

of this kind is created in an Act of Parliament, and itself imposes no personal liability, it would require very clear grounds before I would hold that any such liability existed. One would have expected that a personal obligation would appear on the face of the document itself. Keeping that in view, the 61st section is thus expressed—"Every charge on land by virtue of this Act may be recovered by the company, or the person for the time being entitled to the same, by the same means and in like manner in all respects as any feu-duties or rent or annual rent, or other payment out of the same lands, would be recoverable in Scotland." Now, undoubtedly this section regards the mode of recovering the charge, but it is not concerned with anything else. It does not profess to create any new obligation or to extend the obligation in the absolute order. Then, again, the means and manner to be adopted are those by which other payments are recovered, but "out of the lands." These are the very words of the section. The latter part of the section really means that the charge is to be recovered by the same means as any feu-duties, rents, or other payments are recovered out of lands. In short, the means and manner referred to are the means and manner by which according to the law of Scotland these payments are recovered out of the land itself, or just as if the section had stated that all real diligence was competent to the company, but no other diligence, and certainly no personal action. I therefore think that the Lord Ordinary's judgment is right.

LORD MURE—I have come to the same conclusion. The charge is expressly laid on the lands, and therefore unless there are some words used in the Act giving a personal remedy, such as is here asked, such an order will not warrant a personal action. I agree with your Lordships that we would need to have very distinct provision made for personal actions before we would give effect to the pursuers' contention. In this case the difficulty is created by the 61st section. This is the only section from which the company can derive any benefit. At first sight it would rather seem that this section gave all the remedies which a superior has for the recovery of his feu-duties. But then there is that expression, "out of the lands," and I think that these words are to be read in the way proposed by your Lordship, and that therefore the company are precluded from maintaining that they have a right of personal action such as is claimed.

LORD ADAM concurred.

LORD SHAND was absent from illness.

The Court adhered.

Counsel for the Pursuers and Reclaimers—
Gloag—Low. Agents—Ronald & Ritchie,
S.S.C.

Counsel for the Defender and Respondent—
Wallace. Agents—Menzies, Coventry, & Black,
W.S.

Saturday, December 3.

FIRST DIVISION.

STEWART v. STEWART.

(*Ante*, vol. xxiii. p. 773; 13 R. 1052.)

*Husband and Wife—Separation and Aliment—
Restriction of Aliment.*

In an action of separation and aliment decree of separation was pronounced, and the sum of £250 as aliment was decreed for in terms of a joint minute of the parties. The two children of the marriage—girls, then aged fifteen and twelve respectively—continued to live with their mother. About two years thereafter the husband presented a petition to restrict the amount of aliment to £52, on the ground that his business had fallen off, and that his income otherwise was insufficient to enable him to continue payment of the full amount. The Court remitted to an accountant to inquire into the circumstances of the parties. He reported that the petitioner's income was about £430, and that his wife had no means other than her allowance from the petitioner. There was no evidence that the circumstances of the petitioner had changed since the date of decree for aliment. The Court *restricted* the aliment to £150 per annum.

On 5th March 1884 decree of separation was pronounced in an action at the instance of Mrs Jane M'Cubbin or Stewart against her husband Thomas Stewart, hatter in Glasgow.

The sum of aliment decreed for was £250 in terms of a joint minute of parties. This sum was for the aliment of the pursuer, and also for the maintenance of the two daughters of the marriage, then aged fifteen and twelve respectively, who resided with the pursuer.

On 25th May 1886 Mr Stewart presented this petition for restriction of the amount of aliment to £52, on the ground that his business had fallen off, and that his income otherwise was insufficient to enable him to continue payment of the full amount.

Mrs Stewart lodged answers, in which she stated that she did not know the amount of the petitioner's income, nor anything as to the condition and prospects of his business.

The Court remitted to Mr Alexander Moore, C.A., to inquire into the circumstance of the parties and report, and granted diligence for the recovery of writings, and commission to the accountant to examine havers and receive their exhibits.

Mr Moore's report stated that the petitioner carried on the business of a hatter and hosier in three different shops in Glasgow, and that he had taken the opinion of a skilled party as to the probable profit realisable from the business of these shops, and that, from this opinion, combined with the information obtained from the petitioner's books and papers, it appeared that the income derivable by the petitioner from the business of the shops might be stated approximately at £200 per annum; that the peti-

tioner appeared to be possessed of means, including the capital invested in his business, to the amount of about £8000, and that he had an income apart from his business of about £230 per annum; and that Mrs Stewart appeared to have no means other than her allowance from the petitioner.

There was no evidence as to what the petitioner's means or income was at the date of the decree for aliment.

Argued for the petitioner—The Court has always given a little less than one-fourth of the husband's income, and in the present case £85, the sum given in *Lang's* case, would be enough—*Lang v. Lang*, October 27, 1868, 7 Macph. 24 Lord (Justice-Clerk Patton, 25); *Wotherspoon v. Wotherspoon*, October 30, 1869, 8 Macph. 81; *M'Millan v. M'Millan*, July 20, 1871, 9 Macph. 1067. [LORD PRESIDENT—Is there no evidence of a change of circumstances? A husband is only entitled to have the aliment restricted if there is a change in his circumstances since the date when the aliment was fixed.] Our information is that the petitioner has had to change his entire style of living. He offers to take his two daughters to live with him, and if they were suing for aliment that would be a sufficient answer to their claim. If the respondent wishes to keep them, the Court cannot take that into account in determining the present question. [LORD PRESIDENT—We must either assume that the daughters are to remain with their mother, or we must enter into the merits, to see whether the circumstances of the case justify them in refusing to live with their father.]

Argued for the respondent—The only question is as to the amount of aliment which should be allowed to the respondent. The petitioner avers a material change in his circumstances since the aliment was fixed in the action of separation. But the report of the accountant does not even suggest such a change. Therefore, in the absence of any evidence to prove a change of circumstances, the aliment should remain the same as was formerly fixed by the petitioner himself. No doubt there is this change—that whereas formerly the petitioner was content that his two daughters should remain with their mother he now desires that they should reside with him. They, however, wish to remain with their mother, and she should receive aliment for them at the rate of £25 per annum for each—*Symington v. Symington*, March 20, 1874, 1 R. 871. The whole aliment which should be awarded to the respondent ought to be £150 at least. It is said that the rule is to give one-fourth of the husband's income as aliment. There is, however, no fixed rule, and the amount of aliment will depend on the circumstances of the husband and the source of his income.—The cases of *Lang*, *Wotherspoon*, *M'Millan*, *supra cit.*—*Williamson v. Williamson*, Jan. 27, 1860, 22 D. 599; *Jameson v. Jameson*, Feb. 20, 1886, 23 S.L.R. 402; *Graham v. Graham*, July 19, 1878, 5 R. 1093; *Hay v. Hay*, Feb. 24, 1882, 9 R. 667.

At advising—

LORD PRESIDENT—The peculiarity of this case is that the husband a little more than three years ago consented that his wife's income should be £250 per annum, and if he has not succeeded in

proving that his present income is less than at that time, he must abide by the former arrangement. At the same time we are bound to give effect to the report of Mr Moore, which seems to establish that the petitioner's income at present is £430. In these circumstances I think I may say the opinion of the Court is that the amount of aliment should be reduced to £150 per annum—the reduction to take place from Martinmas 1887.

LORDS MURE and ADAM concurred.

LORD SHAND was absent from illness.

The Court pronounced this interlocutor:—

“Restrict the aliment to be paid by the petitioner to his said wife to £150 per annum as from and after Martinmas 1887: Find the respondent entitled to expenses, and remit,” &c.

Counsel for the Petitioner—Comrie Thomson—W. G. Miller. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondent—Ure. Agents—Crombie, Bell, & Bannerman, W.S.

Tuesday, December 6.

SECOND DIVISION.

[Lord Fraser, Ordinary.

KENNEDY v. CREYK.

Reparation—Sale of Sheep on Farm Pledged for Rent—Illegal Warrant—Oppressive Use of Warrant.

The tenant of a farm sub-let the winter grazing for the period from 1st November 1885 to Whitsunday 1886 to two sub-tenants, at the rent of £140, for which a bill was to be granted on 1st January, payable on 1st April. The sub-tenants granted a written obligation to leave 300 sheep on the farm so long as the rent remained unpaid. The bill was dishonoured. On 5th May 1886, the rent remaining unpaid, the tenant presented a petition to the Sheriff for warrant to sell by public roup the sheep stock belonging to the sub-tenants, and apply the proceeds in payment of the rent. The sub-tenants did not enter appearance. The Sheriff on 31st May, in respect the sub-tenants had not entered appearance, granted warrant to the Sheriff-Clerk to sell by public roup as many of the sheep as would pay the rent claimed. The number of sheep sold was 204, and they realised the price of £234. One of the sub-tenants then raised an action against the petitioner to reduce the Sheriff's warrant, and to recover damages, on the ground (1) that the warrant was illegal in respect the petitioner had not obtained any decree for the rent, nor used any diligence on the bill, and (2) that the use of the warrant was oppressive, as the number of sheep sold was more than necessary to pay the rent.

Held (diss. Lord Rutherford Clark) (1) that the petitioner had taken a legal and proper