Tuesday, January 24.

FIRST DIVISION.

MRS MARGARET PHILLIPS OR HOOD *v.* WM. HOOD.

WM. HOOD *v.* MRS HOOD AND MRS GLENNIE.

Husband and Wife — Aliment — Voluntary Contract of Separation — Revocation. Circumstances in which it was *held* that no sufficient and *bona fide* revocation had been made by a husband of a voluntary contract of separation into which he had entered with his wife, and that accordingly aliment was due to her *ex contractu.* But *held*, farther, that as her action had only been sustained on the contract, and the question of her right to aliment at common law had not been yet raised, and it being in the husband's power at any moment to make a valid and *bona fide* revocation of the contract, decree could only be given for aliment under the contract up to the date of the judgment, and not prospectively.

Parent and Child—Custody—Process—Sheriff-Court —Jurisdiction. Circumstances in which it was *held* that a petition at the instance of a father for custody of his pupil children, brought against the mother in the Sheriff-court, had been properly dismissed on the ground of the father's absence from the country, and other practical difficulties in the way of granting the prayer of the petition; reserving the question of the Sheriff's jurisdiction in such cases.

These two cases between the same parties, the one at the instance of Mrs Hood for aliment against her husband William Hood, the other at the instance of the husband, the said William Hood, against his wife and a Mrs Glennie, for custody of his children, were heard and advised together.

The first-named action, that for aliment, was on a previous occasion before the Court (*vide ante*, p. 79), when, though it was held that arrears of aliment were due to the wife in terms of a voluntary contract of separation, entered into between her husband and her, the decision of her claim for *interim* aliment was, under the circumstances, postponed, in order to give the husband an opportunity of proving the *bona fides* of the revocation of the said contract of separation, which he alleged he had made since the date of the summons. Accordingly, in compliance with the order of the Court, contained in their interlocutor of November last, the defender was communicated with, and a minute was now put in by his agents, in which it was stated that a reply had been received from him, dated Sherbrook, Upper Canada, December 5 1870, that the information conveyed by this letter was to the effect that the appellant had been for some time in the service of the Grand Trunk Railway, and was receiving 24 dollars a month, that he was shortly about to leave that service and proceed to a better appointment in the United States, though he could not at present give the amount of his expected wages, and did not state what part of the United States he was going to. That he was ready and desirous to receive his wife and children, and to afford them a home with him in the States. That he was ready to pay their passage out to Sherbrook, in Upper Canada, which was his present address, and to which communications for him were to be sent. He added nothing, however, about his future address, or about the date of his leaving Canada for the United States. The minute accordingly craved that, in respect the appellant had judicially revoked the voluntary contract of separation, and had now shown himself willing and ready to receive back his wife, and to make arrangements for her joining him, the action should be dismissed.

FRASER, for the respondent, contended that this should be granted, as the only ground upon which the Court had formerly sustained the pursuer's claim was the subsistence of the contract.

BLACK, for the appellant, argued that no proof of the appellant's *bona fides* had yet been given.

In the second action, that at the husband's instance, for custody of the children of the marriage, two in number, aged respectively five and three years, the circumstances were the same as previously narrated in the first stage of the former case, (*vide ante.* p. 79). The respondent in this action, Mrs Hood pleaded *inter alia.* 1, "This action is not competent in the Sheriff-Court, particularly as the averments made, with regard to the petitioner, raise the question of expediency, in deciding which of the parents should have the custody of the children, and it should therefore be dismissed, with expenses. (2) "The petitioner not residing in this country, and not having authorised this action to be raised, it should be dismissed, with expenses."

The Sheriff-Substitute (COMRIE THOMSON) at first sustained the jurisdiction of the Court, and on appeal the Sheriff (JAMESON) pronounced the following interlocutor:—

"*Edinburgh, 15th February* 1870.—The Sheriff having heard parties' procurators on the respondent's appeal, and having considered the process, dismisses said appeal, and adheres to the interlocutor appealed from.

"*Note*—The Sheriff has no doubt of the *competency* of this application. Whether it will be right to grant it will depend on the facts and circumstances, which have not yet been ascertained. In the case of *Harvey* v. *Harvey*, 24th July 1850, *in this Court*, and referred to by the Lord Justice-Clerk in giving judgment in *Harvey*, 15th June 1860, 22 Dunlop 1198, the Sheriff (Mr DAVIDSON), in the first instance *sustained* his jurisdiction; but after the circumstances were disclossed, and it appeared that the petitioner had been divorced on the ground of adultery, he found that this Court was not competent to deal with that state of matters, and dismissed the application."

Thereafter, on a record having been made up, the Sheriff-Substitute sustained the first plea in law for the defender, and dismissed the petition. On appeal, the Sheriff pronounced the following interlocutor:—

"*Edinburgh, 23rd July* 1870.—The Sheriff having considered the petitioner's appeal, with his reclaiming petition, answers thereto, and whole process, recals the interlocutor appealed from in so far as it sustains the first preliminary plea in law stated for the respondents, to the effect that the action is incompetent: Finds that the competency of the original application has been already sustained in this Court by interlocutor of the Sheriff-Substitute, of date 15th December 1869, affirmed by interlocutor of 15th February 1870; but finds that it appears from the closed record that the

children, of whom the petitioner claims the custody, are at present, and have been since the separation of the parties, under the care of their mother, against whose character and fitness to take charge of them no allegations are made, and that they are of the tender ages of five years and three years respectively: Further, finds it admitted that the petitioner is furth of Scotland, and in Canada: Finds that this Court has no jurisdiction to grant the warrant craved by the petitioner, which would have the effect of removing the said pupil children out of Scotland: Therefore, and *quoad ultra*, adheres to the interlocutor appealed from, dismissing the petition, and finding the petitioner liable in expenses, and decerns.

"*Note*—The competency of the original application was sustained in the first instance, for there can be no doubt that the Sheriff can, in a summary petition, regulate the *interim* custody of children. Had it appeared that the respondent, without cause, had capriciously removed the children from their home, and from their father's custody, the petitioner might have been entitled to the warrant he craves. But the record discloses a very different case, and therefore the action has been dismissed."

Against this interlocutor the pursuer appealed to the Court of Session.

FRASER, for the appellant William Hood, contended that the action was competent in the Sheriff-court, and that the writers upon Sheriff-Court practice cited against this view, confounded this action with proper consistorial causes. That if this action was competent, then there was no doubt as to the right of the father at Scotch law to the custody of his children, unless under the exceptional circumstances of a case such as that of *Harvey*, 22 D. 1198.

KEIR, for the respondent Mrs Hood, argued that the action was incompetent in the Sheriff-Court, that the extreme limit of the Sheriff's jurisdiction in these matters is merely to retain the *status quo*, or restore it if disturbed by recent violence. He referred to M'Glashan's Sheriff-Court Practice, p. 35; Dove Wilson's Sheriff-Court Practice, p. 15; and Fraser on Parent and Child, p. 81; and contended that the exercise of such a discretionary power as was here required was only competent to the *nobile officium* of this Court.

LORD PRESIDENT—It is a very common thing to confound the *nobile officium* of this Court with its equitable jurisdiction. I think you are doing so here.

FRASER, for the appellant, farther stated, that if their Lordships were against him in these preliminary points, and were going to dispose of the case on the merits, he then offered to go to proof upon the allegations on record; if this were refused, the case must be decided entirely upon the ground that the appellant was abroad, which he submitted could not be done.

At advising—

LORD PRESIDENT—There are two cases before your Lordships here between the same parties, and it is expedient that they should be decided together. The first is an action of aliment at Mrs Hood's instance against her husband, raised in the Sheriff-court of Forfarshire, and which has come here upon appeal. Your Lordships will recollect that in November last we pronounced an interlocutor decerning for payment of a sum as aliment under the contract of separation up to the date of raising the action, and, in respect of the suspicious circumstances of the case, ordered the defender, the respondent in this Court, to put in a statement which should satisfy us of his *bona fides* in revoking that contract, and in offering to receive back his wife. All we did, therefore, was to sustain the action as an action upon the contract, and decide that, at any rate up to the date of raising the action, the defender had not validly withdrawn from the contract. We have now to determine whether he has since done so. Our interlocutor directed him, by way of satisfying us upon this point, to inform us in a minute where he is at present resident, what are his means of supporting his wife, and what arrangements he proposes to make for enabling her to join him with their children, &c. Information on all these heads is necessary that we may judge of the defender's *bona fides*, and of the effect of his alleged revocation of the contract, and may farther dispose of the case. Now, a minute has been put in by the defender's agents after considerable delay, which was allowed to enable them to communicate with him. In this minute it is stated that a letter has been received from the defender, dated 5th December last. The import of that letter is, that the defender is employed upon the Grand Trunk Railway in Upper Canada, that he is about to remove to the United States, where his position will be better, and where he offers a home to his wife and children. But all this is entirely prospective; he does not state anything as to when he is going to leave Canada, where he is going to in the States, what the nature of his employment is to be there, and what the rate of his wages. He states farther that his address is still "Post-Office, Sherbrook, Upper Canada," and, though avowedly he is about to leave it, he desires that his wife and children will proceed thither, and offers to pay their passage money and expenses from their present abode. His proposal is, therefore, that his wife and children shall immediately proceed to Sherbrook, whereas he himself is avowedly about to leave it, and proceed nobody knows whither; so that, if his wife and children were to comply with his request, they might find themselves landed in the backwoods of Canada without funds, without the possibility of finding any trace of him, and without having any hold over him if they did. Certainly such a proposal as this can never for a moment be entertained by this Court as a ground to bar this action. The object of the minute was, that the defender might make such an offer as would entitle him to have the action dismissed. I confess I find no difficulty in holding that he has made no such offer—no offer that we can look upon as of a *bona fide* character. The action cannot therefore be dismissed *in hoc statu*. How far the wife may afterwards insist is another question.

Though this is enough to dispose of the question before us in the first action, I think it will be more convenient if I proceed to consider the second, before hearing what your Lordships have to say. In this second action we have also an appeal, this time from the Sheriff-court of Aberdeen, in a petition for the custody of the children, where the father is the petitioner. In this action he craves to have delivered to him "the said two pupil children, Margaret Hood and Alfred Hood, and that within a certain short space to be fixed by the Sheriff, failing which to have warrant granted to officers of Court to enter the said house No. 21 George Street, Aberdeen, as well as such other places as may be needful, and to search for and

take the custody of the said children, and thereafter to deliver the said children to the petitioner." This petition was presented while the husband was in this country, and the question was raised before the Sheriff, whether this case came under his jurisdiction. Now, this is a question of no little difficulty, and there has been as yet no authoritative decision of it in this Court. The Sheriff-Substitute at first sustained his jurisdiction in the matter, and then, when the circumstances of the case disclosed themselves, he altered that judgment. Now, I do not intend to express any opinion upon this subject at all, and do not think that I am required to do so as the case comes before us, for the following reasons:—While the case was in dependence before the Sheriff the petitioner left this country, and on 23d July last the Sheriff dismissed the petition, on the grounds, as I understand, that, whatever might have been his jurisdiction in the case under the original circumstances, it had become impossible for him to entertain the action now that the husband had left the country, to the effect of removing the children out of Scotland. Now that seems to me a reason which is so irresistible that I think we need not go beyond it. I took the liberty of asking the petitioner's counsel, in the course of his argument, what he proposed the Court should do with the children, and the answer was, that the petitioner's law agents, who were his mandatories in this country, were authorised to receive them. Now, the law agents of a person are certainly not the proper parties to take charge of his pupil children, and something more than an ordinary mandate would be required to entitle them to interfere in the matter at all beyond their proper sphere. But, supposing the petitioner's law agents were authorised to receive the children, what are they to do with them? They are not going to accompany them to Sherbrook, and yet, while they cannot travel alone, there is no other provision made for conducting them there—to say nothing of there being no provision for their reception if they by good chance did arrive,—and there is little prospect of their father being found there to take them in. Besides, therefore, the legal difficulty, there is also the practical difficulty to be overcome; and I think therefore that we shall be right in adhering to the Sheriff's judgment, so far upon the same grounds upon which he has gone, but declining to say anything upon the question of jurisdiction.

The other Judges concurred.

The question was now raised by the counsel (BLACK) for the appellant in the first action, as to how the question of future aliment was to be disposed of. He contended that he was now entitled to regular aliment, as the Court had held that the contract was still in subsistence, and that independently of his right at common law. Though the case was only in the roll for consideration of the above-mentioned minute, of consent of the respondent, this farther question was taken up in order, as far as possible, to exhaust the case.

FRASER, for the respondent, maintained that the action had only been sustained upon the contract of separation, and that, as his client's consent to that contract had been recalled, which it was quite in his power to do, the action could not be farther sustained, to the effect of giving future, or even interim, aliment. There might be a new action of aliment founded on the common law, but the ground for this present action had been taken away by his revocation.

LORD PRESIDENT—It must be kept in mind that we have sustained the action, at a previous stage, only so far as it is founded upon a contract of separation, and without a good deal more discussion and consideration, I am not prepared at present to sustain it upon the other grounds stated. At the same time, I am still of opinion that we are in a position to give farther effect to its conclusions, even though still viewed as merely an action based upon a contract, because there is now due under this contract, if it still subsists, more than another year's aliment since the raising of this action. Now, I am of opinion that the husband is still bound by the contract, and has failed to withdraw from his obligations under it, for his letters both to his wife and her agent, and the minute now put in, and the proposals they severally contain, were not written or made *in bona fide*, but with the sole object of getting rid of his obligation under the contract, without any intention of receiving back the pursuer as his wife, and affording her a home. Entertaining this opinion still, I am quite prepared to give farther decree for aliment up to the present date. But though ready to do this, on the ground that the contract has not been adequately revoked, I am aware that it may be revoked to-morrow, or at any future time, and I therefore cannot see my way to giving decree for aliment prospectively.

The other Judges concurred.

Agents for Wm. Hood (in the first action)—Muir & Fleming, S.S.C.

Agents for Wm. Hood (in the second action)—Henry & Shiress, S.S.C.

Agents for Mrs Hood—Macdonald & Rodger, W.S.

Tuesday, January, 24.

SECOND DIVISION.

CAMERON *v.* TILLYARD & HOWLETT.

Agent—Traveller—Bill. Circumstances in which *held* that a traveller, employed by a wholesale firm to collect orders and receive payment of accounts due to them, was not entitled to take bills granted in his own name in payment of trade accounts due to the firm.

This was a suspension of a charge upon a bill for £88, 7s. 6d., drawn by the respondents Messrs Tillyard & Howlett, and accepted by the complainer, Mr Cameron, shoemaker, Inverness. The question involved was whether a traveller of the name of Dungan, who was employed by the respondents, was authorised as their agent to accept bills in payment of accounts due to them. It appeared that on 3d December 1869 Dungan called on Cameron, who at that time owed to the respondents two sums, one of £50 odd, and the other of £88 odd. Cameron paid the first sum by a bill in favour of Dungan, which he retired at maturity; and in payment of the second sum he granted the bill, the charge upon which was now sought to be suspended, and which was payable on 6th April 1870. On 13th March the complainer informed Dungan that it would be inconvenient to retire this last bill at maturity. He alleged that "Mr Dungan thereupon offered to renew the bill to an amount to suit the complainer's convenience, and it was arranged between him and