machine in ordinary course. This of course put an end to the defender's agency, and the result was his outlays—the outlays to which I have referred—were thrown away. He now claims repayment of those outlays as damages for breach of contract, and the first question is whether a breach of contract has been committed.

"The pursuer argues that it was an implied condition of the contract of agency that it should hold good only so long as the company continued its business, and he assimilates the case to that of *Patmore* v. *Cannon*, 19 R. 1004, and the *s.s.* "*State of California*" v. *Moore*, 22 R. 562, following the case of *Rhodes*, 1 App. Cases 256.

"I am of opinion that these cases are inapplicable for two reasons. In the first place, I do not think it can be affirmed that the company at the date of the breach had ceased to carry on its business. The contrary, I think, appears from the record and correspondence. But, in the next place, it does not appear to me that the contract in this case can be really assimilated to the contracts under construction in the cases referred to. The somewhat onerous obligations undertaken by the defender as the *quid pro quo* for an appointment conferred on him for a definite period, make, I think, a sufficient distinction. But it is also, I think, a circumstance that the agency here takes the shape of an obligation by the company in absolute terms to sell their machines to the defender during the period of the contract at a definite price.

"The defender is therefore in my opinion entitled to damages, and subject to his handing over to the pursuer, as he offers to do, the gas-engine which has been thrown on his hands, I do not think his claim of damage is overstated.

"The pursuer, however, contends further that assuming the defender to be a creditor of the company for the outlays in question, he has no right of retention either general or special in respect of which he is entitled to refuse delivery of the company's property.

"I do not think it necessary to decide whether the defender, as the pursuer's agent or otherwise, has a lien over the machine in question for a general balance. But I think that he has a lien (implied under the contract by which he obtained possession of the machine) for all claims arising to him under and in virtue of that contract. To that extent the case of *Meikle* v. *Wilson & Pollard*, 8 R. 69, and *Robertson* v. *Ross*, 15 R. 67, are authorities in the defender's favour, and authorities which can be supported on general principles. As expressed by Lord Young in the former of those cases, the law implies a right of retention, *inter alia*, in all cases where property comes into possession of another than the proprietor under a contract which creates rights *hinc inde*. I think this is a case of that description, and I am therefore of opinion that on this point also the defender is entitled to succeed.

"The result, on the whole, is that I shall make a finding to the effect that the pursuer is not entitled to delivery of the machine sued for except on making payment to the defender of the sum of £100, 17s. 1d. due to the defender as set forth on record, the defender being always bound upon payment of said sum to deliver to the pursuer the said machine and the said gas-engine, and in respect of that finding I shall assoilzie the defender with expenses."

Counsel for the Pursuer—Brodie - Innes. Agents — Fraser, Stodart, & Ballingall, W.S.

Counsel for the Defender—Abel. Agent —R. Cunningham, S.S.C.

Tuesday, June 9.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SHIRREFS *v.* SHIRREFS.

Husband and Wife—Aliment—Process—Consistorial Causes—Aliment pending Action.

A wife brought an action of separation and aliment against her husband in which an interim award of aliment was made. She subsequently brought an action of divorce and no further procedure was taken in the action of separation. Decree of divorce in her favour was issued in vacation, but no award of aliment was made in the action of divorce. On the first day of the ensuing session the pursuer moved in the action of separation for a further award of aliment. *Held* that the motion was incompetent, on the ground that the parties being no longer married persons, the pursuer was not entitled to a decree for aliment in an action which assumed as the condition of its competency that she was the defender's wife.

On 29th November 1895 Mrs Elizabeth Taylor Cree or Shirrefs brought the present action, which was for separation and aliment, against John Gordon Lumsden Shirrefs, her husband. On 7th January the Lord Ordinary (KINCAIRNEY) decerned against the defender for payment of £20 in name of aliment, and also for payment of £20 to account of her expenses. Thereafter the pursuer discovered that she had grounds for an action of divorce. Accordingly she brought an action of divorce, and on 27th February 1896 the diet of proof in the present action was discharged. Proof was led in the action of divorce shortly before the close of the Winter Session, and decree of divorce in pursuer's favour was issued on 24th March 1896, during the Spring vacation. No decree for aliment was granted in the course of the action of divorce.

On 12th May, being the first Court day after the decree of divorce was pronounced, the pursuer moved in the action of separation and aliment, in which there had been no further procedure since the discharge of the diet of proof, for decree for payment of an additional sum in name of aliment.

The Lord Ordinary on the same day issued the following interlocutor:—"Refuses the motion, and in respect of the decree of divorce in the action between the parties, dismisses this action and decerns: Finds the pursuer entitled to expenses, under deduction of the expenses already allowed," &c.

The pursuer reclaimed, and argued—There could be no doubt that the defender was bound to aliment the pursuer during the dependence of these actions, and that she was entitled to a larger amount in name of aliment than she had already received. Decree of divorce was pronounced during vacation and this motion was made at the earliest opportunity. The pursuer had been alimented by third parties, and this was the most convenient and least expensive way for them to obtain repayment. The only alternative was a new action against the defender, which would be a needless expense. It could not be maintained that the application was incompetent. This was not a demand for arrears of aliment, and so *M'Millan* v. *M'Millan*, July 20, 1871, 9 Macph. 1067, was not in point. In *Donald* v. *Donald*, May 26, 1860, 22 D. 1118, opinions were reserved as to what would have been the decision if debt had been incurred, as was the case here. If it were competent to grant the application, it was unquestionably expedient.

Argued for the defender—It was incompetent to grant this application after decree of divorce had been pronounced. An action for aliment alone was incompetent, and in this action the conclusion for separation having been superseded by the decree of divorce, the conclusion for aliment, which was necessarily ancillary to that for separation, could not now receive effect. An award of aliment on this motion would not be an answer to an action by creditors of the wife for necessaries supplied to her pending the actions. In any view, there was no hardship to the pursuer or her creditors, because, in consequence of the decree of divorce, she had got a substantial provision out of which to meet her debts.

At advising—

LORD JUSTICE-CLERK—This case is in rather a curious position. [*His Lordship then narrated the steps of procedure above detailed.*] Having given the case the best consideration I can, I have come to the conclusion that there is no ground for altering the Lord Ordinary's judgment. If, as we are informed, this lady received any necessary supplies during the litigation, the persons who supplied her necessities have means for recovering their outlay from the defender. But such persons are not entitled to be aided in recovering their advances by decree in an action which assumes as the essential condition of its competency that the pursuer and defender are married persons at a time when they have ceased to be married to one another.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer—Ure—Crabb Watt. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender—A. O. M. Mackenzie. Agent—John Mackay, S.S.C.

Thursday, June 11.

SECOND DIVISION.

[Sheriff of Aberdeen, &c.

MACPHERSON *v.* LARGUE.

Parent and Child—Illegitimate Child—Affiliation—Proof of Paternity.

The pursuer in an action of affiliation alleged that the defender had had connection with her on a certain occasion. Her statement was corroborated to this extent (by evidence which was accepted as true), that she had been seen alone in the defender's company at the time and place alleged, but not in circumstances in themselves suspicious. The defender denied that he had been with the pursuer on the occasion alleged.

Held that his denial gave a complexion to the incident, and was legitimately treated as evidence leading to the inference that connection had taken place on the occasion in question.

This was an action at the instance of Helen Taylor Macpherson, Muir of Turtory, Rothiemay, against James Largue, farm servant, Lochagan, Banff, brought in the Sheriff Court at Banff. The pursuer sought aliment for an illegitimate child of which she alleged that the defender was the father. The defender denied the paternity.

The pursuer, who up to the time when the child was born was a domestic servant and dairymaid, had been at school with the defender, but after going into service, did not see anything of him for several years, until November 1894, when she met him on the road. Shortly after that the defender called for the pursuer on a Sunday at the house where she was in service, and was with her for some little time. He called again for her twice. The child was born on 31st August 1895. So far the facts were not in dispute.

At the proof which was led on 15th January and 5th February 1896, the pursuer deponed that on the first occasion of the defender's visiting her they had a walk in the grounds together, but this was denied by the defender. With regard to the second visit she deponed—"He came back again on the first Sunday of December between five and six o'clock. He came to the door, and I went out with him after answering it. He did not come in to the house. I went out with him. We went out past the front door, round about the grounds, and down at the back of the laundry, where we sat down. He had connection with me there. He told me that he loved me, and professed