

in respect that it does not specify the occasions on which the pursuer is alleged to have taken strong drink to excess?"

The defender reclaimed, and argued—The counter-issue proposed should have been allowed. It exactly met the principal issue, and there was foundation for it on record. The defender was not bound to propose a counter-issue putting the question whether the pursuer had been drunk on each of the occasions specified by the defender on record, nor to take separate counter-issues relating to each of these occasions, nor even to prove the particular dates on which the pursuer had been seen drunk. A counter-issue in general terms was sufficient—*Aird v. Kennedy*, February 22, 1851, 13 D. 775; *Carmichael v. Cowan*, December 19, 1862, 1 Macph. 204; *Innes v. Swanson*, December 8, 1857, 20 D. 250.

Argued for the pursuer—There was no foundation on record for the counter-issue proposed, and it was also too vague and general in its terms. The only way in which the defender could prove that the pursuer was a notorious drunkard was by proving specific instances in which he had been seen drunk. The defender was bound to take a counter-issue, specifying the dates on which the pursuer was alleged to have been seen drunk—*M'Rostie v. Ironside*, November 14, 1849, 12 D. 74; *Bertram v. Pace*, March 7, 1885, 18 R. 798. In *Aird's* case, the accusation being that the pursuer had been in the constant habit of indulging in ardent spirits, the counter-issue allowed specified continual drunkenness during a particular period. If the pursuer was going to confine his proof to the particular instances alleged on record, the pursuer would have no objection to the terms of the counter-issue, but he frankly stated that he was going to lead proof of rumour in regard to the pursuer's habits, and proof of that kind was quite incompetent.

At advising—

LORD PRESIDENT—If we were to regard the counter-issue apart from the record I should be of opinion with the Lord Ordinary, because there are no occasions specified in the issue, and of course it would be out of the question to send a person to trial on a question of character without giving him notice of the occasions upon which the accusation is based. But the record gives notice of a number of specific occasions, and that being so, the question seems to be one merely of practice or procedure, whether, notice having been given on record of the specific instances which are founded on to prove habitual drunkenness, it is necessary to repeat these in asking the jury whether there existed that habit. It would seem more consistent with our modern general practice to allow the issue to stand in general terms, the specific occasions legitimately falling within the inquiry being those of which notice has been given on record.

The only other question appears to be whether the record contains a relevant

avertment of "addiction." Now, it is hardly fair, I think, to represent that question as being the same as this, whether, given nine or ten instances of intoxication, that is enough of itself to instruct the habit. The jury would be entitled to consider the circumstances of each occasion and to draw their own inferences as to whether they were specimens of the habit, or whether the cases which turn out to be proved were isolated and pardonable instances of this gentleman being overtaken. Therefore I think, the question being a proper jury question, and the record containing a sufficient amount of specific notice to support the general averment, and the jury being entitled to draw their own inferences as to the representative character of the specific occasions, that the record is quite sufficient for its purposes.

I therefore think that we should recall the Lord Ordinary's interlocutor in so far as it disallows this counter-issue, and approve of the issues and counter-issue as the issues for the trial of the cause. Much has been said as to what will take place at the trial in consequence of the pursuer involving himself in the question of notoriety, but these are matters which will extricate themselves, or be extricated by the judge at the trial, and do not affect the question which we have now to determine.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor in so far as it disallowed the counter-issue, and approved of the issues and counter-issue as the issues for the trial of the cause.

Counsel for the Pursuer—M'Lennan—D. Anderson. Agent—P. J. Purves, S.S.C.

Counsel for the Defender—Comrie Thomson—C. N. Johnston. Agent—J. B. M'Intosh, S.S.C.

Wednesday, June 6.

FIRST DIVISION.

[Sheriff of Roxburghshire.]

SCOTT v. SCOTT.

*Husband and Wife—Separation—Parent and Child—Aliment of Child in Wife's Custody.*

After a wife had raised an action of separation and aliment against her husband, an arrangement was concluded, in accordance with which the husband made over £1100 to trustees for behoof of the wife in liferent, and the wife in respect of this provision agreed to abandon the action. About two and a-half months after the date of the trust-disposition, the wife, who was living separate from her husband, bore a child, and when this child was between one and two years old an

action was raised in its name against the husband for payment of aliment. It was averred that the husband was possessed of between £2000 and £3000.

Held that the claim was in substance a claim for additional aliment by the wife; that the parties must have had the birth of the child in contemplation when the trust-disposition was granted for the wife's behoof, and had therefore settled for themselves what sum was to be allowed for the aliment of the wife and child, and that no sufficient reason had been shown for interfering with the arrangement they had made.

Observations by Lords Adam and M'Laren as to what proportion of the husband's means should be applied to the wife's aliment in cases of separation.

In June 1891 Mrs Rachel Scott raised an action of separation and aliment against Thomas Scott, her husband. In August 1891 an arrangement was concluded between the parties. In terms of this arrangement Thomas Scott granted a trust-disposition dated 4th August 1891, whereby he conveyed £1100 to trustees for the following purposes—(1) That the trustees should pay the annual income of the said sum to Mrs Scott, on her separate receipt, so long as she should live with the truster as his wife, said income to be applied by her *pro tanto* towards the upkeep of the household, including her wearing apparel and paraphernalia; (2) that they should have power to purchase furniture to the extent of £100 out of the funds so vested in them to furnish any residence which the wife should choose; and (3) that they should pay over the income of the remainder to the wife during all the days of her life for her liferent use.

By minute of agreement entered into on 4th and 6th August 1891, Mr and Mrs Scott agreed as follows—(1st) Mrs Scott, in respect of the provisions contained in the foresaid trust-disposition, agreed to abandon the action of separation and aliment. (2nd) Mr Scott having promised to conduct himself towards her as a husband ought, Mrs Scott agreed to live with him, but it was declared that she should have the option to choose her own residence, as she declined to reside with the family of her husband by a previous marriage. (3rd) In the event of the husband failing to keep his promise and it becoming necessary for the wife to separate from him, she was to be entitled to apply for a decree of judicial separation and aliment, and the Court in awarding aliment should be entitled to take the provisions of the trust-disposition into consideration.

Shortly after the date of this agreement Mrs Scott left her husband and took up a separate residence. Thereafter on 17th October 1891 she bore a female child.

In May 1893 an action was raised in the Sheriff Court at Jedburgh, at the instance of the child, with the concurrence of Mrs Scott, against Thomas Scott, for payment of £1, 5s. a-month as aliment.

The pursuer averred that the defender had made no provision for her support, and

that he was possessed of means amounting to between £2000 to £3000.

The defender stated that he had made ample provision for support of his child by the trust-disposition of 4th August 1891, that he had always been willing to maintain her, and now offered to receive her in family.

The defender pleaded—“(4) The defender being entitled and willing to support and maintain the pursuer in family, should be assoilzied. (5) The defender and the pursuer's mother having entered into an arrangement for the support of the household, and the defender having implemented his part thereof, and being willing to implement it, should be assoilzied.”

A curator *ad litem* having been appointed to the pursuer, she was allowed a proof of the above averments made by her.

The defender deponed that he was possessed of no means or estate, and the Sheriff-Substitute disallowed questions as to whether he had been possessed of means shortly before the date of the action, and had made over these means to others, on the ground that they did not fall within the scope of the proof allowed.

On 19th October 1893 the Sheriff-Substitute (SPEIRS) sustained the 4th plea-in-law for the defender, and assoilzied him from the conclusions of the petition.

On 24th January 1894 the Sheriff (HOPE) pronounced the following interlocutor:—“Sustains the appeal: Recals the interlocutor appealed against: Finds in fact (1) That the pursuer, who is in pupillarity, lives in Edinburgh with her mother; (2) that before she was born the defender conveyed to trustees the sum of £1100 for behoof of his wife, the pursuer's mother, under certain conditions as set forth in the trust-disposition; (3) that he has never contributed anything specially towards the pursuer's support, and has met the present action for aliment by an offer ‘to receive the child in family, and to support and maintain her;’ (4) that in his evidence the defender has deponed that he has no money and can pay nothing towards the pursuer's upbringing, and that he has no house, but lives with and is maintained by his sons: Finds in law—(1) That the purposes for which the said sum of £1100 was vested in trustees do not include the upbringing of the pursuer; and (2) that the offer made by the defender to receive into family and to maintain the pursuer is elusive, and is not a sufficient answer to the pursuer's claim, in respect that he avers that he is unable to fulfil it: Therefore repels the fourth and fifth pleas-in-law for the defender: Decerns against him for the sum of £1 per month, payable in the manner set forth in the second craving of the prayer of the petition, but declaring that the said decree for aliment is *ad interim* subject to recal or re-arrangement by this Court when any alteration of circumstances arises: Finds the pursuer entitled to expenses,” &c.

The defender reclaimed, and argued—The defender had already made ample provision for the support of his wife and child

by the trust-disposition of August 1891. When that deed was granted the parties must have had the birth of the child in contemplation, and they must be held to have settled for themselves the amount of aliment to be allowed to the wife and child. The defender had no objection to his wife retaining the custody of the child provided she alimanted it out of the sum provided in the trust-disposition for her behoof. If she did not agree to that, the defender claimed the custody of the child, to which he was by right entitled—*Nicolson v. Nicolson*, July 20, 1869, 7 Macph. 1118. The fact that a father was in poverty was not sufficient to deprive him of his right to the custody of his child—*Leys v. Leys*, July 20, 1886, 13 R. 1223.

Argued for the pursuer—The defender's offer to receive the child in family was only made as an answer to the claim for aliment. In his evidence the defender stated that he had no means or house of his own. The offer was not made *bona fide*, and should be disregarded—*Mackenzie v. Mackenzie*, March 18, 1893, 19 R. 636. Further, a father was not entitled in all circumstances to the custody of his child. The main point to be looked to was the welfare of the child, and the mother was the appropriate person to have the charge of a child of two years—*Guardianship of Infants Act 1886*, sec. 5. The father had made no provision for the child's aliment. It was not to be assumed that the trust-disposition was intended to provide for the child as well as the mother, nor was the provision made more than sufficient for the mother. The husband was stated to possess means to the amount of between £2000 to £3000, and the pursuer should be allowed to lead further evidence on this point, as a number of competent questions had been disallowed by the Sheriff. Taking the husband's means to be as stated by the pursuer, he had not sufficiently discharged his obligation to aliment his wife and child by the provisions of the trust-disposition, and the pursuer had a good claim for aliment—*Hay v. Hay*, February 24, 1882, 9 R. 667.

At advising—

LORD PRESIDENT—The spouses here entered into an agreement making arrangements for their living apart. The agreement, so far as money was concerned, was that the husband should assign to trustees the sum of £1100, and the purpose of the trust, which applies to the existing state of matters—that, namely, of the spouses living apart—is that the trustees should have power to purchase furniture to the extent of £100 out of the funds vested in them for any residence which the wife should choose, and the income of the remaining £1000 was to be applied to the life of the wife. Now, it is important to observe that the agreement was come to on the 4th of August 1891, and that the child was born on the 17th October following, or little more than two months afterwards. In these circumstances it must, I think, be taken that when the

parties separated they knew that a child was shortly to be born, and made their arrangements with that contingency in prospect. The child now comes forward in form to claim aliment. It is manifest, however, that the application is really that of the wife, and she raises the question, whether she is entitled, now that the child is born, to get more than the income of the fund vested in trustees for her behoof? She says that her husband has, over and above that fund, from £2000 to £3000, and for the purposes of the present case I assume that he has that amount. The question is, whether—assuming that the mother is right in her estimate of her husband's means—we are to grant her additional aliment in consequence of the birth of the child—the nominal pursuer of the action. Now, even supposing that this was a matter not provided for in the agreement, it is manifest that a small increment only is all that could reasonably be suggested by the wife. But when the facts show clearly that the parties at the date of the agreement not only contemplated living apart, but also the birth and existence of a child, I am not inclined to give even that small increase unless the amount already provided is palpably and grossly insufficient and disproportionate to the whole income of the husband. Now, on the wife's own statement of them, the figures do not show any such disproportion. There is no case of necessity on the part of the child or the mother. I am therefore for recalling the Sheriff's interlocutor.

It will be observed that I do not at all proceed on the evidence of the state of the husband's means. If it were necessary to go into the facts, there would be much to be said as to the right of the pursuer to obtain the evidence excluded by the Sheriff-Substitute. But in what I have said I go, not on the evidence, but on the pursuer's own averments.

LORD ADAM—This is an action raised in name of an infant child, with the consent of its mother, to recover certain sums from the father who is living apart from the mother. Although the action is in the name of the child, it is undoubtedly raised in the interests of the mother. The spouses are living separate under a deed of arrangement. At the date of the agreement the birth of a child was imminent—the deed was executed in August, and the child was born in October, and no one can doubt that its birth was expected, and that the parties contemplated that if the mother was to live apart from the husband the child was to live with its mother, and not with its father. Accordingly the sum of £1100 was set aside and vested in trustees to meet that contingency. That being so, and the sum set aside for the support of the mother and child being not less than one-third of the whole estate of the husband, we are now asked, when the child is still an infant, to open up the agreement of the parties and award a larger sum. I am not prepared to follow that course. There is no fixed proportion of the husband's income which

the Court will allow, but only such as appears to it to be fitting in the whole circumstances of the case. In considering the position in life of the parties here, the sum of £40 may be sufficient. In the case of other parties, or in different circumstances, it might not. There is the case of *Hay*, in which in an action of separation and aliment the wife obtained decree for £40 out of an income of £115. That seems to me a very liberal award, but there were special circumstances no doubt which led to its being given. But what followed there was this—a child was born after the decree was pronounced, and the Sheriff awarded a sum as aliment of the child. The Court sustained that award although they fixed a somewhat smaller sum. But I observe that the Lord President in giving the leading judgment said—"Very soon after this decree was pronounced"—that is, the decree for £40—"the respondent Mrs Hay gave birth to a child, and that was a fact not before the Lord Ordinary, and the maintenance of the child could not be under his consideration in fixing the amount of aliment. The respondent in this appeal maintains that she is entitled to a sum for aliment of the child." The difference between that case therefore and this is, that here we cannot shut our eyes to the fact that the birth of the child was contemplated by the parties when they entered into the agreement. It is fair and reasonable therefore to consider that the matter of the child's aliment was then settled between them.

LORD M'LAREN—If the summons itself were to be considered, I doubt whether the action could be maintained at all, because the summons is at the instance of the child, and it is proved that the child is being maintained by the mother—a person who is under a natural obligation to maintain it—so that there is no case of necessity calling for our interference in the interests of the child. But considered as an action by the mother against the father to have the latter ordained to contribute to the child's maintenance, I think that when the spouses entered into the contract of separation they had in view that a sum was to be allowed by the husband for the maintenance of the mother, and also of the child during the time it should be properly under the mother's care. But I also agree that if that were doubtful, and the case were to be considered on its merits, we could not award a further sum without opening up the terms of the contract of separation, and considering whether the wife has not already received an allowance sufficient for the maintenance of herself and her child. So far as my own experience bears on that question, I am not aware of any case in which the Court has allowed the wife more than one-third of the income of the husband's estate in cases of judicial separation. One case was cited in which a small additional amount was allowed in case of the birth of a child after the date of the separation. If there is no legal limit to the amount of the allowance which may

be made to the wife, there has been a practical limit to the income of such a share of the estate as the wife would take on the death of the husband. There are, however, many cases in which a smaller annuity would be suitable to the wife's position in life, and the wife is only entitled to such an amount as suits their position in life, and not to any certain proportion of the husband's estate. Here the husband, who is a retired tradesman, has made a provision as large if not larger than the law would give to his widow, and I do not think we should increase it.

LORD KINNEAR—I am of the same opinion. I agree that the action is in substance an action by the mother, because the mother is the proper claimant and proper creditor for the aliment of a child of two.

Now, if we know that the parties had agreed that the aliment of the wife alone should be £40 a-year, and that in making this arrangement they had not contemplated the possibility of a child being born, then I should be disposed to consider whether on the occurrence of this unexpected event an additional allowance should be made to the mother for the child's support. But I agree that when we look at the agreement with reference to its date and the circumstances in which it was concluded, it is impossible to doubt that the parties had the birth of the child in contemplation when they entered into it, and I think that the parties having settled the matter for themselves, no sufficient ground has been stated for interfering with the arrangement they have made.

The Court pronounced this interlocutor:—

"Sustain the appeal: Recall the interlocutors of the Sheriff dated 24th January 1894 and of the Sheriff-Substitute dated 19th October 1893: Find that within three months prior to the birth of the pursuer, her mother and the defender entered into the agreement No. 9 of process, and that the defender conveyed to trustees the sum of £1100 for the purposes set forth in the trust-disposition referred to in the said agreement: Find that the pursuer's mother, with whom she lives, is in the enjoyment of the income provided under the said agreement for the event of her living (as she has done) separate from the defender: Finds that the pursuer is at present being alimented by her mother: Find in law that the pursuer's averments as to the amount of the defender's means are not in the present circumstances found as matter of fact relevant to entitle her to a decree against him for aliment: Dismiss the petition, and decern."

Counsel for the Pursuer—N. J. D. Kennedy—Cooper. Agent—Thomas M'Naught, S.S.C.

Counsel for the Defender—Strachan. Agent—J. Murray Lawson, S.S.C.