by that in the recent case of *Cavers*, to which your Lordships have referred. In particular, I may quote as specially applicable an observation by Lord M'Laren. His Lordship said—"We are only concerned with a period prescribed by statute, and in the absence of express provision to the contrary I should hold that it was unnecessary to reckon by hours and minutes."

LORD M'LAREN and LORD JOHNSTON were absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Horne—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Jameson. Agent—D. R. Tullo, S.S.C.

Thursday, November 25.

FIRST DIVISION.

(SINGLE BILLS.)

PETRIE *v.* PETRIE.

Husband and Wife—Aliment—Expenses—Declarator of Marriage where Alleged Husband Dead—Interim Awards.

A lady raised an action of declarator of marriage against the executor-dative of her alleged husband, and obtained decree in the Outer House. The defender reclaimed, and the cause was sent to the roll. The pursuer then presented a note craving an award of expenses and of *interim* aliment.

The Court *granted* pursuer an award of thirty guineas for expenses and *interim* aliment, which, however, was fixed at merely sufficient for bare subsistence on the grounds that the obligation depended on the establishment of the marriage and the estate was small.

Mrs Annette Cooper or Gordon Petrie, who alleged she was the widow of Alexander Gordon Petrie, S.S.C., Edinburgh, raised an action of declarator of marriage with the said Alexander Gordon Petrie, and for an accounting, against Margaret Cathro Petrie, Fountainbleau, Dundee, as executrix-dative *qua* next-of-kin of the said Alexander Gordon Petrie, and also as an individual, and against George Petrie, Fountainbleau, Dundee, the only other next-of-kin known to her. On 3rd November 1909 the Lord Ordinary (SALVESEN), after proof, granted decree in terms of the declaratory conclusions of the summons, *quoad ultra* continued the cause, and granted leave to reclaim. On 10th November 1909 a reclaiming note was presented by the defenders, and on 12th November 1909 the case was sent to the roll.

The pursuer thereafter presented a note to the Lord President, which, *inter alia*, stated that the value of the estate given up by the executrix-dative, including a heritable bond for £500, amounted to £7133; and that the pursuer (respondent) was without sufficient means to aliment herself pending the disposal of the reclaiming note. The note craved for an award of aliment at the rate of £200 per annum, commencing as at 4th February 1909 (the date of the death of the said Alexander Gordon Petrie), and for the sum of £50 towards the expense of supporting the Lord Ordinary's judgment in her favour.

On 24th November counsel for the pursuer moved the Court to grant the prayer of the note, and argued—(1) In any case pursuer was entitled to an *interim* award of expenses—*Forster* v. *Forster*, February 18, 1869, 7 Macph. 546, 6 S.L.R. 355 (*voce Fleming* v. *Foster*). (2) *Interim* aliment should also be awarded. There was here a strong *prima facie* case that the pursuer was right; the Lord Ordinary had decided in her favour. It was not here the husband who was denying the marriage, and his executors' denial was not of the same force. These elements distinguished the case from *Campbell* v. *Sassen* (*cit. infra*), and *Browne* v. *Burns* (*cit. infra*), relied on by the defender.

Argued for the defender—(1) Any award of *interim* expenses should be small; pursuer could not obtain anything for past expenses—*Forster* v. *Forster* (*cit. sup.*)—and defender was willing to print any papers pursuer might think necessary. (2) There was no reported case in which an application for *interim* aliment by a wife suing for declarator of marriage had been upheld. It was refused in *Browne* v. *Burns*, June 30, 1843, 5 D. 1288, and when it had been granted in the Court of Session, it was said in the House of Lords that it ought not to have been granted—*Campbell* v. *Sassen*, May 23, 1826, 2 W. & S. 309.

At advising—

LORD PRESIDENT—This is an action of declarator of marriage at the instance of a lady, her alleged husband being dead, and it is defended by the executrix-dative of the deceased. The action has run its course in the Outer House and decree has been given in favour of the lady. The interlocutor giving decree has been reclaimed to this Division, and the case has been sent to the roll to await discussion in its turn.

Under these circumstances a motion is made on behalf of the lady, who if the decree stands was the wife of the deceased, for an allowance, first of expenses, and second of aliment. As regards expenses there can be no doubt, and indeed the learned counsel for the executrix did not contend against an allowance of expenses, for here the lady is *prima facie* right and should be allowed money to maintain the judgment in her favour before your Lordships. The lady being respondent in this Court has no expenses of printing, and, moreover, an offer has very properly been made by the executrix to print any papers she may wish to have printed. In these circumstances I think that an award of

thirty guineas in name of expenses is sufficient.

The question of aliment is perhaps more difficult, and several cases have been cited to us. I think, however, that the matter is well settled by decision and by the observations made, first in the House of Lords in the case of *Campbell* v. *Sassen*, 1826, 2 W. & Sh. 309, and then in this Court in the case of *Browne* v. *Burns*, 1843, 5 D. 1288. In *Campbell* v. *Sassen* aliment had been allowed in the Court of Session, but it was said in the House of Lords that it ought not to have been allowed. But then in all the cases where aliment has not been allowed the alleged husband has been present denying the marriage. Under these circumstances the grounds upon which aliment has been disallowed are plain. The husband appears and denies the marriage, and accordingly why should the Court assume that the lady is right rather than he? Even then expressions have been used by many Judges that if a strong *prima facie* case was presented they would consider themselves in a position to grant aliment, but what they have said they would not do was to give aliment while there was no proof of marriage.

It appears to me that in this case we have two very strong circumstances. In the first place proof has been led and a Judge has decided that the marriage took place. Now that is a very strong *prima facie* case. Indeed, it is more, because the presumption is that the Lord Ordinary has arrived at a right conclusion. In the second place the alleged husband is not here. The case is defended by his executrix, quite properly no doubt, because the lady not having entered upon the marriage state in a regular way has put upon herself the *onus* of proving her case; but at the same time the denial of the executrix cannot be of the same weight as the denial of the alleged husband himself, for the executrix cannot say that she has the knowledge of the husband himself. Therefore I think it is right to grant aliment in this case. At the same time, as the obligation to furnish aliment depends upon the establishment of the marriage, and as the estate in this case is not a large one, I do not think that we should grant more than sufficient for bare subsistence. We shall accordingly award interim aliment of £1 per week.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court decerned against the defenders for payment to the pursuer of the sum of one pound sterling weekly as aliment, commencing as at the 3rd day of November 1909, the date of the interlocutor reclaimed against, and continuing until the further orders of the Court; decerned further against defenders for payment to the pursuer of the sum of thirty-one pounds ten shillings sterling to account of her expenses in the Inner House.

Counsel for the Pursuer—Hunter, K.C.—Garson. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defender—Constable, K.C.—D. Anderson. Agents—Ronald & Ritchie, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, December 9.

(Before the Lord Justice-Clerk, Lord Low, and Lord Ardwall.)

WHILLANS *v.* HILSON.

Justiciary Cases — Procedure — Sentence — Competency — Misdemeanour — Offence Tried Summarily — Limitation of Sentence—Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65), *sec.* 13—*Night Poaching Act* 1828 (9 *Geo. IV, cap.* 99).

The Summary Jurisdiction (Scotland) Act 1908, sec. 13, enacts — "Any offence described in any statute as a 'misdemeanour' or a 'crime and offence' may be tried in the Sheriff Court either by indictment or summarily, and if tried summarily the imprisonment competent on conviction shall, without prejudice to any wider powers conferred by statute, not exceed three months."

The Night Poaching Act 1828 (9 Geo. IV, cap. 69), sec. 1, provides that a person offending against the Act a third time "shall be guilty of a misdemeanour," and "being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for seven years, or to be imprisoned and kept to hard labour . . . for any term not exceeding two years."

A person was charged on a summary complaint with a third offence under the Night Poaching Act 1828, and was convicted and sentenced to four months' imprisonment.

Held, in a suspension, that the sentence was incompetent in so far as it exceeded the limit of three months' imprisonment prescribed by the Summary Jurisdiction Act 1908.

Justiciary Cases — Procedure — Sentence — Restriction by High Court — Summary Jurisdiction (Scotland) Act 1908 (8 *Edw. VII, cap.* 65), *sec.* 75.

The Summary Jurisdiction (Scotland) Act 1908, sec. 75, in a proviso, provides—"... The High Court may amend any conviction, sentence, judgment, order of court, or other proceeding, or may pronounce such other sentence, judgment, or order as they shall judge expedient."

A person was convicted on a summary complaint of a contravention of the Night Poaching Act 1828, and was sentenced to four months' imprisonment.