Wednesday, July 20.

FIRST DIVISION.

MOFFAT OR FOULIS *v.* FAIRBAIRN.

Aliment—Obligation of Son-in-Law to Support Mother-in-Law—Amount.

The widow of a person who had held various appointments as a schoolmaster was left in poor circumstances, weakly in health, and unfit for manual work. She raised an action against her son-in-law, concluding for payment of aliment. The defender was in a position to contribute to the pursuer's support, as was also one of her sons. *Held*, following *Moir* v. *Reid*, July 13, 1866, 4 Macph. 1060, that her son-in-law was bound to contribute, and, following *Thom* v. *Mackenzie*, Dec. 2, 1864, 3 Macph. 177, that £40 was a sufficient sum, of which he was bound to contribute one-half.

In 1849 Miss Emily Woolford Moffat, the daughter of a solicitor before the Supreme Courts in Scotland, married Mr Robert Foulis, who was a teacher by profession. He held at different times various appointments as a teacher in Edinburgh. In 1877, when he was headmaster of one of the Merchant Company's Schools, his health broke down, and he obtained an appointment as inspector of schools at Wanganui, New Zealand. Thereafter he was made headmaster of the New Plymouth High School there, and held that appointment until his death on 21st July 1885. After her husband's death Mrs Foulis was in very poor circumstances. For some time she held a situation as companion to an invalid lady, but found herself unable, from the state of her health, to perform the duties required of her, and was obliged to resign her situation. She had had fourteen children, of whom seven survived. In 1875 her eldest daughter married Mr Fairbairn, solicitor, Galashiels.

This action was raised by Mrs Foulis against Mr Fairbairn, concluding for payment of £40 yearly for aliment to her. She averred that she had no means of support other than what she received from her eldest son Dr Foulis, a medical practitioner in England, and that he and Mr Fairbairn, as representing his wife, were the only members of the family in a position to contribute to her maintenance. The defender averred that Dr Foulis gave his mother £52 yearly, and he declined to make the pursuer any separate allowance beyond this sum of £52. He averred that he had conceded his liability to relieve Dr Foulis of a portion of the latter's contribution upon being satisfied that the pursuer was unable to maintain herself.

The pursuer pleaded—"The defender being bound to aliment the pursuer, his mother-in-law, and the sum sued for being fair and reasonable as his proportion of the aliment to which the pursuer is entitled from the members of her family, she is entitled to decree in terms of the conclusions, with expenses."

The defender pleaded—"(1) The statements of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (2) The pursuer being able to aliment herself, the present action ought to be dismissed. (3) The pursuer being already in receipt of an allowance amply sufficient for her maintenance and support, the defender ought to be assoilzied."

On 24th May 1887 the Lord Ordinary (LEE) pronounced this interlocutor—"Finds it not disputed that the pursuer is in receipt of aliment from a son at the rate of £52 per annum; and finds that the allegations on record are not relevant and sufficient to support the conclusions of the present action: Therefore dismisses the action."

The pursuer reclaimed.

The First Division allowed the summons and pleas-in-law to be amended, and allowed a proof. The summons as amended contained a conclusion against the defender for payment of the sum of "£40 sterling yearly, or such other sum as our said Lords shall determine to be fair and reasonable as his proportion of, or contribution to, the aliment to which the pursuer is entitled from members of her family." For his second and third pleas-in-law the defender substituted—"(2) The pursuer not being indigent, the present action ought to be dismissed. (3) The defender being only the son-in-law of the pursuer is not liable to aliment the pursuer, or at least is not liable to contribute to the aliment furnished for her by her own children."

A proof was taken before Lord Shand. It appeared that only Dr Foulis and Mr Fairbairn were in a position to contribute to the pursuer's support; that since the end of 1886 she had been endeavouring to get employment, but without success; and that though suffering from no disease, she was weakly and unfit for manual work, but that she might act as a lady's companion, or keep lodgings with the assistance of servants.

It was argued for the pursuer that the proof showed that she could not support herself, and that Dr Foulis and Mr Fairbairn were alone able to contribute to her support. It was settled that a son-in-law must contribute to the maintenance of his mother-in-law—*Reid* v. *Moir*, July 13, 1866, 4 Macph. 1060; *Laidlaw* v. *Laidlaw*, July 3, 1832, 10 S. 745. The expense of living had increased since the date of *Thom* v. *Mackenzie*, December 2, 1864, 3 Macph. 177, and therefore a sum larger than £40 in all should be awarded.

It was argued for the defender that, on the evidence, the pursuer was able to earn her livelihood. Consequently she was not indigent, and had therefore no claim for maintenance—Ersk. i. 6, 56. In *Thom* v. *Mackenzie*, *supra*, a judicial offer was made, and so the question of indigence did not arise for determination. Moreover, in making such a claim superfluity on the part of the person against whom the claim was made must be proved—*Hamilton* v. *Hamilton*, March 20, 1877, 4 R. 688. The case of *Macdonald* v. *Macdonald*, June 20, 1846, 8 D. 830, had not received due weight in *Reid* v. *Moir*, *supra*, and the latter case had been doubted—Fraser on Parent and Child, 115. As regarded the amount, that was settled by *Thom* v. *Mackenzie*.

At advising—

LORD PRESIDENT—It is not in our power to review the judgment which was pronounced in the case of *Reid* v. *Moir*, *supra*. That was a fully argued case, and it was a unanimous judgment; and I still remain of opinion that it was a

sound one. Accordingly, on the assumption that the son of the pursuer and her daughter, as represented by her husband, the defender, are equally liable to support the pursuer, the only question which we have to decide is the amount which they are to contribute. I am not disposed to go beyond the sum which we thought sufficient in *Thom* v. *Mackenzie*, *supra*. That case was a very fair precedent for Mr Murray to found upon, and therefore I think we shall do justice between the parties if we decern against the defender for the one-half of £40, the other half being provided by Dr Foulis.

Lord Mure concurred.

Lord Shand—The case of *Reid* v. *Moir*, *supra*, was decided in 1866, and we are now in 1887, and your Lordship has pointed out that the judgment was a unanimous one. But if the matter which was there decided could have been opened up I should not have regretted it, for I have always entertained considerable doubts as to the soundness of that judgment. Although, in the general case, a husband when he marries incurs liability for his wife's debts, I think that in a case like the present there is sense in saying that that general principle does not apply.

Otherwise, I agree that £40 is a sufficient sum to award to the pursuer.

Lord Adam concurred.

The Court pronounced this interlocutor:—

"Decern against the defender for payment of aliment to the pursuer at the rate of £20 per annum, as his contribution towards the support of the pursuer, and that half-yearly, beginning the first term's payment at Martinmas 1886: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer and Reclaimer—A. J. Young—Salvesen. Agents—Sturrock & Graham, W.S.

Counsel for the Defender and Respondent—Graham Murray — Watt. Agent — Thomas Dalgleish, S.S C

Wednesday, July 20.

FIRST DIVISION.

MACLAGAN (COLLECTOR OF THE MINISTERS' WIDOWS' FUND) *v.* BROWN.

Church—Ministers' Widows' Fund—19 *Geo. III. c.* 20—54 *Geo. III. c.* 169.

The trustees of a church erected by private subscription offered the charge to an ordained minister of the Church of Scotland who was not a parish minister. He accepted the appointment, which was approved by the Presbytery. The trustees, in a petition to the Presbytery, set forth that they were about to apply to the Teind Court for the erection of the church and district into a church and parish *quoad sacra*, and submitted a draft constitution for approval, which provided that the said minister "shall be recognised and received by the presbytery of the bounds as the first minister of the new church and parish as soon as possible after decree of erection has been pronounced by the Court of Teinds." The Presbytery approved of the proposed application, and the constitution was approved by the General Assembly. Thereafter the Teind Court granted a decree of disjunction and erection, and the minister was inducted. *Held*, in a question between the minister and the collector of the Ministers' Widows' Fund, that the former was entitled and bound to become a contributor to the Ministers' Widows' Fund.

Grant v. *Macintyre*, July 14, 1849, 11 D. 1370, *distinguished.*

The Church of St Margaret's, Dumbiedykes, Edinburgh, was built in 1881 by private subscription in order to accommodate the inhabitants of the vicinity in connection with the Church of Scotland. On the 17th of October 1881 the trustees resolved to appoint the Rev. William Morris Brown minister of the church, and they intimated their resolution to him in a letter in the following terms:—"*Edinburgh*, 17*th October* 1881.—To the Rev. W. M. Brown.—My dear Sir,—At a meeting of the trustees held this forenoon it was agreed to offer you the charge as minister of Dumbiedykes Church. We guarantee you a yearly stipend of £150 for the first three years, the grant from the Home Mission in addition. Rev. Mr M'Nair, as convener, intends calling a meeting of the committee appointed by Presbytery for Friday first, at 22 Queen Street. I would be pleased to have your reply before then.—Yours sincerely, W. M. Ford." The Rev. William Morris Brown was at this date a duly ordained minister of the Church of Scotland, but was not a parish minister. At the meeting which followed the trustees elected Mr Brown; the Presbytery, upon the report of the committee appointed by them, approved Mr Brown's appointment, and he thereafter entered upon his duties as minister of St Margaret's.

In March 1885 the trustees of the church presented a petition to the Presbytery of Edinburgh, setting forth that they were now to apply to the Court of Teinds for the erection of the church, with a suitable district attached, into a church and parish *quoad sacra*, in terms of the Act 7 and 8 Vict. cap. 44; that in order to make the said application it was necessary that they should procure a constitution, and they therewith submitted the draft of a constitution to the said Presbytery for sanction and approval, and also prayed the Presbytery to recommend the boundaries proposed for the new *quoad sacra* parish. Article 15 of the said constitution proposed—"That the Rev. William Morris Brown, M.A., shall be recognised and received by the Presbytery of the bounds as the first minister of the new church and parish as soon as possible after decree of disjunction has been pronounced by the Court of Teinds."

The Presbytery approved of the proposed disjunction and erection, and consented to application being made to the Court of Teinds. The deed of constitution was, on the recommendation of the Presbytery, approved by the delegation appointed by the General Assembly for that purpose on 1st April 1885.

On 6th January 1886 a petition was presented to the Court of Teinds, and on 12th July 1886,