great risk of the Sheriff interfering in cases where there is no necessity, and where he cannot approach the subject without trenching on ground which is only suitable for the Supreme Court.

When this action was raised the pursuer was living in family with her husband in his house, which was the domicile of the marriage. It was an essential preliminary to granting aliment that she should prove her right to separation, and this she could only do by a consistorial process, an action of separation and aliment in this Court. It would have been quite different if the spouses had been long separate, or had been living separate under a joint arrangement. Then it might be supposed that the parties consented to an allowance being made to the wife. But so far from this being the nature of the case, the pursuer continued to live with her husband after defences were lodged, and after proof was allowed. Then, for the first time, when she considers herself safe of obtaining interim aliment, she thinks fit to leave the house. Nothing could more clearly illustrate the abuse of the power of granting interim aliment than the conduct of the pursuer here. It was just because she saw she was going to obtain her aliment that she left the house. I think that the action is incompetent under the circumstances, and should be dismissed.

The other Judges concurred.

The Court pronounced this interlocutor:—

"Recall the interlocutors of the Sheriff-Substitute and Sheriff complained of; find that when the action was raised in the Sheriff-court the pursuer and defender were living together in the defender's house; find that they continued so to live together during the dependence of the action down to the 17th of March 1874, when the pursuer left the defender's house, and has since lived separate from him; find that, in these circumstances, the action for aliment was and is incompetent; dismiss the said action, and decern."

Counsel for the Pursuer and Respondent—Mr Balfour. Agents—J. & R. D. Ross, W.S.

Counsel for the Defendant and Appellant—Mr Rhind. Agent—Wm. Kelso Thwaites, S.S.C.

Wednesday, May 26.

FIRST DIVISION.

[Sheriff of Roxburgh.

DUKE OF ROXBURGH AND OTHERS *v.* MARQUIS OF LOTHIAN.

Process—Appeal—Competency—16 *and* 17 *Vict., c.* 80, § 24—31 *and* 32 *Vict., c.* 100, § 53.

In a petition for division of the area and sittings of a church, a question arose as to the rights of certain heritors whose lands had been disjoined from the parish under a previous decree of disjunction and erection *quoad sacra*. The Sheriff pronounced an interlocutor disposing of this question, but containing no finding as to expenses. On appeal to the Court of Session, an objection to the competency of the appeal, on the ground that the interlocutor did not dispose of the whole merits of the case, *repelled.*

This was an appeal from an interlocutor of the Sheriff of Roxburgh (PATTISON) in a petition at the instance of the Marquis of Lothian, as principal heritor of the parish of Jedburgh, and William Millar, solicitor, Jedburgh, clerk of the heritors of the said parish, for and as representing said heritors, craving division of the area of the new parish church of Jedburgh. This church had been erected in conformity with an agreement entered into in 1869 between the late Marquis of Lothian, the petitioner's predecessor, and the heritors of the parish, by which the Marquis undertook to be at the whole expense of building a new parish church on St Mary's, or Virgin Glebe of Jedburgh, in lieu of and exchange for the then existing Abbey Church, which was thereafter to become his property. Previously to this, in the year 1855, following on a decree of the Court of Teinds, a considerable portion of what was then the parish of Jedburgh had been disjoined *quoad sacra* from that parish, and, along with small portions of neighbouring parishes, had been erected into the parish church of Edgerston; and one of the questions which fell to be determined by the Sheriff under the petition was whether those heritors whose lands were so disjoined were entitled to a proportion of the area and sittings in the new church corresponding to the valuation of their whole land, or merely to that of the part, if any, of their lands which was not included in the *quoad sacra* parish.

The Sheriff, on 30th April 1875, issued an interlocutor in the cause, finding, *inter alia*, "that, in so far as regards the dividing and apportioning of the area and seatings of the new parish church of Jedburgh recently erected, the heritors of the lands so disjoined and erected into the parish of Edgerston *quoad sacra*, are not to be considered as heritors of the parish of Jedburgh." Other findings followed, and the interlocutor concluded without any award of expenses.

Several of the heritors appealed, and on the case being called in the Single Bills an objection to the competency of the appeal was taken.

Argued for the respondents—The appeal is incompetent, because the interlocutor is not one falling under sec. 24 of 16 and 17 Vic., cap. 80, nor under sec. 53 of 31 and 32 Vic., cap. 100. It cannot be interlocutor disposing of "the whole merits of the case," because the question of expenses is entirely omitted.—*Gordon* v. *Gray*, 1 R. 1081.

No appearance by appellants in answer to objection.

At advising—

LORD PRESIDENT—The process before us is one of a peculiar kind, and was not in the mind of the Legislature when the statutes 16 and 17 Vic., cap. 80, and 31 and 32 Vic., cap. 100, were framed. Still, the rule as laid down in these statutes falls to be applied to the present case, and the 53d section of the Court of Session Act of 1868 must be the standing enactment on the subject. By that section a final judgment is one "which either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause," &c. The petition before us plainly raises a competition

if it raises any controversy at all. Being a petition for the division of the area and sittings in a church, it might be carried through without dispute or question, but when dispute or question arises amongst the heritors or others concerned, the process becomes one of competition. The Sheriff's interlocutor disposes of the whole matters at issue between the parties, and by its terms the heritors within the *quoad sacra* parish are finally excluded from all interest, and put out of Court. The only difficulty which arises is owing to the fact that the Sheriff has not disposed of the question of expenses. But this matter of expenses cannot again be raised, and it has to all intents and purposes been dealt with already. It would be incompetent for the Sheriff to revert to it at any later stage, and an award must have been made in this interlocutor if at all, seeing that the exclusion of the parties interested is final.

LORD DEAS—I think that a process of competition includes, in the sense of the statute of 1868 (31 and 32 Vic,, cap. 100, sec. 53), a process of division of the area and sittings of a church. A process of division of a commonty may be thus comprehended, and it seems to me that such a process as the present also falls to be similarly included. I doubt whether the argument based on the omission of an award of expenses could hold even in the case of processes of multiplepoinding where an interlocutor with findings analogous to those in the present case has been issued. The Sheriff cannot return to give a decision on the matter of expenses.

Lords ARDMILLAN and MURE concurred.

Repel objection to the competency of the appeal, and to roll.

Agents for Appellants—Mackenzie, Innes, & Logan, W.S.

Friday, May 28.

SECOND DIVISION.

MORISON *v.* SCHOOL BOARD OF GLENSHIEL.

Education (Scotland) Act, 1872, *sec.* 60, *sub-sec.* 2—*Parochial Schoolmaster — Dismissal — Fault—Retiring Allowance.*

A School Board dismissed a parochial schoolmaster on account of inefficiency arising from his own fault. The resolution of the Board was sanctioned by the Education Board. In an action of declarator by the master to be found entitled to a retiring allowance.—*Held* that the dismissal having been carried out *bona fide*, and having been sanctioned by the Education Board on the ground of personal fault, the schoolmaster had not a good action for a retiring allowance on a general denial that the unfitness for which he was removed was due to his fault.

This was an action at the instance of James Morison, parochial schoolmaster of the parish of Glenshiel, against the School Board of that parish, for declarator that the defenders were bound to pay to the pursuer, whom they had removed from office, a retiring allowance.

The pursuer was appointed schoolmaster of the parish of Glenshiel in 1860. In April 1874 the School Board obtained a special report from Her Majesty's Inspector of Schools for the district, which certified the pursuer's inefficiency, and on the 15th June they passed the following resolution:—"The special report under section 60 (2), 'Education (Scotland) Act, 1872,' on the Glenshiel Public School by Mr J. MacLeod, H.M. Inspector of Schools, was read, and the clerk stated that a copy of this report had been sent to Mr Morison, the teacher. The School Board having considered the said report, and finding that Mr Morison has failed to make any communication to this meeting, of which he had notice, and a copy of the special report having been sent to him, they have no hesitation in coming to the conclusion, on the strength of this report and from the knowledge of the majority of the members of the School Board of the circumstances of the case, that the teacher is unfit by his conduct, and inefficient from his own fault, and that, in justice to the inhabitants of the parish, he should be removed from the office of teacher. They therefore resolved, subject to the confirmation of the Education Board, to dismiss, as they hereby do dismiss, the said Mr James Morison from the office of teacher of the Glenshiel Public School aforesaid, together with all the privileges and emoluments attaching thereto; and they respectfully trust that the Educational Board will grant the necessary confirmation of this judgment and resolution." The Board of Education for Scotland confirmed the foregoing judgment, removing the pursuer from office on 24th July 1874.

The pursuer pleaded that, as his removal was not occasioned by any fault on his part, he was entitled to a retiring allowance.

The defenders, *inter alia*, pleaded that they ought to be assoilzied, in respect the pursuer having been removed for inefficiency caused by his fault, he was not entitled to a retiring allowance.

The Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"*6th February* 1875.—The Lord Ordinary having heard counsel for the parties, and considered the record and process, Sustains the defences: Assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses, and remits the account thereof, when lodged, to the Auditor to tax and report."

"*Opinion.*—This is an action by a schoolmaster, removed under clause 60 (sub-section 2) of the Education Act, 1872, for unfitness and inefficiency, to recover the retiring allowance to which he alleges right under the provisions of that clause. The action proceeds on the same construction of the clause which I rejected in a similar action at the instance of the schoolmaster against the School Board of Logiealmond. The parties here were not content to abide by the final decision in that case, and I was not unwilling to hear a full argument from the able counsel who represented them, and to reconsider the opinion which I had previously formed on a question of novelty and interest. In deciding the Logiealmond case, I assumed that the management of the school (in the ordinary sense of the