

against the pursuer for the market value of the potatoes. The Lord Ordinary's interlocutor right, and should be adhered to.

Agents for Pursuer—Scott, Bruce & Glover, W.S.

Agent for Defender—J. S. Mack, S.S.C.

Wednesday, July 20.

NISBET v. NISBET.

Separation—Aliment—Custody of Child—Pupil. The income of a man who had been judicially separated from his wife for adultery was estimated at £309 from his business and £71 from property. The Court fixed the amount of aliment at £80 per annum, and gave the father the custody of a pupil son 13 years of age.

In this case of separation and aliment (reported *ante*, vol. vii, p. 591), the Court remitted to Mr Carfrae to report the amount of the defender's income.

Mr Carfrae reported as follows:—

"The reporter having examined the books of the defender, and taken all other requisite means of satisfying himself as to the amount of his income from all sources, begs to report to the Court that in his opinion the sum of Three hundred and eighty pounds sterling (£380) is a fair average amount of the yearly income of the said defender.

"Humbly reported by

"ROBERT CARFRAE.

"Edinburgh, 77 George Street,
"16th July 1870.

"Of the above Three hundred and eighty pounds sterling, the sum of Three hundred and nine pounds sterling is from business, and Seventy-one pounds sterling from property. R. C."

The Court fixed the amount of aliment at £80 per annum, and gave the custody of the boy of 13 years of age, to the father.

Agent for Pursuer—William Mitchell, S.S.C.

Agent for Defender—Robert Mure, S.S.C.

Wednesday, July 20.

SECOND DIVISION.

WEIR v. OTTO AND OTHERS.

Inhibition—Declarator—Recal—Competency. Held that in an action of declarator containing no conclusion for payment of a pecuniary claim, or implement of any other obligation, inhibition could not be competently used.

This was a petition at the instance of Alexander Weir, joiner, Sanquhar, for the recal of an inhibition. The petition contained the following statements:—"The petitioner is proprietor of certain heritable subjects in the burgh of Sanquhar, and that the said subjects immediately adjoin certain other heritable subjects belonging in liferent and fee respectively to Mrs Susan Barker or Otto, residing at Newark, near Sanquhar; Mrs Margaret Crichton Otto or Barker, wife of David Barker, residing at Woodlands, in the parish of Terregles and stewartry of Kirkcudbright; and John Barker, eldest son of the said David Barker and Margaret Crichton Otto or Barker.

"That a dispute having, in the year 1861, arisen between the petitioner and these parties as to the

boundary between their respective properties, the boundary line was settled by arbitration to the satisfaction of both parties; and upon the line of boundary so fixed, the petitioner, at the sight of the arbiters, erected a wooden fence, which continued to be the march between the two properties until the month of May 1869, when the said David Barker, as acting for the said Mrs Susan Barker and others, illegally removed the fence erected by the petitioner as aforesaid, and erected another fence, which encroached to a considerable extent upon the petitioner's property. The said David Barker at the same time pulled down a portion of a small building which the petitioner was in the course of erecting on his own property, within his side of the fence which had bounded the two properties for years previously as aforesaid.

"That the petitioner then presented a petition to the Sheriff of the county of Dumfries for interdict against the said David Barker encroaching upon the petitioner's property, and to have him ordained to remove the fence illegally erected by him, and to restore the former fence and the petitioner's building to their former condition. The Sheriff-principal, after proof led by both parties of this date, decerned against the said David Barker in terms of the petition, and found him liable to the petitioner in expenses.

"That the said David Barker has appealed the said judgment to your Lordships for review, and an action of declarator has also been raised before your Lordships, at the instance of the said Mrs Susan Barker and others, against the petitioner and Janet Currie, another adjoining proprietor, for the purpose of settling the disputed boundary. To this action the petitioner, as the only defender interested in the question, lodged defences of this date."

After setting forth the conclusions of the action of declarator, the petition further states:—"That, in virtue of a warrant contained in the said summons of declarator, the pursuers used inhibition against the petitioner, and execution thereof being dated the 4th day of June 1870, and recorded along with the summons and execution in the General Register of Inhibitions at Edinburgh the 7th day of June 1870.

"That the conclusions of the said summons of declarator are not of such a nature as to form a competent or legal ground for inhibition, there being no conclusion for payment of a pecuniary claim, or implement of any other obligation, as the ground of action in security of which inhibition could competently be used. That the said inhibition was therefore incompetent and illegal, and, even if competent, was, in the circumstances otherwise of the case, nimious and oppressive. It is humbly submitted, therefore, that the inhibition ought at once to be recalled without caution."

Answers were lodged to the petition, and, *inter alia*, the following statements were made:—"The petitioner, who is by trade a joiner, has little or no business, and he is not possessed of any means or property other than the subjects in Sanquhar referred to in the proceedings. The respondents had reason to believe, from circumstances that came to their knowledge, that the petitioner intended to divest himself of this property, which is the only source the respondents had to look to for meeting any expenses which may be awarded to them in the action above mentioned. The respondents therefore deemed it necessary for their protection to use inhibition against the petitioner,

—availing themselves for that purpose of the provision contained in the 18th section of the Court of Session Act 1868, by which it is made 'competent to insert in the will of a summons passing the signet a warrant of inhibition which shall have all the like force and effect as letters of inhibition in the form in use at the passing of this Act.' The form of the warrant is prescribed by the statute, and it is also provided that when warrant of inhibition is contained in the will of a summons passing the signet, 'such warrant may be executed either at the same time as the summons is served, or at any time thereafter; and it shall not be necessary to publish such warrants, or to intimate letters of inhibition passing the signet to the lieges in any other way than by registration in the General Register of Inhibitions, and in registering it shall be sufficient to register the summons, including the warrant of inhibition, and the execution of such warrant without registering any condescendence or note of pleas in law which may follow the summons.' It is not alleged in the petition that there was anything irregular or informal in the warrant or the execution of the inhibition, or in the registration. The respondents deny that there was anything incompetent or illegal in the proceeding itself.

"The petition prays for the recal of this inhibition without caution, and prays also that the respondents be found liable in the expenses of the petition, and the procedure to follow hereon. The petition was presented, without any application to the respondents either to recal or restrict the inhibition, and without any intimation that such a petition was to be presented.

"The respondents are quite willing that the inhibition shall be recalled upon caution for such amount as your Lordships may direct. But they submit that there is no ground for recalling it without caution, and that the petition ought to be refused, with expenses."

NEVEY for petitioner.

PATRISON in answer.

The Court held unanimously that such an action of declarator was not of a nature to form a competent or legal ground for inhibition, there being no conclusion for payment of a pecuniary claim or implement of any other obligation as the ground of an action, in security of which inhibition could be competently used; and they granted the prayer of the petition.

Agent for Petitioner—Robert Finlay, S.S.C.

Agent for Respondent—James Somerville, S.S.C.

OUTER HOUSE.

OSWALD, PETITIONER.

(Before Lord Mackenzie)

Entail—Rutherford Act—Power to Feu—Value of Estate. Held by Lord Mackenzie (and acquiesced in) that the powers granted to heirs of entail to feu under Rutherford Act to extent of one-eighth of estate are in addition to powers to feu under the entail; and that the value of estate in any such question is yearly, and not actual intrinsic or selling value.

In this petition to feu the Lord Ordinary (MACKENZIE) has pronounced the following interlocutor, which has become final:—

"Edinburgh, 19th July 1870.—The Lord Ord-

nary having resumed consideration of the petition with the reports of Mr Thomas Brodie, W.S., and of Mr Colledge, Nos. 13 and 16 of process, and proceedings, Finds that the procedure under the petition has been regular and proper; and that the portions now proposed to be feued, along with that portion already feued under the former application to the Court, do not exceed in all one-eighth part in value of said entailed estate mentioned in the petition, and do not form any part of the mansion-house, offices, or policies of the same; and that the proposed feuing would be permanently advantageous to the said estate: Interpones authority, and authorises and empowers the petitioner to grant feus of the seven parcels of land specially described in the petition, and delineated on the plan No. 17 of process, which is subscribed by the Lord Ordinary as relative hereto, and that at such times and in such portions as the petitioner may think fit; fixes and determines the minimum rates of feu-duty at which the said lands may be feued to be the following:—viz. (*first*) the minimum rate of £35 sterling of yearly feu-duty per imperial acre for the parts of said lands first and second described in said petition; (*second*) the minimum rate of £171, 10s. sterling of yearly feu-duty per imperial acre for the parts of said lands third and fourth, fifth and sixth described in said petition; and (*third*) the minimum rate of £12 sterling of yearly feu-duty per imperial acre for the part of said lands seventh described in said petition, and decerns: Appoints a draft of a form of feu-charter, feu-contract or feu-disposition, to be made use of under this application from time to time as such feus shall be granted, to be lodged in process, and when lodged, remits to Mr Thomas Brodie, W.S., to revise and adjust the same, and to report.

"*Note.*—The 24th section of the Rutherford Act authorises the heirs of entail in possession to grant feus of the entailed estate, 'such feus'—that is, feus granted under the powers of the Act—not exceeding in all one-eighth part in value for the time of the estate. There is no prohibition in the Act similar to what occurs in the Aberdeen Act against the heir exercising the said statutory powers in addition to the powers conferred by the deed of entail, so as to exceed in the whole the proportion of ground authorised to be feued by the Act; not only so, but the said section of the Rutherford Act provides that nothing therein contained shall prevent the heir in possession from exercising any power in the entail of granting feus more extensive than the power conferred by the Act. The Lord Ordinary is therefore of opinion that the petitioner may exercise both the power conferred by the statute and the power conferred by the deed of entail.

"The Lord Ordinary is also of opinion that the value for the time of the entailed estate, which the heir in possession is prohibited from selling, means the yearly value of the whole estate, independent of any exercise of the statutory power. Such value is, he thinks, a more accurate criterion of the value of the estate, and of an eighth part thereof for the time than the estimate of skilled witnesses as to the actual intrinsic value, more especially seeing that the power conferred by the statute is to feu or lease certain parts of the estate for an annual return. Such actual intrinsic or selling value also depends so much upon contingencies and upon speculation as to render its ascertainment with any certainty very difficult. This appears to be the opinion of the skilled re-