

Saturday, February 20.

## SECOND DIVISION.

[Lord M'Laren, Ordinary.]

JAMESON v. JAMESON.

*Husband and Wife—Separation—Desertion by Husband—Aliment—Quantum of Aliment.*

A husband, sued for aliment by his wife, and admittedly bound to pay it, had a free income of £200 a-year. *Held (disc. Lord Craighill)* that £65 per annum was not an excessive sum to allow as aliment to the wife.

The pursuer Mary Ann Sawers or Jameson was married to the defender John Jameson, fruiterer in Edinburgh, on 4th June 1879, and they continued to live together as married persons until 26th April 1885, when, as was admitted in this action, the defender left the pursuer in the house where they were living, and did not again cohabit with her, having resolved to live separate from her in consequence of their disagreements. A child had been born of the marriage in April 1880. At the time of this action this child was living with and supported by the defender.

In June 1885 Mrs Jameson raised this action of adherence and aliment against Jameson. By minute lodged at closing the record the conclusion for adherence was deleted, and the summons then asked the Court to declare "that the defender as the husband of the pursuer has deserted her," and that he should be ordained to pay £80 a-year as aliment to her.

The Lord Ordinary allowed a proof. The evidence for the pursuer was directed to show that the income of the defender was at least £300 a-year, while the evidence for the defender was to the effect that his income was only £105 per annum.

The defender offered aliment at 15s. a-week, the pursuer, however, not to continue to have the use of the house.

The Lord Ordinary (M'LAREN) issued the following interlocutor:—"Decerns against the defender for £15 of aliment past due to the pursuer as at the date of this decree; and decerns against him also for payment of future aliment to her at the rate of £65 yearly, commencing as at the date hereof, and payable quarterly in advance so long as the defender shall live separate from the pursuer, his wife, with interest thereon at the rate of five per cent. on each quarterly payment as it falls due until paid, &c.

"*Note.*—It is difficult to estimate the income of a trader who does not keep books, but there are ways of coming near it. Mrs Jameson thinks that when she was in the shop and having access to the books they had a profit of £300 a-year; and she had also the means of knowing to some extent what sum they were in the habit of spending on their living. Apparently whatever profit they made was spent, because Mr Jameson says he has not saved any money, and has not been able to pay off debt. Therefore I assume the business could not be worth more than £300, and apparently is now worth less, because the gross turnover has been decreasing during the last three years. But whether the estimate made by Mr Romanes [an accountant who on the basis of the turnover in the business, estimated the gross profit at £524, and the defender's income,

after deducting business expenses, at about £109] is to be taken as reliable depends entirely upon the opinion that one may form as to the gross profits, and as to these we have nothing but opinions. I must say I was not at all surprised at the evidence given for the pursuer, that the gross profits would be about one-third of the turnover, because we know that in a trade concerned with perishable articles like vegetables and fruit you must have a large gross profit to compensate for the risks incident to that kind of business; and in the hands of skilful men who know how to buy, such a business may realise a very handsome percentage of profit. That is the result of their own exertions and knowledge of business; and I should not be at all surprised if this business was worth fully £300 a-year in the hands of a man like Mr Jameson, who knows how to manage it. It may be that, owing to these unhappy domestic differences, he may not have been giving so much attention to economical buying during the last year as before; that, of course, may be made up to him afterwards; but I think I cannot quite accept the estimate of £109, and that a mean between the estimate brought out by Mr Romanes, without apparently any assistance except some documents, and the sum of £300 suggested by Mrs Jameson, would not be unfair—that is to say, that I might take the business as worth £200 a-year, on a fair average of years, looking forward as well as backward. Now, there are many cases where even a man in the position of a workman earning weekly wages has been made to contribute as much as 15s. a-week to his wife's support, and I do not think I can accept the offer here made as satisfactory or suitable to a lady in Mrs Jameson's position, the wife of a respectable dealer in this city. But wishing not to award an excessive sum, because I may be mistaken about the value of the business, I shall give a yearly or quarterly sum to represent 25s. a-week. That will come to between £60 and £70; and I shall make it payable monthly or quarterly as may be desired."

The defender reclaimed, and argued—Even assuming that the Lord Ordinary had taken the defender's income fairly at £200 per annum, he had given too large a portion of it as aliment. In no case had more than one-fourth of the income been given as aliment to the wife only, and in the case of *Lang* the Lord President had laid it down that that was the proper proportion—*Lang v. Lang*, 27th October 1868, 7 Macph. 24. In other cases the same proportion had been given—*Crombie v. Crombie*, 19th May 1868, 6 Macph. 776; *M'Millan v. M'Millan*, 20th July 1874, 9 Macph. 1067; *Grahame v. Grahame*, 19th July 1878, 5 R. 1093.

Argued for the pursuer—The Lord Ordinary had under-estimated the income of the defender, but the amount of aliment that he had given was a fair amount considering the income, and his interlocutor should be adhered to.

At advising—

LORD JUSTICE-CLERK.—In this case the circumstances are peculiar. The action was originally one for adherence and aliment, but the parties have of consent dropped the conclusion for adherence out of the summons, and have limited the action to one for the amount of aliment, and I

have expressed my doubts in the course of the discussion of the propriety of our interference; but the Lord Ordinary has gone into the action on the footing that it was right aliment should be given, and has decided the amount of aliment to be given, and I am not prepared to disturb his decision. I should have thought that the amount given was going to the verge of unreasonableness, but at the same time I am not disposed to change it.

**LORD YOUNG**—My opinion is the same. I share your Lordship's doubts, but I also agree that the parties having gone on before the Lord Ordinary with the action to decide the amount of aliment due by the defender to the pursuer, and the Lord Ordinary having decided that question, I am not prepared to go back from that judgment.

The husband did not turn the wife out of his house, but he went out of the house himself without giving her sufficient support. The wife then brings an action of declarator that her husband is bound to adhere, and as incident to that she puts in a conclusion that he is bound to aliment her until he did adhere. The conclusion for aliment however was a mere incident of the conclusion for adherence.

Now, in the course of the case a minute was put in for the pursuer, but I confess I think it was curiously carried out. The minute was—"Gunn for the pursuer proposed to delete the conclusion of the summons for adherence, and he therefore craved his Lordship to grant leave accordingly." Now this minute is a proposal to delete the conclusion for adherence. I find that that conclusion was deleted, but these words were added on the margin, "that the defender as the husband of the pursuer has deserted her." Now, that comes just to be the case of a wife saying, My husband and I have agreed to separate, and I ask the Court that my husband should be ordained to pay me a certain sum of aliment. I think the proper answer to that is, the separation you agreed to was part of your own affairs, and we think that the amount of aliment ought to be the same also. But on the record the husband says that he cannot live with his wife, and before the Lord Ordinary it was agreed that it was reasonable that he should pay her aliment. Now, I am not prepared to say what kind of cases should or should not come up to the Inner House. But the Lord Ordinary could not look upon this case as other than that of a wife deserted by her husband, and that he had not led any evidence to justify his desertion. Now, the amount of aliment depends on what is the profit of a fruiterer's business in Edinburgh. I suppose it is a matter of some difficulty to fix the exact amount of profit the defender draws from the business. The Lord Ordinary in fact does not seem quite clear what should be taken as the proper sum. But the Lord Ordinary has investigated the matter and has decided it. I do not think that it was necessary to bring a reclaiming-note on such small grounds as those which can be urged for that before us, and I should not feel that I was acting rightly if I ordered a change, unless it appeared clearer than it does that Mr Jameson's income was much larger than what the Lord Ordinary thought it. I see no reason why we should not simply refuse the reclaiming-note, and of course with expenses.

**LORD CRAIGHILL**—I confess that I have come to a different conclusion. As regards the propriety of the action I say nothing. The question which is for decision in this case is, whether the Lord Ordinary has allowed too large a proportion of what he stated to be the income of the defender as aliment for his wife? If he has not, then his interlocutor should be allowed to stand, but if he has, then I think a reduction of the amount of aliment should be made. In regard to that question we have to consider—

First, what is the income of the defender? The witnesses for the pursuer say that his income is £300 a-year, while the witnesses for the defender say that it is £105 per annum. As regards the defender's free income, I agree with the Lord Ordinary in his estimate of the sum, and think that he has followed the equitable course of taking the mean between the two sums. I think that the sum to be divided is £200 per annum. The defender is also supporting his child.

But secondly, what is the allowance that has been made in similar circumstances? The rule which was followed in the Outer House, so far as I remember, and the rule as laid down by the Lord President in the case of *Lang*, is, that a fourth of the free income is a reasonable sum to be given, and the pursuer was obliged to confess in answer to my question that he knew of no case where more had been given. That has been the practice in this Court and I am for not departing from the practice which is an only guide in cases of this sort. I regret to differ from your Lordships, but as that was my opinion, I considered that I ought to give expression to it.

**LORD RUTHERFURD CLARK**—I agree with your Lordships that the Lord Ordinary's interlocutor ought to be affirmed. I confess that I do so, however, only on the ground that the Lord Ordinary has under-estimated the free income of the defender.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuer (Respondent)—Gunn.  
Agent—Daniel Turner, S.L.

Counsel for Defender (Reclaimer)—Salvesen.  
Agent—D. Howard Smith, Solicitor.

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## FIRST DIVISION.

[Exchequer Cause.]

### INLAND REVENUE v. WATT.

*Revenue—Income—Tax—Deduction of Losses—Property Tax Act 1842 (5 and 6 Vict. c. 35), sec. 100, Schedule D, First Case, Rule Third, and sec. 101—Income-Tax Act 1853 (16 and 17 Vict. c. 34), sec. 2, Schedules B and D.*

*Held* that a farmer who was assessed for income-tax under Schedule B upon the rent, in respect of the occupation of his farm, and who was also assessed under Schedule D in respect of the annual profits arising from his business as a seed merchant, was not entitled, either under sec. 100, Schedule D,