Well, then, the second article of the agreement provides that "Each of the parties shall be entitled to the use, for persons from their respective districts, of one-half of the number of beds."

Now, if anyone feels doubt as to what the district is, he has only to look back to the title, and he finds that it is the parish, because they are described as the "local authority of the said parish." Accordingly, it is matter of stipulation that the common use is to be for persons from those two stated districts.

Well, now, this transference under the Local Government Act takes place, and the District Committee comes and asks fulfilment of the agreement in this extraordinary sense—they say, "our district now has come to be, not one parish, but twenty-two parishes, and we claim fulfilment of this agreement with the parish of Lanark, in the sense of entitling all the other twenty-one parishes to send their sick to this hospital."

What possible foundation is there for this contention? The agreement, as I have said, plainly refers, not to any and whatsoever persons who may, in the future and by future legislation, come under the jurisdiction of the local authority for the time, but to persons who are in that specified district or parish of Lanark. That seems to me to be completely conclusive. I can imagine —although it would be a very improvident bargain—that some very speculative town council might have resolved that, whatever legislative changes might take place, the hospital should always be available to the whole area administered by the same authority as the landward part of the parish.

That is not what is provided here. A much more reasonable provision is made. The two parties to the agreement looked to the area of the parish, and provided for it. Therefore, I think the proper way of dealing with this case is, to find that the rights of the second parties to send patients is limited to that part of the parish of Lanark lying outwith and beyond the parliamentary area of the burgh of Lanark.

LORD M'LAREN—I am of the same opinion. If Parliament had provided that the Local Government Board of Scotland should be the controlling sanitary authority, with power to appoint agents to carry out agreements throughout the country, I scarcely think it would be maintained that this hospital at Lanark was to be used for the whole of Scotland; but I see no difference except a difference of degree between the actual case and the case which I put.

LORD ADAM and LORD KINNEAR concurred.

The Court affirmed the second alternative of the question.

Counsel for the First Parties—Lord Advocate Sir C. Pearson, Q.C. — M'Lennan. Agents—Maconochie & Hare, W.S.

Counsel for the Second Parties—H. Johnston—C. K. Mackenzie. Agent—Arthur B. Paterson, W.S.

Friday, November 29.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WATSON *v.* WATSON.

Parent and Child—Husband and Wife—Process—Action of Divorce—Aliment—Conjugal Rights Amendment Act 1861, *sec. 9—Minority.*

In actions of divorce the Court has no jurisdiction to regulate the custody, maintenance, and education of the children of the spouses except under the Conjugal Rights Amendment Act 1861, sec. 9, and such jurisdiction as is conferred upon them by that section is confined to children in pupillarity.

In an action of divorce brought by a wife against her husband the Lord Ordinary pronounced decree of divorce; of consent found the pursuer entitled to the custody of the two children of the marriage, and ordained the defender to pay an annual sum for the aliment of the children, who were then in pupillarity. Five years after the younger of the two children had attained minority the pursuer wakened the action, and craved the Court to increase the amount of the aliment to a sum sufficient to complete the education of the children for the medical profession. The defender also lodged a minute in the action craving the Court to put an end to the aliment hitherto paid by him, on the ground that the children were now able to support themselves, and that he himself was in a condition of absolute want.

Held that both motions must be refused as incompetent in such an action.

On 9th February 1880 Mrs Eliza Catherine Liddell or Watson raised an action of divorce against her husband Hugh Watson. The summons contained conclusions for the custody and aliment of the children of the marriage.

On 10th March 1880 the Lord Ordinary (CRAIGHILL) pronounced an interlocutor, in which, after granting decree of divorce, he proceeded:—"Further, of consent of the defender, finds the pursuer entitled to the custody and keeping of Andrew Gordon Watson and John Liddell Watson, the children of the pursuer and defender, for the present, and until the further orders of the Court. . . . Ordains the defender to make payment to the pursuer of the sum of £75 sterling yearly, as aliment of the said Andrew Gordon Watson and John Liddell Watson, the children of the marriage of the pursuer and defender . . . so long as the said children shall remain in the custody of the pursuer. . . . Reserving to either the pursuer or the defender at any time to move the Court in the present action to increase or diminish the aliment now awarded to the pursuer for said children should a change of circumstances occur rendering such an increase or diminu-

tion necessary or expedient in the opinion of the Lord Ordinary or the Court."

At the time at which the said interlocutor was pronounced the two children referred to therein were aged respectively four years and three years.

After decree had been pronounced, the defender, in consideration of the recal by the Court of the inhibition and arrestment used on the dependence of the action, executed an assignation in favour of certain trustees of the bond and disposition in security therein specified, to the extent of £3000, to be held by the trustees for payment of the aliment out of the interest thereof, and if necessary, out of the principal.

In 1886 the process was wakened on the motion of the defender, and by interlocutor dated 27th January 1887 the Lord Ordinary (FRASER) refused the motion made by the defender in a minute for a diminution of the aliment awarded to the pursuer for the maintenance of the children.

On 10th July 1895, on the motion of the pursuer, the Lord Ordinary (KYLLACHY) again awakened the cause, and allowed a minute for the pursuer to be received, which, after reciting the previous stages of the process, went on to crave his Lordship to increase the aliment payable for the said children to the sums of £150 per annum and £120 per annum respectively. The facts upon which this motion was founded were thus set forth by the pursuer:—"The said Andrew Gordon Watson is now nineteen years of age, and has decided to become a medical practitioner. His professional education will cost about £40 per annum for the next five years, and the cost of his board and maintenance, exclusive of education, is not less than £140 per annum, in all £180 per annum for Andrew Gordon Watson. The said John Liddell Watson is now eighteen years of age, and is at present receiving private tuition from Mr Crawford, who prepares young men for examinations preliminary to professions, and he is also desirous of becoming a doctor of medicine. The cost of his board and maintenance, exclusive of education, is not less than £140 per annum, and his present education costs about £25 per annum. If his intention is carried out, the expenditure on him will not be less than that on his brother, *i.e.*, in all, £180 per annum; and in any view the present aliment falls far short of the expenditure required for said Andrew Gordon Watson and John Liddell Watson. It is impossible to complete the education of the said Andrew Gordon Watson and John Liddell Watson so as to enable them to earn their own living without an increase of the said aliment."

On 10th October 1895 the defender lodged a minute, in which, after referring to the interlocutors of Lord Craighill and Lord Fraser, he stated:—"Since the dates of the interlocutors above quoted, the circumstances have entirely changed. The two sons of the pursuer and defender have now nearly attained majority, the elder son being upwards of twenty years of age, and the younger nearly nineteen. They have thus reached an age when they might either be supporting themselves, or at least contributing something for their maintenance. On the other hand, the defender's condition has been reduced to one of absolute want through a succession of losses and misfortunes, and it is only the generosity of friends which has saved him from starvation. He has endeavoured to obtain remunerative employment, but without success, principally owing to the fact that he never received any professional or business training, and he is now unfortunately in a delicate and unsatisfactory state of health, simply from the want of the necessaries of life. . . . Since the year 1880, when the children were only four or five years of age, the pursuer and they have been in the receipt of a joint income of £450 per annum (inclusive of the annuity of £300 provided and secured to the pursuer by the marriage-contract), derived entirely from the defender's means, so that there has been an ample sufficiency of funds available for equipping the children and fitting them for earning their own livelihood, and if this has not been properly looked after and attended to by the pursuer, she is solely responsible, as she has had the custody of the children till the present time."

The defender accordingly craved the Court to put an end to the aliment hitherto paid by him for behoof of his two children, and to order the balance of the said sum of £3000 to be made over to him by the trustees to whom it had been by him conveyed.

On 17th October 1895 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the minute for the pursuer, and answers thereto for the defender, Nos. 39 and 40 of process, and also the minute for the defender, No. 41 of process, refuses the motion made by the pursuer in said minute for an increase of the aliment awarded to the pursuer for the maintenance of their children, Andrew Gordon Watson and John Liddell Watson, by the interlocutor of 17th March 1880; also refuses, *in hoc statu*, the motion made by the defender in said minute No. 41 of process that the aliment should now terminate: Grants leave to reclaim."

The defender reclaimed.

The Conjugal Rights Amendment Act 1861 (24 and 25 Vict. c. 86), sec. 9, enacts—"In any action for separation *a mensa et thoro*, or for divorce, the Court may from time to time make such interim orders, and may in the final decree make such provision, as to it shall seem just and proper, with respect to the custody, maintenance, and education of any pupil children of the marriage to which such action relates."

Argued for the defender and reclaimer—(1) Prior to the Conjugal Rights Amendment Act 1861 the Court had no right to grant aliment or to pronounce an order with respect to custody of children in a process of divorce. The interlocutor of Lord Craighill must therefore be read in the light of that Act, from which alone he derived his powers, and his decerniture for

aliment must be limited to the pupillarity of the children—*Symington* v. *Symington*, March 18, 1875, 2 R. (H.L.) 41. (2) But in any case two conditions were essential to aliment becoming a binding obligation on a parent—indigence on the part of the child, and superfluity on the part of the parent—*Reid* v. *Moir*, July 13, 1866, 4 Macph. 1060, *per* Lord Justice-Clerk, p. 1063. Here the children were of an age to support themselves, while the father was so far from superfluity that he was unable to maintain himself. (3) Lastly, if aliment were exigible from the father, it must be sued for by the minor children themselves, and not by their mother—*Hardie* v. *Leith*, October 31, 1875, 6 R. 115.

Argued for the pursuer—The children here were still *de facto* in the custody of the mother; aliment was the correlative of custody; the children were entitled to aliment suitable to their condition in life; therefore the pursuer's motion should be granted. The true meaning of section 9 of the statute was that the Court might do incidentally in an action of divorce what in virtue of its *nobile officium* it had a right to do on a separate application—*Lang* v. *Lang*, January 30, 1869, 7 Macph. 445. There was not a word in the statute to indicate that an order competently pronounced under section 9 should not continue in force after the children attained minority. In any event, the defender had, since the children attained minority in 1890, acquiesced in the payments made under the judgment of the Court, and was therefore barred from maintaining that aliment should cease. As for his allegation of indigence, it must be kept in mind that in his marriage-contract he had bound himself to "aliment, maintain, and educate" his children in a manner suitable to their station in life.

At advising—

Lord President—In my opinion, the Lord Ordinary who pronounced the interlocutor of 17th March 1880 had no power to assign to the pursuer the custody of these children after they had ceased to be pupils. His Lordship's jurisdiction necessarily rested on the Conjugal Rights Act 1861; for, apart from that statute, questions of custody are not competent to a Judge in the Outer House. Now, the 9th section of the statute applies only to pupils. Seeing, then, that the interlocutor is an exercise of the statutory jurisdiction, it is to be read—and, I think, may fairly be read—as relating solely to the period of pupillarity. The custody having ceased, the aliment had also ceased. Were the true meaning of the interlocutor wider, to that extent it would be *ultra vires* and ineffectual. This being so, the interlocutor ceased to be operative as regards each child when he passed pupillarity.

In this view the present process has ceased to be one in which any order of custody or aliment can competently be pronounced. On this ground I consider that the defender's motion should have been refused absolutely, and not *in hoc statu* merely.

The rights *inter se* of the defender on the one hand and his sons on the other, if these come in dispute, must be determined in some other process, and may arise in relation to the disposal of the money remaining in the hands of the trustees. There may also arise any equitable claims which the wife may have, arising out of the conduct of the husband in allowing her while *de facto* providing for the children, to enter into onerous engagements for their benefit. None of such questions are now competently before us.

I am for varying the Lord Ordinary's interlocutor of 7th October 1895 by omitting the words *in hoc statu*, and *quoad ultra* adhering.

Lord Adam—I am of the same opinion. The Lord Ordinary had no jurisdiction to regulate the maintenance, custody, and education of children before the Conjugal Rights Amendment Act of 1861. But section 9 of that Act empowers the Lord Ordinary to make such provision as to "him shall seem just and proper with respect to the custody, maintenance, and education of any pupil children of the marriage," &c. It appears that the jurisdiction of the Lord Ordinary does not go beyond the power to regulate the custody, maintenance, and education of pupil children, and that he has none to regulate those of minors. That being so, the question is, What is the meaning of the Lord Ordinary's judgment? I agree with your Lordship that there is no doubt that it must be read with reference to the jurisdiction which he possesses. If that be so, the meaning is, that the children referred to in the decree are pupil children, and that the virtue of the interlocutor ceases as soon as the children attain minority. I therefore agree.

Lord Kinnear concurred.

Lord M'Laren was absent.

The Court varied the interlocutor of the Lord Ordinary by omitting the words "*in hoc statu*;" *quoad ultra* adhered.

Counsel for Pursuer and Respondent—Guthrie—W. C. Smith. Agents—Pringle & Clay, W.S.

Counsel for Defender and Reclaimer, W. Campbell—Craig. Agent—James Allan, Solicitor.

Friday, November 29.

FIRST DIVISION.

MUNRO AND OTHERS (M'KIMMIE'S TRUSTEES) *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue — Stamp — Discharge of Bond — Partial Discharge—Stamp Act 1891 (54 *and* 55 *Vict. cap.* 39), *Sched.* 1.

By the first schedule of the Stamp Act 1891, sub-sec. 5, under the heading "mortgage, bond, debenture, covenant," *ad valorem* duty is charged upon