Wednesday, October 25, 1911.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Linlithgow.

DUNBAR *v.* DUNBAR.

Process—Sheriff—Separation and Aliment—Remitted Cause—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 5.

The Sheriff Courts (Scotland) Act 1907 extended the jurisdiction of sheriffs, *inter alia*, to actions of separation and aliment, provided that on cause shown or *ex proprio motu* the Sheriff might at any stage remit such action to the Court of Session.

In an action of separation and aliment raised in a Sheriff Court the pursuer made distinct averments of personal violence. The Sheriff *ex proprio motu* remitted the cause to the Court of Session. The Court, on the ground that if the pursuer proved these averments no question of difficulty could arise, *remitted* the cause back to the Sheriff to proceed.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—section 5—"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: . . . Provided also that on cause shown or *ex proprio motu* the Sheriff may at any stage remit to the Court of Session any action of separation and aliment or relating to the custody of children."

Mrs Mary Brown or Dunbar raised in the Sheriff Court at Linlithgow an action of separation and aliment against her husband Robert Dunbar.

The pursuer, *inter alia*, averred—"(Cond. 3) About six months after the marriage defender gave way to drink, and he has continued to lead an intemperate life ever since. (Cond. 4) Both in his fits of drunkenness and when sober defender frequently beat his wife and threatened her life. In particular, on or about the evening of 25th December 1907, in his dwelling-house in Market Street, Bo'ness, defender struck the pursuer a severe blow on the face and compressed her throat to her serious injury. In July 1909 defender locked out pursuer, who had to get a night's lodging with Mr and Mrs Harris, Grangepans. He (defender) again assaulted pursuer by striking her on the face on a day in the month of February 1910, also in his said dwelling-house in Market Street, Bo'ness. (Cond. 5) Latterly defender's acts of cruelty towards the pursuer became so frequent and serious that the latter, having regard for her personal safety, was compelled to leave the defender's house, which she did on or about 7th July 1911. The direct and immediate cause of pursuer's leaving defender's house was as follows—On the date mentioned, 7th July 1911, defender returned home at 5·30 p.m. John Falconer . . . was in the house with pursuer at the time. He was there by appointment with the defender, whose friend he was and whom he had come to meet to arrange, it is believed, how they were to spend the following Saturday afternoon. Defender on entering the house demanded some dinner. Pursuer explained that this had been ready for him at one o'clock, at which hour he had promised to return, but that she would prepare something fresh as quickly as possible. Defender thereupon struck the pursuer a blow on the face and said he would prepare the dinner himself. Pursuer, referring to defender's systematic ill-treatment of her and this last instance of it, then said that unless there was a change in his (defender's) way of living she would go home to her folks, to which defender replied, 'Go now, and I'll give you something more to take home with you,' accompanying his remark with a further attempt to strike pursuer, which he was prevented from carrying out by the timely intervention of Falconer. On Falconer interfering defender flew into a rage and ordered him to leave the house at once, which he did. After Falconer's departure defender lifted the pursuer off her feet and threw her heavily against a bed, gripped her savagely by the neck, and attempted to strangle her. She escaped after a struggle, when he pursued her and struck her a severe blow on the face. Then it was that the pursuer with ample justification left the defender's house, where to remain was at the risk of her life."

On 3rd October 1911 the Sheriff-Substitute (MACLEOD) pronounced this interlocutor—"The Sheriff-Substitute having advised the closed record, *ex proprio motu* remits the cause, under section 5 of the Sheriff Courts (Scotland) Act 1907, to the First Division of the Court of Session."

Note.—"It was, I think, the intention of the Legislature that in the ordinary case an aggrieved spouse should have the right to have her claim to this remedy decided in the Sheriff Court. But there will arise now and then an exception.

"My attention was attracted by the pleadings and productions in this case. They seemed to me at first sight to disclose a situation of considerable delicacy. I have thought over the matter with care, and my impression deepens, that in the interests of the administration of justice, it would later on be matter for grave regret if this cause failed to have at all subsequent stages the benefit of the wider matrimonial experience of a Judge of the Court of Session."

On 25th October, in Single Bills, counsel for the defender moved the Court to remit the case back to the Sheriff on the ground that there was, as he admitted, no delicate or difficult question of law in the case so far as appeared, for there were direct averments of assaults.

Counsel for the defender stated that he neither supported nor opposed the motion.

LORD PRESIDENT—This is an action of separation and aliment raised in the Sheriff Court in terms of the extended jurisdiction given to Sheriffs by the Sheriff Courts Act 1907, and the Sheriff-Substitute has remitted the cause to the Court of Session, his warrant for doing so being the proviso appended to section 5 of the Act, which is in these terms—"Provided also that on cause shown or *ex proprio motu* the Sheriff may at any stage remit to the Court of Session any action of separation and aliment or relating to the custody of children."

Now it is clearly within the power of the Sheriff to take this step, but I do not think that the Act excludes the power of this Court to deal with the matter as it thinks fit, and in particular to send the case back to the Sheriff.

I have examined the record in this case, and I do not think that it is one that raises questions of delicacy such as sometimes arise in these cases. The law of what entitles a spouse to separation and aliment has been clearly stated in a passage of the opinion of Lord President Inglis in the case of *Graham* v. *Graham* [(1878) 5 R. 1093, at p. 1095] quoting the opinion of Lord Brougham in the case of *Paterson* v. *Russell* [7 Bell's App. 363], where he says—"Personal violence, as assault upon the woman, threats of violence which induce the fear of immediate danger to her person, maltreatment of her person so as to injure her health—these are, both by the law of Scotland and England, a sufficient ground for divorce *a mensa et thoro*"; and Lord Brougham goes on to state other conduct which is sufficient. Now where there has been conduct short of the brutal conduct instanced by Lord Brougham, difficult and delicate questions are raised sometimes, but here there is a distinct averment of personal violence, and if the pursuer proves this averment there can be no question of difficulty in the case It seems to me that it involves a simple question of fact, and I think the pursuer is entitled to avail herself of the cheaper procedure in the Sheriff Court, and that we should re-remit the case.

LORD KINNEAR—I am entirely of the same opinion. I think that the ground upon which this particular case has been remitted to the Court of Session, if it were sound, would justify the same procedure in every case of the kind. The Lord President points out in *Graham* v. *Graham* that in these cases the Court must always have a very delicate duty to discharge, for reasons which he explains. But that general difficulty 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, and that is the ground on which the case has been remitted. It would have been a different matter if the Sheriff had found any special difficulty peculiar to the particular case, and it may be that a question of that kind might still arise. But the Sheriff's absolute refusal on general grounds to exercise his statutory jurisdiction cannot in my opinion be supported.

LORD JOHNSTON—I concur.

LORD MACKENZIE — I am of the same opinion.

The Court pronounced this interlocutor—

". . . Remit the cause back to the Sheriff-Substitute to proceed: Find the pursuer entitled to expenses since 3rd October 1911, the date of the Sheriff-Substitute's interlocutor: . . ."

Counsel for the Pursuer — Macquisten. Agents—Purves & Simpson, S.S.C.

Counsel for the Defender—W. T. Watson. Agent—James F. Macdonald, S.S.C.

Saturday, October 21.

OUTER HOUSE.

[Lord Ormidale.

A B *v.* C D.

Process—Proof—Additional Evidence after Proof Closed—Evidence of Absconding Person subsequently Arrested.

In an action where proof had been allowed, evidence was led by both parties, and each party closed his proof. Subsequently, before the hearing on evidence, the Lord Ordinary (Ormidale), on the motion of one of the parties, *allowed* the proof to be opened up for the purpose of examining a witness who had absconded from justice but who had now been found and arrested.

A B brought an action against C D for payment of a business account alleged to be owing to him as Edinburgh agent for C D in connection with a litigation in the Court of Session. C D denied liability and raised a counter action against A B for payment of the value of a cheque which X, C D's local agent, had sent to A B.

It was averred on record that X was employed by C D to carry through the purchase of a heritable property, and received from C D a sum of money for that purpose. Subsequently, however, X was instructed by C D to withhold payment of the price owing to a question having arisen as to the sufficiency of the title to the property offered by the seller. The seller thereupon raised an action in the Court of Session against C D for implement, and A B was employed to defend for C D. This action, however, was settled, and X was instructed by C D to hand over to A B the purchase price which was in his hands in order that the settlement might be implemented. Accordingly X sent to A B a cheque on his own bank account for the amount of the price, which remained for some days in A B's hands uncashed, and before it was presented for payment X had become insolvent and a warrant was issued for his arrest on a charge of embezzlement.