Friday, October 30.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

HENDERSON *v.* FAIRGRIEVE.

Parent and Child—Aliment—Liability of Mother to Aliment her Child—Cost of Maintenance—Set-off.

A widow on her husband's death was decerned his executrix, and the money left by him was continued in his business. *Held* that in accounting some years afterwards with a daughter who had continued to reside with her, for her share of the estate, the widow was entitled to set off against the daughter's claim for interest on her share the expense of maintaining her while she continued to live in family with her.

Observations (*per* Lord President) on the case of *Galt* v. *Reid*, 8 S. 332, and upon the respective liabilities of a father and of a mother for aliment.

The late Robert Naismith junior, wine and spirit merchant, Leith, died upon 4th August 1878, leaving moveable property of about £1000 sterling in value. His widow Mrs Margaret Naismith was decerned executrix-dative *qua* relict, and she entered upon the management and possession of the means and estate of her deceased husband. She also continued to carry on his business as a wine and spirit merchant until her marriage to a second husband, William Henderson, when the licence was transferred to his name.

In May 1884 Elizabeth Naismith or Fairgrieve, a daughter of the deceased Robert Naismith junior, raised an action of count and reckoning in the Sheriff Court of the Lothians against her mother Mrs Margaret Naismith or Henderson, praying that Mrs Henderson be called upon to exhibit a full account of her intromissions with her deceased husband's estate as executrix-dative, so that the true balance due to the pursuer (which she placed at £150) might be determined, or alternatively to pay a sum of £150 with legal interest from 4th February 1879.

The pursuer, though claiming to be entitled to £150, offered to take as payment in full of her share of her father's moveable estate £96, less £16 already paid.

The defender refused to settle upon these terms, and claimed to deduct a certain reasonable sum to meet the cost of the pursuer's maintenance from the date of her father's death to the date of her marriage, about four and a-half years.

The pursuer averred that during part of the time that she lived with the defender she was employed in a shop in Edinburgh, and earned wages sufficient for her maintenance and support, which wages were always handed over to the defender, and during the remainder of the time she was constantly employed as assistant in the defender's shop, and also as a servant in the house, and that it was understood that the wages and services were to be held as equivalent to and in satisfaction of any claims for board and lodging.

The defender, as already stated, claimed credit for the board and maintenance of the pursuer between her father's death and her marriage. "She explained that from the date of the death of the said Robert Naismith junior until the date of her marriage the principal pursuer was in the employment of third parties for a period of about twelve months only. During the first six months the wages she earned varied from 5s. to 6s. per week, and for the remaining six months of said period her wages at no time exceeded the sum of 8s. per week, which wages were duly accounted for to the principal defender. During the remainder of said period (from the date of her father's death until her own marriage) the principal pursuer frequently, but not daily, assisted the principal defender for two or three hours in the afternoon in the management of the shop at No. 1 Shore, Leith, but she was engaged in no other services, and earned no wages whatever. The defender had always a general servant to attend to the household duties. Very considerable expenses for medical attendance and otherwise were incurred on the principal pursuer's account to the principal defender, repayment of which has not been made."

The pursuer pleaded that the defender was bound to count and reckon with her for her intromissions as executrix-dative aforesaid.

The defender pleaded—"(2) The defender having supplied the pursuer with board and maintenance for the period between the death of her father and her marriage, she is entitled to credit to a reasonable sum therefor in settling with the pursuer for her share of her father's estate."

Other points in the action having been arranged, and in particular it being admitted that the pursuer's share of her father's estate was £96, 11s., from which certain deductions fell to be made for sums paid or credited to her since his death, which reduced it to £69, 13s., the interlocutor which it was sought to have altered by this appeal was pronounced on 18th May 1885 by the Sheriff-Principal (Davidson), and was as follows:—

"Finds, in terms of an arrangement between the parties, that the sum to be paid to the female pursuer as the share due to her of her father's personal estate is £69, 13s., and decerns against the defenders for payment of the said sum to the pursuers, with interest at 5 per cent. per annum on the sum of £96, 11s. from the date of the death of the father of the female pursuer on 4th August 1878 until the date of her marriage on 5th April 1883, being £22, 6s. 6d., and with interest at 5 per cent. per annum on the said sum of £69, 13s. from the date of her said marriage till this date, being £7, 7s, 6d., and decerns against the defenders for payment to the pursuers of the said sums of £22, 6s. 6d. and £7, 7s. 6d.: Finds the pursuers entitled to expenses, &c.

"*Note.*—The only questions now remaining are as to interest and as to the expenses of process.

"The female pursuer not having been at once paid her share of the executry estate, or that share not having been put aside for her use, she is of course entitled to the interest of it from the executrix, who retained it (with good intentions only) for the use of the business she adopted. The Sheriff does not see any reason, nor did the defenders suggest any, why, if interest is due at all, it should not be at the usual rate of 5 per cent.

"As to expenses, the pursuers could hardly avoid bringing this action. They offered to accept the sum of £96, 11s., under deduction of the £16 advanced, without further inquiry, but the defenders rejected that offer, and in somewhat peremptory terms. The defenders have been unsuccessful in their contention (plea 2), and have only prevailed on a subordinate point, which was hardly insisted upon by them."

The defender appealed to the Court of Session, and argued—It was always a question of circumstances whether a mother was to be held liable for her child's aliment, and in a case like the present, where the child had independent means, the mother ought to be relieved. Had the child been without resources the case would have been different. At any rate, the defender ought to be allowed to set-off the claim for interest against the cost of maintaining the pursuer during the four and a-half years between her father's death and her marriage.

Authorities—*Hamilton* v. *Stewart*, July 11, 1834, 12 S. 924; *Stewart's Trustees* v. *Stewart*, February 21, 1871, 8 S.L.R. 367.

Replied for respondent—Services were given in return for board and lodging. When a parent aliments a child the aliment is presumed to be given *ex pietate*, even although the child has a little private means. The profits of the business might fairly be set against the claim for interest.

Authorities—*Guthrie*, M. 10,133; *Melville* v. *Ferguson*, M. 11,433; *Galt* v. *Black*, January 19, 1830, 8 S. 332; *Menzies* v. *Livingstone*, February 27, 1839, 1 D. 601; *Hunter's Trustees* v. *Macan*, May 25, 1839, 1 D. 817; Fraser on Parent and Child, p. 99.

At advising—

Lord President—The interlocutor of the Sheriff dated 18th May 1885 is really what we have to deal with in this case, and the question comes to be, whether we are to adhere to it in whole or in part? I understand that the principal sum of £69, 13s. for which the Sheriff had decerned against the defenders is the share of her father's estate to which the pursuer is entitled, under deduction of certain sums advanced to the pursuer by the defender at the time of her marriage; and it is clear therefore that up to this point the Sheriff's decree is well founded. But the question remains whether the pursuer is entitled to interest at the rate of 5 per cent. upon her share of her father's estate from his death to the date of her marriage, that is, from the year 1878 to 1883. The defender says that she is entitled to credit for what she spent in alimenting the pursuer for this period, or at any rate that she is entitled to set off against this claim of interest the cost of maintaining and educating the pursuer from 1878 to 1883. As to the first of these contentions, I think that it cannot in the circumstances be maintained; as to the other, I think the claim is good. The money for which the pursuer claims interest was in the hands of her mother, who was carrying on her late husband's business, and she was quite entitled to set off against the expense of maintaining the pursuer the interest of the pursuer's share of her father's estate. It would have been a very different question if the proposal had been to set off capital for such a purpose. That could not have been done. In the present case we have a daughter living in family with her mother. The daughter has a certain income, and it is only reasonable that the interest of her capital should go to meet the expense of her maintenance. I think, therefore, that the finding of the Sheriff for the pursuer of £22, 6s. 6d. as interest should be disallowed. It is to be observed that the position of a mother in such a case differs materially from that of a father. His obligation is absolute and unconditional. He cannot say that because his children may happen to have independent means they are bound to do for themselves what the law imposes upon him as an absolute duty. I think that the principle of this is well laid down in the opinion of Lord Gillies in the case of *Galt*, to which we were referred. "When a father," he says, "provides suitable aliment to his child he does not make a donation. He only fulfils an obligation morally and legally incumbent on him." Now, I think that these observations do not apply to the case of a mother. No doubt she would be bound to aliment her children if the consequence of her failing to do so would be that they would starve, but the obligation upon the father is much higher and more absolute in its character. I think, therefore, that the defender is entitled to reimburse herself for the cost of her daughter's maintenance from the interest of the pursuer's share of her father's estate, and I should propose accordingly that the large sum of £22 of interest referred to in the Sheriff's interlocutor should be disallowed, but that the smaller sum of £7 should be allowed to stand.

Lord Mure—I am of the same opinion, and I quite agree with your Lordship as to the distinction which is to be drawn between the cases of a father and of a mother as to their respective liabilities for the maintenance of their children. Here the mother carried on the father's business after his death, drew the profits, and maintained the family with the earnings. But it has been shown that the pursuer in the present action has some private means from her share of her father's estate. I agree with your Lordship in thinking that the £22 of interest claimed by the pursuer should be disallowed, and that in the circumstances the defender is entitled to set against this the cost of maintaining the pursuer from her father's death to the date of her marriage.

Lord Shand—I am of the same opinion. As regards the claim by the defender to retain a portion of the capital of the pursuer to pay for her maintenance, I think that in the present case that cannot be allowed. Had the widow been left in poor circumstances and her children fairly provided for, it might have been a most reasonable thing for her to have spent a portion of their capital in maintaining and educating them; but that is not the state of matters in the present case. She had the means to pay for their upbringing, and accordingly she cannot be allowed to encroach upon their capital by any such claim as she now makes. As to the interest of the money falling to the children from their father's estate, that is upon quite a different footing, and should be used for their maintenance and education. Even in a question with a father I think that the same claim might sometimes fairly be made. If he were comparatively

destitute of means, and his children were possessed of property, I think he might be quite justified in using the interest of their money for their education and maintenance.

Lord Adam—I am of the same opinion and have nothing to add.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff of date 18th May 1885: Find in terms of an arrangement between the parties that the sum to be paid to the female pursuer as the share due to her of her father's personal estate is £69, 13s: Decern against the defenders for payment of the said sum to the pursuer, with interest at the rate of 5 per cent. per annum on the said sum from the date of marriage of the female pursuer till payment thereof."

Counsel for Pursuers—Darling—Thorburn. Agent—Andrew Wallace, Solicitor.

Counsel for Defenders—Gloag—Strachan. Agent—Andrew Newlands, S.S.C.

Saturday, October 31.

FIRST DIVISION.

CARR *v.* THE NORTH BRITISH RAILWAY COMPANY.

Poor's Roll—Where Reporters on Probabilis causa litigandi *are Equally Divided in Opinion—Decision Adverse to Applicant in Sheriff Court—A. S., November* 21, 1842.

Where the reporters on the *probabilis causa litigandi* reported to the Court that two of them were of opinion that an applicant had, and that two of them were of opinion that she had not, a *probabilis causa*, the Court, on the ground that the applicant had already two judgments in the Inferior Court adverse to her case, *refused* to admit her to the benefit of the poor's roll.

This was an action of damages for personal injury raised by Mrs Janet Neilson or Carr, residing at 4 Gellatly Street, Dundee, against the North British Railway Company.

The action was raised in the Sheriff Court of Forfarshire, and decree was pronounced both by the Sheriff-Substitute and by the Sheriff in favour of the railway company.

Mrs Carr presented a note to the First Division of the Court of Session praying for admission to the poor's roll.

On 17th October 1885 the Court remitted the application to the reporters on the *probabilis causa litigandi.*

On 31st October the reporters reported that they were equally divided in opinion upon the application, and that they respectfully left it to be disposed of by the Court.

The applicant craved the Court to admit her to the benefit of the poor's roll.

The railway company objected to the application on the ground that not only were the reporters equally divided, but the applicant came to the Court of Session with two judgments of the Inferior Court against her, and that in these circumstances the application ought to be refused.

Authorities—*Williamson*, November 21, 1863, 2 Macph. 126; *Duncan* v. *Morrison*, January 16, 1863, 1 Macph. 257; *Marshall* v. *North British Railway Company*, July 31, 1881, 8 R. 939.

Replied for the applicant—The case of *Marshall* favoured the application. There the reporters were equally divided and the Court admitted the applicant to the roll.—*Halliday*, June 25, 1864, 2 Macph. 1288.

At advising—

Lord President—I think that there is a very clear distinction between this case and that of *Marshall* to which we were referred. In *Marshall's* case the object of the application was to enable the applicant to institute proceedings in this Court. The reporters were equally divided in opinion as to whether the applicant should or should not be admitted to the benefit of the poor's roll, and we admitted the applicant.

Here the action was raised in the Sheriff Court, and by the judgments of both Sheriffs the defenders are assoilzied from the conclusions of the action. The applicant has therefore obtained from these Judges a distinct opinion adverse to her claim, and she has not succeeded in satisfying more than two of the reporters that she has any case at all. This case is one involving solely a question of fact, and an adverse decision has been given in the Sheriff Court. I do not think that such a case ought to be carried any further, and I am not disposed to encourage such appeals. I think therefore that this application ought to be refused.

Lords Mure, Shand, and Adam concurred.

The Court refused the application.

Counsel for Applicant—MacWatt. Agent—James Forsyth, S.S.C.

Counsel for Respondent—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Saturday, October 31.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MACLEOD *v.* THE CALEDONIAN RAILWAY COMPANY.

Master and Servant—Reparation—Known Danger—Relevancy—Averment sufficient to Entitle to an Issue.

In an action of reparation by the personal representative of a workman against an employer for personal injuries resulting in death, caused by the alleged unsafe state of the premises on which the workman was employed, averments not amounting to an allegation that not only did the master know, but that the servant was ignorant of the danger, *held* relevant and sufficient to entitle the pursuer to an issue.

This was an action in the Sheriff Court at Glasgow by Murdo Macleod, designing himself as a crofter at Portree, against the Caledonian Railway