt incurred to himself, and that whether this fund would be effectually protected from the pursuer's other creditors or not, yet the defender could not appropriate it in liquidation of a debt not incurred for the pursuer's maintenance.

I think the Sheriff-Substitute is right in the view which he takes of this case. The way in which the money became due was this:—In 1878, Reid, the pursuer, was tenant in possession of a number of valuable farms in Ayrshire, which Bell, the defender, who it appears is also his son-in-law, was his creditor for no less a sum than £8384. An agreement seems then to have been entered into between the parties by which Reid was to give up to Bell the right of possessing the various farms held under lease, and indeed all that he possessed. Bell was to carry on the farms, and as the counterpart of getting possession of them, he agreed to pay Reid a sum of "maintenance" money. All this is fully set out in article 3 of the agreement, which is in these terms.—[*His Lordship here read article 3, quoted supra*].

It is now maintained by the respondent's executrix that this allowance is alimentary, and that contention, I think, is sound. It is said to be for "maintenance;" that, perhaps, might not in itself be considered sufficient, but when we look at the whole circumstances of the case, which we are entitled to do in a question of this kind, the nature of the transaction becomes quite clear. Reid, who had been possessed of considerable property, consented to divest himself of everything in Bell's favour, who, in consideration of this, agreed to pay him £100 for maintenance, and to allow him a cow's grass and some other trifles, and then, in the event of Reid's death, a special provision was made for his daughter Mrs Elliot. Looking to these circumstances, then, I think that this allowance of £100 is alimentary in its nature, and that the defence set up to this claim cannot be maintained.

Had we been here in a question with the general body of creditors, that would have been an entirely different matter, and probably in such a case they would have been found entitled to claim this fund. That, however, is not Bell's position, and looking to the terms of this agreement, he is not in my opinion entitled to retain any portion of this stipulated annual sum in payment of the expenses for which he holds a decree.

Lord Adam concurred.

Lord Mure—I am of the same opinion. The sum demanded by the pursuer is explained in the prayer of the petition to be aliment or maintenance money due to him by the defender. Against this claim the defender produced a decree of expenses found due to him in a litigation between him and the pursuer, and the question comes to be, whether the pursuer's claim for maintenance-money can be met by a plea of compensation in respect of the sum of expenses which he is due the defender under decree. The circumstances of this case are so very special that I hardly think it necessary to refer to the principles which would have been applied had we been dealing with the case of a claim of a body of creditors. The question rises under a family arrangement between parties who stand to each other in the position of father-in-law and son-in-law, and it appears from the agreement that Reid, in handing over all he possessed to Bell, took in exchange an annual sum for his own maintenance. Some of the older authorities lay it down that to give such a fund the privileges of an alimentary fund the word "alimentary" must be used, or that there must be something in the agreement or deed declaring the provision to be of an alimentary character.

That, however, does not appear to me to enter into the present question, because I agree with the Sheriff and your Lordships in thinking that the party who has made this alimentary provision cannot be allowed now to set up a sum of debt against the other party to the agreement and plead compensation. I am for refusing this appeal.

The Lord President and Lord Deas were absent.

The Court pronounced the following interlocutor:—

> "Find in fact, that under the agreement founded on the sum sued for was an alimentary provision as between the parties: Find in law, as found by the Sheriff-Substitute in his interlocutor; and therefore refuse the appeal, and decern."

Counsel for Pursuer (Respondent)—Young. Agent—John Macmillan, S.S.C.

Counsel for Defender (Appellant)—J. P. B. Robertson—Dickson. Agents—Duncan & Black, W.S.