Friday, July 20.

FIRST DIVISION.

[Sheriff Court at Alloa.

MURRAY *v.* FORSYTH.

Process—Parent and Child—Sheriff—Custody of Child—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 5 (2)—*Sheriff Courts (Scotland) Act* 1913 (2 *and* 3 *Geo. V, cap.* 28), *sec.* 3 *and First Schedule.*

The Sheriff Courts Act 1907, as amended by the Sheriff Courts Act 1913, provides that the jurisdiction of the Sheriff "shall extend to and include . . . actions for regulating the custody of children." *Held* that an action by a father to recover the custody of his legitimate pupil child from a third party was competently brought in the Sheriff Court, and, questions of the child's best interests having been raised in the defences, cause *continued* for discussion on the merits. Authorities *considered per* Lord Skerrington.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 5, enacts—"Nothing herein contained shall derogate from any jurisdiction, powers, or authority presently possessed or in use to be exercised by the Sheriffs of Scotland, and such jurisdiction shall extend to and include . . . (2) actions of aliment, or of separation and aliment, and for regulating the custody of children."

The Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V, cap. 28), sec. 3 enacts—"The principal Act shall be amended to the extent and effect shown in the First Schedule to this Act." And the First Schedule substitutes for section 5 (2) *supra* the following—"(2) Actions of aliment, provided that as between husband and wife they are actions of separation and aliment, adherence and aliment, or interim aliment, and actions for regulating the custody of children."

Joseph Murray, *pursuer*, brought an action in the Sheriff Court at Alloa against David Forsyth, *defender*, craving the Court to ordain the defender to deliver to the pursuer, within such time as the Court should fix, his pupil child Jean Donald Murray, presently in the possession of and under the control of the defender.

The *facts* of the case were—Jean Donald Murray was the lawful child of the pursuer by his second wife. She was born on 16th April 1908. The pursuer's first wife was a sister of the defender's wife. In the summer of 1909 the pursuer and his wife, together with the child Jean, were on holiday in Alloa. Another child had been born to them in March 1909, and the child Jean was by arrangement left with the defender, who resided in Alloa, when the pursuer and his wife returned to their home in Glasgow. That arrangement was for a limited period, but there were subsequent arrangements under which the child Jean continued to remain with the defender. The pursuer averred that those arrangements were temporary; the defender averred that the pursuer had handed over the permanent custody of the child to his wife.

The parties further *averred*—"(Cond. 5) In the years 1914, 1915, and 1916 the pursuer desired the said Jean Donald Murray to accompany him on his holidays, but defender refused to allow her to do so. (*Ans.* 5) Denied. (Cond. 6) Pursuer is the tutor and guardian of the said Jean Donald Murray, and is entitled to her custody. He desires the custody of said child, and has requested defender to hand over said child to him, but the defender refuses to do so, and unwarrantably and illegally retains the custody of said child, thus necessitating the present action. The defender's averments in answer are denied. (*Ans.* 6) Denied. In the beginning of October 1915 the pursuer again arranged with the defender for the child to remain in the custody of the defender. Explained and averred that the pursuer is unable, and has hitherto been unwilling, to provide a proper home, otherwise than with the defender, for the child. It is in the best interests of the child that she should be allowed to remain in the custody of the defender, where she has been and is being brought up carefully and where she is perfectly happy. The child is in bodily and well-grounded fear of being taken away by the pursuer. The defender's wife is attached to the child, and the child is happy and contented in defender's home. The defender is in a position to give the child a comfortable home and a good education, and has the intention of doing so. The pursuer is not in a position to attend to the child. It is believed and averred that the pursuer's wife, who has four other children to attend to as well as her father and the pursuer, is not now more able to attend to the said Jean Donald Murray than hitherto."

The defender *pleaded*—"1. No jurisdiction. 2. The action is incompetent. 4. It being for the best interests of the child that she should remain in the custody of the defender the action should be dismissed, with expenses."

On 10th January 1917 the Sheriff-Substitute (DEAN LESLIE) sustained the defender's first and second pleas-in-law.

Note.—[*After narrating the facts of the case*]—"The action is for the permanent custody of a pupil child.

"That such an action as between spouses was in the Sheriff Court incompetent at common law or under statute prior to the passing of the Sheriff Courts Acts 1907 and 1913 has been settled so far as this sheriffdom is concerned by the judgment of the learned Sheriff in *Cairns* v. *Cairns*, May 23, 1905, 21 S.C. Rep. 208.

"Here the question is not between spouses but between a father and a defender who avers no title to the custody unless under the agreement condescended on. The only defence is that hitherto the pursuer has been unable and unwilling to provide a proper home for the child, without any specification of facts to support the averment. The general question is thus sharply raised whether the Sheriff Court is empowered under section 5, sub-section 2, of

the Sheriff Court Acts 1907 and 1913 to deal with the permanent custody of children according to its discretion. Of the competency of regulating the interim custody of children in the Sheriff Court there is no doubt, but it is argued that the declaration in the section quoted enlarges the jurisdiction because there is no qualification of the expression 'actions regulating the custody of children.' Actions of separation and aliment, it is said, have been committed to that jurisdiction by the same section, and their importance is greater than that of the permanent custody of children. While that is so, bearing in mind that otherwise the determination of the permanent custody of children has hitherto been reserved for the *nobile officium* of the Court of Session, I am of opinion that the element of permanency is not necessarily implied in the word regulating, and therefore must hold that the competency of this action has not been established beyond doubt."

The pursuer appealed, and argued—At common law the Sheriff had a jurisdiction in an action in which a parent sought to recover the custody of his child from a third party who had stated no special defence—*Marshall* v. *Smith*, 1904, 21 Sh. Ct. Rep. 60. Apart from that, the action was competent—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 5 (2). The action therein referred to was not one ancillary to an action of aliment or separation and aliment, but a substantive independent action—Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V, cap. 28), sec. 3, and First Schedule. The words of those sections were plain, and extended the undoubted right of the Sheriff to deal with interim custody to permanent custody. It was immaterial that that interpretation might encroach upon the jurisdiction of the Court of Session. The fact that as a result the Sheriff would have power which a Lord Ordinary had not, caused no difficulty, for the same was true of the power to grant interim interdict, which could only be granted in the Bill Chamber.

Argued for the defender (respondent)—Prior to the 1907 Act (*cit.*) the Sheriff had no power to deal with permanent custody—Fraser, Parent and Child, p. 94; *Gillan* v. *Parish Council of the Barony Parish of Glasgow*, 1898, 1 F. 183, 36 S.L.R. 135. An application for the custody of a child was, except in a consistorial cause, an appeal to the *nobile officium*—*A B* v. *C D*, 1906, 8 F. 973, *per* Lord M'Laren at p. 974, 43 S.L.R. 731. If the appellant was right the result would be that the jurisdiction of the Inner House in petitions to the *nobile officium* would be devolved on the Sheriff, who would as a result possess powers exceeding those of a Lord Ordinary. All that was intended was that the Sheriff should have powers similar to those of a Lord Ordinary. Further, the only matter competent for the Sheriff was the "regulation" of the custody. That meant the variation of existing orders as to custody, and did not give him a right to decide the whole question of custody. A similar application had been held incompetent—*Mercer* v. *Mercer*, 1914, 31 Sh. Ct. Rep. 115. Further, the defences which had not been considered by the Sheriff showed that the question of the best interests of the child had been raised. That could be tried only in a petition to the Inner House. Such questions as were contemplated by the Custody of Children Act 1891 (54 Vict. cap. 3), secs. 1, 2, and 3, were also raised, and those were appropriated to the Inner House. In any event the action should be sisted to enable those questions to be tried if and when the pursuer presented a petition to the Inner House.

At advising—

LORD SKERRINGTON—At common law the Sheriff had power to make interim orders as to the custody of children in case of emergency. The question whether he also had jurisdiction to pronounce an order which professed to be permanent (though all orders as to custody are really *in hoc statu*) was stated by the Lord President (Inglis) to be one of delicacy—*Hood* v. *Hood*, (1871) 9 Macph. 449, at p. 455, 8 S.L.R. 320. So far as I understand the matter, the Sheriff had jurisdiction at common law to give effect to and enforce the *prima facie* legal title of a father to have the custody of his legitimate child, and the somewhat similar right of the mother to have the custody of her illegitimate child. The opinions in the case of *Brand* v. *Shaws*, (1888) 15 R. 449, 25 S.L.R. 332, 16 R. 315, 26 S.L.R. 199, support this view. On the other hand, the Sheriff's jurisdiction was ousted if the true question between the parties involved an appeal to the *nobile officium* for the purpose of overriding the parent's legal title, or to a statute such as the Custody of Children Act 1891 (54 Vict. cap. 3), which applied only to petitions for the custody of a child when presented to the Court of Session—*Mackenzie* v. *Keiller*, (1892) 19 R. 963, 29 S.L.R. 829; *Gillan* v. *Barony Parish Council of Glasgow*, (1898) 1 F. 183, 36 S.L.R. 135. It was, however, enacted by the Guardianship of Infants Act 1886 that applications by a mother for the custody of her child or for access to it might be made either in the Court of Session or in the Sheriff Court, but in the latter case any party to the application had a right to remove it to the Court of Session in the manner provided by and subject to section 9 of the now repealed Sheriff Courts (Scotland) Act 1877. In this somewhat confused state of the law the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) was passed, and it now falls to be construed as amended by the Act of 1913 (2 and 3 Geo. V, cap. 28). By this legislation (section 5 as amended), without prejudice to their existing jurisdiction, the Sheriffs' jurisdiction is declared to "extend to and include . . . actions for regulating the custody of children." These words, according to their natural meaning, include all actions as to the custody of children, and they cannot reasonably be limited, as has been done by the learned Sheriff in this case, so as to refer only to questions of interim regulation, or as was suggested in the argument to questions merely as to the regulation of custody, *e.g.*, by an order for access, in contrast to questions as to an

award of the custody. It is true that the wider construction involves a certain extension of the inroad initiated by the Guardianship of Infants Act 1886 into a territory formerly appropriate to the *nobile officium* of the Court of Session. That consideration, however (to quote from the opinion of Lord Kinnear in *Dunbar* v. *Dunbar*, 1912 S.C. 19, at p. 21, 49 S.L.R. 16) "does not justify the notion that a jurisdiction which Parliament has expressly conferred upon the Sheriff Court is suitable only for the Court of Session." The Sheriff Courts Act provides a remedy which the Sheriff will no doubt use in cases of delicacy, and which in my judgment it is his duty to use if an appeal to the Act of 1891 is really necessary in order to do justice between the parties. He can either on cause shown or *ex proprio motu* remit the cause at any stage to the Court of Session.

For these reasons, I think that the Sheriff-Substitute was wrong in deciding that he had no jurisdiction and that the action was incompetent. Although the defender's averments are somewhat vague, and although he does not in his pleadings expressly found upon the Act of 1891, I think that the Sheriff-Substitute might reasonably have exercised the discretionary power to which I have referred by remitting the case to this Court. As the case is here I think that the relevancy and merits of the defence should be decided in this Court.

LORD JOHNSTON—This matter has been the subject of consultation with our brethren of the other Division, and there is in detail some slight difference of opinion, more in detail than in substance. I take a somewhat different view from my Lord Skerrington, and I think it right that I should explain where that slight difference lies.

The application is for delivery to the pursuer of his pupil child, at present in the hands of the defender.

The defences disclose that the child has been in the custody of the defender's wife and himself for a period of seven years by agreement, which they understood, though of course this could not legally be, a permanent arrangement or adoption. The defences also raise, though not very fully and with bare relevancy, the question of the interest of the child. The Sheriff-Substitute, on grounds which I do think are sufficient, has held the application incompetent for want of jurisdiction. That question depends on the scope of the recent Sheriff Court Act 1907, section 5, as amended by the subsequent Act of 1913, section 3 and First Schedule.

At common law the Sheriff had no jurisdiction in cases of permanent custody—"permanent" being, however, not an absolute but a relative term, and to be contrasted with "in emergency" and "*ad interim*."

By statute the question of the custody of children has been recently several times dealt with. Passing over the Conjugal Rights Act 1861, section 9, there is the Guardianship of Infants Act 1886, which, confining itself to questions of custody arising between the parents, enacted (section 5) that the Court on the application of the mother may make such order as it may think fit for the custody of an infant and the right of access thereto of either parent. The term "Court" is defined to mean either the Court of Session or the Sheriff Court having local jurisdiction, but with a saving clause that nothing therein contained is to restrict or affect the jurisdiction of the Court of Session.

This provision so far as it goes quite clearly confers upon the Sheriff jurisdiction in certain cases regarding the custody of children, hitherto only competent to the Court of Session in the exercise of its *nobile officium*. The jurisdiction so conferred is, however, subject to this limiting condition (section 10) that in Scotland any application made under the Act to a Sheriff Court may be removed to the Court of Session at the instance of any party, in the manner and subject to the conditions provided by the Sheriff Courts Act 1877, section 9, which were that either party at any date prior to the record in the Sheriff Court being closed, or within six days thereafter, might require transmission to, and that on transmission the case must proceed as if raised, in the Court of Session.

But whereas the Act of 1886 thus for the first time gave the Sheriff a limited jurisdiction on this side of the question, there followed only five years later the Custody of Children Act of 1891, which dealt with the question of custody, not as between the parents but as in a question between the parents and a third party. It in fact empowers the Court, and the Court is limited to the High Court and the Court of Session, to interfere with the *patria potestas*, and to refrain in its discretion from enforcing the parent's right to the custody of the child in question with third parties. And it details carefully certain matters to which the Court in the exercise of that discretion is to attend, *e.g.*, the conduct of the parent and the costs which have been incurred by the third party in maintaining the child. I conceive that this statute was passed because of doubt whether even in exercise of its *nobile officium* the Supreme Court could deal with such cases in the manner in which it was proposed they should be dealt with.

But then the recent Sheriff Court Act in turn still further extended the jurisdiction of the Sheriff so as to include (section 5 (2) as amended) "actions of aliment, provided that as between husband and wife they are actions of separation and aliment, adherence and aliment, or interim aliment, and actions for regulating the custody of children," but, subject to the proviso that "on cause shown or *ex proprio motu*, the Sheriff may at any stage remit to the Court of Session any action" mentioned in section 5 (2).

This like many other of the crude changes introduced by the Act of 1907 leaves it in doubt whether it is intended to have as wide an effect as its literal terms would indicate. The draughtsman has evidently not been aware of the existence of the Act of 1891 to which I have referred. It is hardly to be supposed that whereas it was

thought fit and necessary to confer upon the High Court and the Court of Session discretionary powers to interfere with and restrict the *patria potestas* by a separate Act passed expressly to deal with the matter and carefully defining this discretion, it was intended by this sweeping clause of three lines to confer upon the Sheriff, even subject to the power to "remit" such cases to the Court of Session, the whole powers so conferred upon the High Court and the Court of Session by the Act of 1891.

When I come to consider and try to reconcile this course of legislation on the subject, I find myself brought to the conclusion that the Act of 1907, section 5 as amended, ought to be interpreted and applied in view of the continued presence of the Act of 1891 on the statute book, and of the distinction which certainly exists between cases of custody when arising between parents, and cases where they involve the assertion of the *patria potestas* against third parties. I do not think that I am justified in ignoring these considerations, because it may be said that there is just as much reason for conferring jurisdiction on the Sheriff in both classes of case as in either. Personally I do not concur in that view, but think that there is a distinction, and one with some foundation. I am therefore for giving to this new extension of the Sheriff's jurisdiction full effect in cases properly of the *nobile officium* order, not merely of the "emergency" but of the "permanent" kind, relying on the Sheriff exercising a wise discretion in remitting such cases to the Court of Session when proper, but to hold that it was not intended to confer on Sheriffs the discretionary powers of the Act of 1891, and therefore that when it is disclosed by the defences that a case of interference with the *patria potestas* is involved, it becomes the duty of the Sheriff to transmit the cause to the Court of Session. It is not until the defences are lodged that the true nature of the question at issue is disclosed. On the first view of the initial writ it may appear to be a mere emergency question. On the record being complete it may develop into a more serious and "permanent" question. Hence I think it is not to be thrown out *de plano* as incompetent but preserved and remitted.

I do not think that there is really much more than a difference in words between my view and that announced by Lord Skerrington, for, as far as I understand, he looks to the class of case where third parties are concerned as sometimes capable of being dealt with by the Sheriff and sometimes requiring an appeal to the Act of 1891. I think so also, provided it be not assumed that the Sheriff has jurisdiction in that class of case except they be *ad interim* questions—emergency questions, as for instance of a child being abducted and the parent seeking to recover it.

Where they come to be questions such as we have here, and particularly where the custodier of the child has received the child in a regular manner and has been at charges in that connection for its maintenance, and pleads that it is a question of the interest of the child, depending as that does largely upon the character and conduct of the parent, whether the application should be granted, I am of opinion that these are not questions in which there is any power conferred on the Sheriff, but in which it is necessary directly or indirectly to appeal to the Act of 1891. That being so, then if that appears on the face of the record when the defences are put in, I think that it is not merely a question of discretion but a question of duty on the part of the Sheriff to send the case to this Court.

LORD MACKENZIE—The question argued before us raises a point of general importance, and we have had the benefit since the hearing of considering the matter at more than one consultation with the Judges of the other Division.

I agree with the views expressed in the opinion of Lord Skerrington, and I do not think that I should add anything of my own except to say this, that I am unable to give a fair meaning to the language of the Sheriff Courts Act of 1907 as amended by the Act of 1913 and come to a different conclusion. It would not, I think, be dealing fairly with the Sheriff Courts Acts to exclude from the jurisdiction of the Sheriff all cases which hitherto have been properly dealt with under the *nobile officium* of the Court of Session. I think it may be left to the good sense of the Sheriff-Substitutes throughout the country to give effect in working the Act to what Lord Skerrington said in regard to their power to remit cases. The success of the actual working of the Act can only be tested by experience.

LORD PRESIDENT [*who had not heard the case*]—I did not hear this case, but I had an opportunity of considering it in consultation with your Lordships along with the Judges of the Second Division, and I agree with the views expressed by Lord Mackenzie and Lord Skerrington. So also do the Judges of the Second Division. Our views, as has been observed, did not differ materially from those just expressed by Lord Johnston.

The Court recalled the interlocutor of the Sheriff-Substitute and continued the cause for further procedure.

Counsel for the Pursuer—M'Laren. Agent—James G. Bryson, Solicitor.

Counsel for the Defender — Morton — Greenhill. Agent—James Bee, Solicitor.