SUMMER SESSION, 1891.

COURT OF SESSION.

Wednesday, May 13.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

BRACKEN *v.* BLASQUEZ.

Process—Sisting of Mandatary.

In an action for aliment against the alleged father of an illegitimate child, the Sheriff ordained the defender, who had gone to Spain, to sist a mandatary. On appeal, it was stated by the defender's counsel that he had returned to this country, and undertook to remain here till the action was decided. *Held* that he was not bound to sist a mandatary.

Prescription — Triennial Limitation — Claim for Aliment of an Illegitimate Child.

A person who had been entrusted with the charge of an illegitimate child sued the alleged father for payment of an account for aliment extending over six years, alleging a verbal undertaking on his part to repay whatever sums might be expended on the child's maintenance. It was not alleged that the terms of payment or the amount of aliment had been fixed, but in the account rendered, aliment was charged at the rate of £4 a-quarter. *Held* that the triennial prescription did not apply to an account of this description.

In June 1883 Margaret Bracken gave birth to an illegitimate child.

In May 1890 Elizabeth Bracken, the aunt of Margaret Bracken, brought an action in the Sheriff Court at Edinburgh against Raymond Blasquez, a domiciled Spaniard, manager of the firm of Ruano & Company, esparto grass merchants, No. 3 Frederick Street, Edinburgh, for payment of an account for the aliment and maintenance of this child.

She averred (Cond. 3) that the defender was the father of the child. "(Cond. 10) In or about the month of October 1884 the defender, through the said Margaret Ann Bracken, agreed with the pursuer that she should take charge of the said child, and undertook to repay her whatever sums she should expend on his aliment and maintenance. With the exception of about a month in the spring of 1885, when the child was taken away by the said Margaret Ann Bracken, and lived with her and the defender, the said child has been maintained by the pursuer ever since. The pursuer produces herewith, and specially refers to an account showing the details of the expenditure made by her for said child, and amounting, with interest, as at 1st April 1890 to the sum of £104, 13s. Said sum is due and owing by the defender as father of said child to the pursuer." "(Cond. 11) The pursuer has repeatedly requested payment from the defender of the sums expended by her in alimenting and maintaining said child, but he refuses or delays to make payment, and also to make any arrangement for repaying the sums to be expended by the pursuer for the future maintenance of said child."

The account rendered amounted to £104, 13s., made up of £92 of principal and £12, 13s. of interest, aliment being charged at the rate of £4 a-quarter from October 1884 to April 1890.

The defender pleaded, *inter alia*—"(3) Prescription. Pursuer's claim is prescribed, so far as regards the items on and prior to 1st April 1887."

On 12th June 1890 the Sheriff-Substitute (HAMILTON), before answer, allowed parties a proof of their averments. On 19th December the Sheriff-Substitute, in view of the fact that the defender had gone to Spain, ordained him to sist a mandatary, and on 30th January 1891, in respect of the defender's failure to obtemper the order contained in the interlocutor of 19th Decem-

ber, decerned against him in terms of the prayer of the petition.

The defender appealed to the Court of Session, and at the hearing it was stated by his counsel that he had returned to this country, and undertook to remain here until the action was decided.

Argued for the defenders—(1) Looking to the fact of his return to this country and his undertaking to remain, the order upon the defender to sist a mandatary should be recalled. (2) The triennial prescription applied to the quarterly payment of aliment alleged to be due for the period prior to April 1st 1887, three years before the account was rendered—*Ligertwood* v. *Brown*, June 21, 1872, 10 Macph. 832, 44 Scot. Jur. 472; *Taylor* v. *Allardice*, January 16, 1858, 20 D. 401, 30 Scot. Jur. 224.

Argued for the pursuer—The defender was a foreigner, and the circumstances were not such as to warrant the Court in recalling the Sheriff-Substitute's order upon him to sist a mandatary. The decree ought therefore to stand.

The Court did not call upon the pursuer to argue the question relating to prescription.

At advising—

LORD PRESIDENT—I think we are in a position to dispose of this appeal. As regards the order of the Sheriff-Substitute ordaining the defender to sist a mandatary, that is obviated by the return of the defender to this country, and by his expressed intention to remain here until this action is disposed of.

The only question which has been argued to this Court has reference to the plea of prescription which has been stated on record. It is a question of some importance whether that plea is applicable to such a contract as is averred in the 10th article of the condescendence. It is there stated that "In or about the month of October 1884 the defender, through the said Margaret Ann Bracken, agreed with the pursuer that she should take charge of the said child, and undertook to repay her whatever sums she might expend on his aliment and maintenance." No rate of aliment is mentioned, and no statements are made or figures given from which the rate can be implied. The article then proceeds—"With the exception of about a month in the spring of 1885, when the child was taken away by the said Margaret Ann Bracken, and lived with her and the defender, the said child has been maintained by the pursuer ever since. The pursuer produces herewith, and specially refers to an account showing the details of the expenditure made by her for said child, and amounting with interest, as at 1st April 1890, to the sum of £104, 13s." Now, it does not appear to me that the circumstance of the pursuer's putting her claim for aliment into the form of a detailed account makes any alteration upon the nature of the question which we have to decide. The account merely sets forth the sums that the pursuer alleges she has spent on the child's behalf, and accordingly it carries us no further than article 10 itself does. In article 11 the pursuer states that she has "repeatedly requested payment from the defender of the sums expended by her in alimenting and maintaining said child, but he refuses or delays to make payment." There is no mention of any fixed sum as yearly or quarterly aliment,

I do not think that the defender has been able to quote any authority for the application of the triennial prescription to an account of this description. It is not said that there was any communication between the pursuer and defender as to the amount of expenditure to be allowed on the child's behalf. The statements are of the vaguest kind, and the only thing said is that there was an agreement that the pursuer should take charge of the child, and that she should be repaid whatever sums she might actually expend. The exact figures can be reached only by evidence, and that fact is of itself sufficient to exclude the operation of the triennial prescription,

Accordingly, I am for recalling the interlocutor of the Sheriff-Substitute as to the sisting of a mandatary, and for sending the case back to be tried by him in the Sheriff Court in common form.

LORD ADAM—There are two questions in the present case. The first relates to the interlocutors of 19th December and 30th January last ordaining the defender to sist a mandatary, and giving decree against him in respect of his failure to obtemper that order. At that time the defender had left the country, and accordingly these orders were very proper. Since that time he has returned, and I understand he is prepared to put in a minute undertaking to remain here until the present action is over. There is, therefore, now no case for sisting a mandatary.

The second question has reference to the application of the triennial prescription to such a transaction as that libelled. The account is set forth in an appendix, and is continuous, extending from 1884 to 1890—coming down in the last item contained in it to within three years of the present time. *Prima facie*, accordingly prescription is not applicable. But Mr Wilson says that *de facto* it is a termly account, and that prescription must run from the date at which each payment fell due. If that had been the nature of the account there might have been force in the plea which has been stated. But the averment made upon record as to the contract under which the account was incurred does not set forth that the defender undertook to make termly payments. It merely comes to this, that the defender undertook to repay to the pursuer whatever sums she might expend on the child's aliment and maintenance. The expenditure thus incurred is stated in the account to which I have referred, and the pursuer must prove in the ordinary way that the expenditure in question was made. I am clearly of opinion that the account is a continuous one, and accordingly that the triennial prescription Act has no application.

LORD M'LAREN—I concur with your Lordships in the view that there has been such an alteration of circumstances since the date of the Sheriff-Substitute's interlocutor that the defender ought not to be bound to sist a mandatary.

On the question of prescription it is to be kept in view that the Statute of 1579 enumerates various descriptions of debts, "house-maills, men's ordinaries, servants' fees, merchants' accounts, and others the like debts." It is enacted that these shall prescribe in three years, and that the creditor shall have no action unless he prove his case by the writ or oath of his debtor. I think it is evident that the statute has established a qualified presumption of payment, not an absolute presumption, but one having regard to the fact that people do not always preserve receipts or evidence of payment, and that it would not be fair to a debtor after the lapse of three years that he should be exposed to the risk of a dishonest claim being made against him for a debt which he had already discharged. In the interpretation of the statute one of the important questions has always been to determine whether a series of items shall be massed together and treated as one debt or shall be treated as separate debts. In the case of a current account, the items are treated as part of one debt, viz., the balance, and prescription runs only from the last date. The reason of this is, that in the case of a current account there is no presumption—certainly no strong presumption—of interim payment. The presumption is that payment has been made within three years from the date when the account was rendered. In the alternative case of house rents or aliment fixed at so much per year or per term, the practice is to make payment at each term, and accordingly each termly payment prescribes after three years from the date when it falls due. A debtor knows what his liability is, and the presumption is that he has settled for each term as it fell due, or at all events within three years after that date.

In considering under which of these two categories this case falls, I observe that some light is thrown upon the question by the citation from Mr Bell's Principles, where it is pointed out (sec. 629) that claims of relief by a party who has paid aliment fall to be treated as current accounts, and that prescription only runs in such cases from the last date of the account. I am not sure that in this passage the author means to enunciate a principle. He is merely stating the result of certain decisions. The presumption seems to rest on this, that there is not the same probability of payment in such cases as in those cases where there are agreements for termly payments, and if that is so, the principle appears to me to apply very strongly in the present case. Here there is no agreement alleged either as to the amount or the period of payment; there is only an undertaking to pay whatever might be advanced by the pursuer for the maintenance and aliment of the child. Accordingly, the undertaking appears to me to be of the same nature as these claims of relief, which have always been treated as current accounts. I am therefore of opinion that the plea of prescription as stated is not well founded, but applies only to the claim as a whole, the result being that prescription runs from the date of the last item in the account.

LORD KINNEAR was absent.

The Court recalled the interlocutors of the Sheriff-Substitute, dated 19th December 1890 and 30th January 1891: *Quoad ultra* repelled the 3rd plea-in-law for the defender, and remitted to the Sheriff to proceed with the proof.

Counsel for the Pursuer—Gunn. Agent—John Scott, Solicitor.

Counsel for the Defender—Wilson. Agent—A. W. Gordon, Solicitor.

Wednesday, May 13.

SECOND DIVISION.

HENRY-ANDERSON AND OTHERS (JOHNSTON'S TRUSTEES) *v.* JOHNSTON AND OTHERS.

Succession — Vesting — Settlement — Construction—Residue Disposed of "amongst those of my Relatives according to their Legal Rights."

A truster directed her trustees to pay half of the residue of her estate to her nephew on his attaining the age of twenty-five, and till then to hold it in trust and apply the income or one-half of the capital for his behoof. On his death before attaining that age without issue, his share was to go to the truster's brother and his children, to whom also the other half of her estate was to be conveyed on her death. By codicil the truster revoked the provisions in favour of her brother and his children, and with regard to the share of the residue in which they were interested under the settlement declared, "in the event of my death before executing a new settlement, such residue will be disposed of among those of my relatives according to their legal rights." Her heirs *in mobilibus* at the date of her death were her brother and nephew.

Held that the nephew's share vested *a morte testatoris*, and that the other half of the residue fell to be equally divided between the truster's brother and nephew.

Miss Margaret Johnston of Welton, Blairgowrie, died in Edinburgh on 14th July 1890. Her heirs *in mobilibus* at her death were her brother James Johnston and her nephew William Low Johnston. She left a trust-disposition and settlement by which she directed her trustees to convert her whole estate into money, and hold, apply,