Thursday, March 20.

OUTER HOUSE.

[Lord Kyllachy.

FINGZIES *v.* FINGZIES.

Husband and Wife—Parent and Child—Aliment—Liability of Married Woman with Separate Estate to Aliment her Husband—Right of Father Alimenting Son to recover from Son's Wife.

A married woman who was possessed of separate estate was sued by her husband's father for expenses incurred by him in alimenting her husband and providing him with medical attendance. Her husband was without means, and unable to work on account of illness. In incurring these expenses the father was not acting under any agreement with her. *Held* that the father being bound to aliment his son *ex jure naturæ*, was not entitled to recover from the wife even if she were also bound to aliment her husband.

Opinion that a married woman possessed of separate estate is not bound to aliment her husband.

In this case James Fingzies, weaver, residing at Kinnesswood, in the county of Kinross, sued Mrs Jane Lees, sometime Purves, now Fingzies, residing at No. 8 Hermitage Terrace, Leith, for "(1st) The sum of £14 sterling, being the amount due to the pursuer for boarding and lodging John Arnot Fingzies, sometime draper, now residing at Kinnesswood aforesaid, from 6th February 1889 to 20th August 1889 inclusive, being twenty-eight weeks at the rate of ten shillings per week; (2nd) The sum of ten shillings per week so long as the pursuer boards and lodges the said John Arnot Fingzies subsequent to said last-mentioned date; and (3rd) The sum of £23, 10s. sterling, being the amount of the account incurred by the pursuer to David Robert Oswald, batchelor of medicine and master in surgery, Kinross, for professional attendance upon the said John Arnot Fingzies, and for three plaster of Paris apparatus supplied to him; with interest at the rate of five per cent. per annum upon the said sums of £14 and £23, 10s. from the date of citation to follow hereon until payment, and on the said weekly sums of ten shillings from the date when each falls due until payment." The parties put in joint minute of admissions and renounced probation. The facts so admitted sufficiently appear in the opinion of the Lord Ordinary.

Authorities cited at discussion—Upon title to sue—*Lady Kinfauns* v. *Laird of Kinfauns*, M. 5882. Upon the merits—Fraser on Husband and Wife, i. 837; More's Notes to Stair, vol. i. note B. xxiv; Eversley on Domestic Relations, p. 252; Fraser on Parent and Child, pp. 86, 99, 100; Stair, i. 8, 2.

The Lord Ordinary (KYLLACHY) issued the following interlocutor—"The Lord Ordinary having considered the cause, assoilzies the defender from the conclusions of the summons, and decerns: Finds no expenses due to or by either party, and decerns.

"*Opinion.*—The pursuer in this case is the father of John Arnot Fingzies, the defender's husband, and the object of the action is to obtain from the defender, who is possessed of separate estate, recompense for certain aliment supplied by the pursuer to the said John Arnot Fingzies, and also for certain medical attendance and medicine supplied to the said J. A. Fingzies on the pursuer's employment and at his expense.

"The parties in order to avoid a proof have adjusted joint minutes of admission and have renounced probation. The facts of the case as thus ascertained appear to be shortly these.

"John Arnot Fingzies, whose aliment is the subject of dispute, is admittedly indigent and unable to work, and he is and has for sometime been under medical treatment for a disease of the knee. He was for sometime a patient in the Edinburgh Infirmary, and it being the opinion of the doctors that rest and country air were necessary for his recovery, his father, the pursuer, on 6th February 1889 removed him from the house in Leith, where he resided with his wife, the defender, to his (the father's) house in Kinnesswood, in Kinrossshire. Since then he has resided there with his father and sister, being nursed by his sister and attended to by the local doctor, to whom his father has in consequence incurred a bill of upwards of £23. It is not said that the defender, his wife, was a party to these arrangements, or proposed or desired her husband's removal. Neither is it said that the aliment or attendance in question was supplied under any agreement either with the defender or with John Arnot Fingzies himself. Further, it does not appear that any demand was made on the defender until 22nd April 1889, being about two and a half months after the date of the removal.

"The pursuer is, it appears, a handloom weaver, whose earnings do not average more than 12s. a-week. He is old and has no other means, and he occupies a two-roomed house with his daughter, his son—the defender's husband—being the only other inmate. The defender's position on the other hand is this:—She is possessed of a capital sum of £2000, which is at her own disposal, and lives in a house in Leith the rent and taxes of which amount to £20 a year. She has two children by a former marriage, who are possessed of £2000 in their own right, as also two younger children by her present marriage. There is thus no question of her ability to support her husband and to provide him with the medical attendance and country quarters which are admittedly necessary in his condition. It may also perhaps be thought that there is no question as to the moral claim of the pursuer to be reimbursed for his outlays, or as to the inadequacy of the 5s. per week which the defender tenders as the limit of her contribution. The ques-

tion, however, is as to the extent, if any, of her legal liability.

"I do not consider that there is any good objection to the pursuer's title to sue. The defender maintained that her husband should himself have sued, and in any case that the doctor should have sued directly for his account; but if that were the only difficulty—if, for example, the pursuer was not the father of the invalid but a stranger, and if it were also clear that the defender was in law liable for her husband's aliment, I should not, I confess, have much doubt of the pursuer's title to sue. He (the pursuer) has not the less furnished the aliment and the medical attendance sued for because he has procured the same on credit and has not yet paid the debts which he has thus incurred.

"The first question however is, whether it is not a sufficient answer to the pursuer's claim that he is the invalid's father, and is thus himself liable *super jure naturæ* to aliment his son and furnish him with the other necessaries which he requires. The defender maintains the affirmative, and I do not think it doubtful that she is right, unless it can be shown not only that the defender, as the invalid's wife, is liable for her husband's aliment, but also that she is liable *primo loco*, and moreover that the circumstances are such as to exclude the presumption that the aliment, &c., in question was furnished *ex pietate paterna*, and cannot therefore found a claim of debt against any third party.

"Now, upon both of those points I am compelled to hold that the weight of argument is against the pursuer. *Esto* that a wife who has separate estate is on some ground or other liable to support her indigent husband, I am not able to find sufficient grounds for holding that her liability is any other higher or more primary than the father's liability. She is certainly not liable *super jure naturæ*. The relationship between husband and wife is one arising entirely out of contract, viz., the contract of marriage, and assuming it to be an implied incident of that contract that the wife if possessed of separate means shall be liable to aliment her indigent husband, I have not been furnished with any authority or any argument for the proposition that this liability is to be held as primary and comes before, for example, the liability of a son, or, as here, the liability of a father. But, in the next place, even if this were otherwise, and if the wife was liable *primo loco*, it is I think settled that except in very special cases aliment furnished by a person *subsidiare* liable (*e.g.*, a grandfather) cannot be recovered from a person primarily liable (*e.g.*, a father), at all events until after a demand has been made for relief, and there has been a refusal or failure on the part of the person primarily liable to do what is requisite. This doctrine is illustrated by a variety of cases which are collected in Lord Fraser's work on Parent and Child, at p. 101, and it appears to me to be conclusive against the pursuer's case so far at least as regards the period prior to 22nd April 1889.

"But while these considerations may be enough for the decision of the case, I am not, I confess, satisfied that the pursuer would have here succeeded. Even if he had been a stranger, and the question had simply been the general question whether a wife with separate estate is liable to aliment her indigent husband—this is a question on which, so far as I can find, there is an almost entire absence of authority. For any *data* which can be appealed to appear to me to relate to a somewhat different question, viz., the liability of a wife with separate estate to contribute to the expenses of the household, *e.g.*, her own aliment and that of her and her husband's common children. The question, therefore, which is here at issue must be considered as open, and, as I before observed, the wife's liability, if it exists, must rest entirely on contract—that is to say, must rest on something implied by law in the contract of marriage. Now, taking the contract of marriage as it stands, or rather as it stood, at common law, it was, it rather seems to me, impossible that any liability such as that suggested should attach to the wife. For at common law the wife's whole moveable estate passed upon marriage to her husband, and the fruits of her heritable estate were in the same position. She, therefore, apart from special paction, had nothing wherewith to aliment anybody, and if by special paction the spouses varied the legal incidents of their marriage, the variation required to be expressed, and only operated so far as expressed. Prior, therefore, to the recent Married Women's Property Act, I hold the suggested liability excluded by the very first principles of the marriage law, and if that was so and still is so at common law, I cannot hold that the Acts in question make any difference. For those Acts carefully express the consequences which are to follow from the changes which they introduce, and the imposition of any new liability on the wife in the case of her husband's indigence is not one of them. The law therefore on that subject remains in my opinion as before.

"It was no doubt argued that because the husband was bound to aliment the wife the obligation must be reciprocal, at all events when, as now, the spouses' rights in their respective estates are in law equal. But this argument appears to me to overlook two points, viz.—(1) That at common law the husband's position was altogether different from the wife's, he being not only the breadwinner and head of the family but having also the entire administration of the wife's estate as well as his own; and (2) that the obligation of parties being established on this footing, recent legislation cannot be held to have made any difference in respect that, as I have already stated, that legislation proceeds on the principle of expressing fully the alterations on the rights and obligations of the spouses which are to follow from the changes in the marriage law which it has introduced.

"On the whole, therefore, I regret to say that I feel bound to assoilzie the de-

fender. I have only to add, that if I could have taken a different view of the law I should have had no hesitation upon the facts as now admitted in giving decree in terms of the conclusions of the summons. Moreover, the matter of expenses being in the discretion of the Court, I shall in this case find no expenses due to or by either party."

Counsel for the Pursuer—Shaw. Agents—Curror, Cowper, & Curror, W.S.

Counsel for the Defender — Graham Stewart. Agents — Whigham & Cowan, S.S.C.

Monday, March 31.

OUTER HOUSE.

[Lord Kincairney.

WILSON (MACBEAN'S *CURATOR BONIS*), APPLICANT.

Judicial Factor—Curator Bonis to Person Incapax—Payment of Heritable Debt out of Moveable Estate—Special Powers—Power to Take Assignation to Heritable Bonds—Extinction of Debt confusione—Effect on Succession.

The estate of a person suffering from incapacity, to whom a *curator bonis* had been appointed, consisted partly of heritage which was burdened by bonds and dispositions in security granted by the ward to the extent of £14,600, and bearing interest at about 4½ per cent. The *curator bonis* having in his hands about £12,000 for which he found it difficult to get a suitable investment even at a low rate of interest, was desirous to apply that sum in extinction of the bonds, and presented a note in the Bill Chamber for authority to take assignations to the bonds in his own name as *curator bonis*, the assignations to contain a clause bearing expressly that the money had been paid for the protection of the heritage, and not with the intention of discharging the debt, and that the payment was not in any way to alter the order of succession. The Lord Ordinary being satisfied that the payment would be for the benefit of the estate, *granted* authority.

Opinion that the transaction would not extinguish the bonds or alter the order of succession if it sufficiently appeared in the assignations that it was not intended that there should be such extinction or that the character of the funds should be altered,

On 6th November 1889 John Wilson, chartered accountant, Glasgow, *curator bonis* to Hugh MacBean, sometime paint manufacturer and merchant in Glasgow, a person suffering from incapacity, presented a note to the Accountant of Court setting forth that the estate consisted partly of certain heritable properties which were burdened by bonds and dispositions in security granted by the ward to the extent of £14,600, the average rate of interest payable upon that sum being £4, 8s. 5d. per cent. At the appointment of the curator in 1883 the properties were valued at £22,053. There was no arrangement with any of the creditors for the bonds being continued for a fixed period. The note further stated—"In these circumstances it appears to the *curator bonis* that it would be for the interest of the curatorial estate that the foresaid bonds should be taken up by the funds on hand. He has at present about £6000 in bank, and on 6th January next he will have a further sum of £6000. He finds it most difficult to get a suitable investment for any of the funds even at a low rate of interest. To avoid the risk of altering the order of succession to the ward's estate, the *curator bonis* would propose to take an assignation to the said bonds, either in his own name as *curator bonis*, or, if approved of, in name of a third party as trustee, and which assignation would contain a clause bearing expressly that the money had been paid for the protection of the heritage, and not with the intention of discharging the debt, and that the payment was not in any way to alter the order of succession."

The Accountant of Court on 25th November 1889 issued the following opinion—"The curator desires power to pay off debt affecting the heritage belonging to his ward, and that out of moveable estate.

"The ward is proprietor of certain heritable property in Glasgow, burdened with debt amounting to £14,600, the average rate of interest payable for which is £4, 8s. 5d. per cent.

"The curator reports that at present he has in bank a sum of £6000 or thereabouts, and that at 1st January next he will have an additional sum of about the same amount. At present it is difficult, if not almost impossible, to obtain investments properly secured to yield the rate of interest the curator is paying upon the debt affecting the heritage. The Accountant has therefore no hesitation in expressing his opinion that it would be greatly in the interest of the estate, if it can competently be done, that powers be granted to take up the bonds affecting the heritage by applying the moveable funds at the curator's disposal towards payment.

"The Accountant, while expressing this opinion, has to point out that the bonds taken over might be extinguished *confusione*, and thus the succession of the ward's estate *quoad* heritage and moveables altered. Reference is made to the case of *Moncrieff* v. *Milne, &c.*, 18 D. 1286, where it was held that money borrowed on the security of an heritable estate under the Court for temporary convenience did not affect the succession by converting moveable debts into heritable, and that therefore the heir in heritage was entitled to relief of the burden on the heritage out of the executry funds.

"The circumstances of the present case are not, however, precisely similar to those