nary professional skill. On the other hand, to make an agent liable for want of success, where no such culpability can be fairly charged on him, and he was acting not only in good faith, but with zeal for the interest of his client, would be against all equity, and against all sound policy.

LORD PRESIDENT—The damage concluded under this summons is only the expense of the action against Mr Bruce, in which the pursuer failed, but as regards the two first grounds of action they would go much farther and make the defenders liable for all the consequences of not getting the deed duly executed and completed. The first ground is, that the defenders are liable because they did not get a deed completed which would have bound Bruce as a joint-tenant; if this were so, the defenders ought logically to be liable for all the rents, lordship, &c., which the pursuer failed to recover from Mr Bruce. But it appears very evident that the defenders did not undertake to get the deed executed, and the pursuer himself did not wish to have it executed.

As regards the second ground of action, viz.—the altering of the draft after revisal—in order to establish this as a good ground the pursuer must make out a great many things. He must make out clearly that the defenders never communicated the alteration, and the circumstances under which it was made, to himself or to the other parties to the deed. He must, moreover, make out that Bruce, possessing along with Wingate, would in consequence of that draft minute, with possession and *rei interventus* following on it, have been liable as a joint-tenant. I cannot say that I would hold that he would be so liable; very difficult questions would arise as to whether one who was merely a beneficiary, as Bruce was under that minute, would be liable as a joint-tenant.

Then there is another very important objection; every liability of this kind must arise from a failure to discharge a duty undertaken. The professional men here did not undertake to adjust a minute which, followed by possession and *rei interventus* would operate as a contract. Such a ground of action would lead to claims much more extensive than those in this summons. If the tenant was lost to the pursuer by the neglect of the defenders, they would assuredly be liable to the pursuer for all he lost through the failure of his tenant.

The last ground of action, if well founded, would justify this summons and go no farther. It is this, the pursuer was allowed by his advisers to raise an action, which was unsuccessful, without their telling him that they had caused to be altered after revisal, and had not seen duly executed and completed, a deed on which his case rested. The pursuer says that if he had been told of this he would not have raised his action, but we have no evidence of that. Now, when the judgment in the former action was pronounced we thought the ground very narrow and very difficult, and yet the pursuer says he would have foreseen that the non-execution and alteration of the deed would be fatal to his action. I think it not the least surprising that the defenders did not specially call the pursuer's attention to the alteration after revisal and non-execution of the deed, because they thought it of no consequence. Had they known of the importance of the alteration and non-completion, and not communicated it to their client, that might have been ground for professional liability, but it was not so here.

On the whole matter, I am of opinion that the interlocutor reclaimed against should be recalled and the defenders assoilzied from the conclusions of the summons.

LORD ARDMILLAN gave no opinion, having been absent in the Registration Court during the debate.

The Lord Ordinary's interlocutor recalled, and the defenders assoilzied from the conclusions of the action, with expenses.

Agents for Pursuer—Hill, Reid, & Drummond W.S.

Agent for Defenders—P. S. Beveridge, S.S.C.

Saturday, November 5.

HOOD *v.* HOOD.

Process—Sheriff-court—Competency—Amendment of Summons — Aliment — Contract of Separation, Held that arrears of aliment were due to a wife on a formal, though voluntary, contract of separation, up to the date of the action, when the husband judicially revoked the contract; and that, the circumstances being suspicious, the husband must satisfy the Court of his *bona-fides* in revoking the contract and offering to receive back his wife, before they will finally dismiss the claim for future interim aliment. *Held*, farther, that an action for interim aliment only is competent in the Sheriff-court. Record allowed to be amended by the insertion of the word "interim," and of the grounds of separation and claim for aliment.

This was an appeal from the Sheriff-court of Forfarshire, at the instance of Mrs Margaret Philips or Hood, against the Sheriff's interlocutors pronounced in an action for aliment brought by her against her husband, the respondent, William Hood, a guard on the Caledonian Railway at Aberdeen, afterwards a carter in Brechin, and now, since the date of the summons, residing in Brazil, or elsewhere abroad,

It appeared from the condescendence lodged in the Sheriff-court that in April 1867 the appellant had been obliged to separate from her husband in consequence of his alleged ill-treatment of her, and of his alleged drunken habits. A minute or memorandum of agreement of separation between them was duly executed. This agreement set forth as the cause of separation, simply, "dissimilarity of temper and other circumstances," and in it the respondent agreed to permit his wife and children to occupy certain premises, and undertook to pay her weekly in name of aliment and support for herself and children, at the rate of nine shillings a week. The parties accordingly did live apart from the date of this minute of agreement, but Mrs Hood did not receive her aliment in terms of the agreement. Accordingly, on Nov. 4th 1868, she raised a summons in the Sheriff-court of Forfar, concluding for aliment under the deed of separation, up to the date of the action, under deduction of certain sums paid. In Nov. 1869 she was obliged to apply for a *meditatione fugæ* warrant against her husband, which was refused, and at the same time raised another action for aliment from the 4th Nov. 1868, in the same Sheriff-court.

It was in this action that the present appeal was taken.

The respondent's statements went to shew that at the date of the separation, he was a guard on the Caledonian Railway, residing at Aberdeen, and that at first he had paid the stipulated aliment, at least partially. That he had in March 1868 been discharged from the service of the railway company, and then became unable to continue the said payments; that he had gone to his native place, Brechin, where he had ultimately obtained employment at a very much reduced rate of wage, and had been unable to resume his payments to his wife, especially as he had been burdened in addition with the payment of debts incurred by her. That in consequence of her proceedings against him he had lost his employment at Brechin, and was now at Liverpool, endeavouring to obtain an appointment on the railway in Brazil, which he hoped shortly to get. While unable to pay his wife the stipulated aliment, he had several times, judicially and otherwise, recalled the agreement of separation, and offered to take her and their children to his house. This offer he again repeated in this action, and stated his readiness to take them with him to Brazil, in the event of his obtaining the situation which he expected. The appellant replied that these offers, and especially this last one, were quite elusory, and were made for the purpose of evading his legal obligations. In point of fact, since the raising of this action, the respondent had left the country without making any provision for his wife and children, either for their support here or for their joining him abroad. And farther, that though he might have, through his ill-conduct, lost certain situations, he had lately succeeded to a considerable sum of money, amounting to more than two hundred pounds, and therefore was quite able to make the requisite provisions for herself and children.

Such is a narrative of the circumstances in this case, but an objection was taken in the Sheriff-court to the relevancy and competency of the summons. It concluded for the sum of nine shillings weekly, "in name of aliment and support" for herself and two children—"from and since the 4th day of Nov. 1868, and that in one sum, so far as now due and payable up to the date of the present summons, and thereafter weekly, so long as the said William Hood shall, as he has done during the period libelled, live apart and separate from the pursuer and her said children, or shall fail to find security for the future aliment," &c.

Against this summons the respondent took the following preliminary pleas:—"(1) There is no jurisdiction in this (the Sheriff) Court to entertain an action for permanent aliment at the instance of a wife against her husband. (2) The summons is irrelevant, no ground which the law recognises as sufficient to justify the pursuer in separating from, and remaining separate from her husband being libelled. (8) Generally, the action is incompetent, and the summons irrelevant and defective, and ought to be dismissed.

The Sheriff-Substitute (ROBERTSON) found "that the summons did not set forth the grounds of action, and that it is, as laid, vague and irrelevant, and, in respect the action is one between husband and wife, and in respect cruelty is averred in the pursuer's condescendence, which, if proved, will justify the Court awarding interim aliment, allows the pursuer to amend her summons if so advised," &c. In his note the Sheriff-Substitute adverted to the fact that no litigant in the Sheriff-court has any right to trust to a condescendence for disclosing his grounds of action, as a condescendence is entirely in the discretion of the Court.

On appeal the Sheriff (MAITLAND HERIOT) sustained the appeal, adhered to the interlocutor appealed against so far as it found the summons to be vague and irrelevant, but recalled the remainder, and dismissed the action, on the ground, as stated in his note, that this summons was so very irrelevant and confused that it seemed "hopeless to cure matters by any amendment."

Against this interlocutor the pursuer appealed to the First Division of the Court of Session. When the case came up for hearing, the Court, before answer, allowed the appellant to lodge a minute of the amendments which she proposed to make on the summons. This was done, and the summons as amended concluded for the same sum "in name of *interim* aliment," instead of merely aliment, and that "so long as the said William Hood shall, as he has done during the period libelled, *fail to provide* for the future aliment and support of the pursuer and said children, and so long as such aliment may be required by them, *or until a permanent arrangement of the rights and interests of the parties shall be made by a competent court, which aliment*, primo, *is due under and in virtue of a certain minute or contract of separation between the defender and the pursuer, dated 5th April* 1867; secundo, *is, separatim, due in consequence of the defender having, through cruelty to the pursuer, dangerous to her health and life, compelled her and the said children to live separate from him since a date anterior to said 4th day of November* 1868; *and*, tertio, *is in any event due in consequence of the defender having, since a date anterior to said 4th day of November* 1868, *wrongfully failed to provide for the aliment and support of the pursuer and the children foresaid, &c.*"

These amendments the Court allowed.

BLACK, for the appellant, pleaded that the action as originally laid was competent, and referred to Ersk. 1, 5, 30, for the principle, and to Soutar's Styles as evidence, of the practice. He admitted, however, that the existing practice in some Sheriff-courts was contrary, and accordingly, in deference to this, the action had been confined to interim aliment. He submitted that under the contract of separation, voluntary though it was, he was entitled to arrears of aliment, and to interim aliment until there should be a *bona fide* proposal of the husband to provide for his wife at bed and board with himself. He relied upon the following cases —*Reid* v. *Black*, Hume, p. 5; *M'Leod* v. *Telfer*, Hume, p. 18; *Hamilton* v. *Wylie*, 8th July 1824, F. C., p. 583; *Grahame* v. *Grahame*, 4 S. 670; *Braick*, 8 S. 284; *Kelly* v. *Kelly*, 9 S. 871; *Williamson*, 22 D. 599; *Cowper*, 23 D. 68; *Paterson* v. *Paterson*, 24 D. 215; *Coutts*, 4 Macph. 802.

FRASER, for the respondent, argued, upon the case of *Bell* v. *Bell*, 22d February 1812, F.C., that the appellant could not sue upon the contract at all, there having been no judicial separation. It was a purely voluntary contract, which might be ended at the will of either party, and its only effect is to give the husband the plea of personal bar to the wife's claiming more than the aliment agreed upon. He admitted that, were the respondent unwillingly to take back his wife, the Court might give decree for aliment; but he contended, on the principle of *Hamilton* v. *Wylie*, 8th July 1824, F.C., he, offering to receive back his wife, could not be held so liable. The cases of *Donald* v. *Donald*,

22 D. 1118, and *Malcolm* v. *Malcolm*, Hume p. 2, were also referred to.

At advising—

LORD PRESIDENT—The contract of separation here, a tested instrument, is a good ground of action for sums due under it, and will be so in all time coming for sums accruing, till revoked. The husband may revoke it judicially, and he has done so in form of words. So, all we can do is to give decree for so much in name of aliment down to the date of the action. Peculiarities here, however, lead one to doubt the *bona fides* of that revocation. The husband offers to take home his wife and children, but this, if not in good faith, is no answer at all. The question, therefore, remains, how are we to be satisfied as to the *bona fides* of this offer.

LORD DEAS—I have no doubt at all that under such a contract, while unrecalled, the aliment due may be sued for in any competent Court in the kingdom. If the husband says he revokes the contract, that may be a *prima facie* answer. But if the wife replies that it is a mere pretence, and condescends upon facts and circumstances to show that the revocation is not in good faith, *e.g.*, if she were to say that he is living in a house of ill-fame, and getting drunk every day, that might be let go to proof in that action, and if proved to the satisfaction of the Court, aliment must continue so long as matters are in that situation. I hardly think your Lordship meant to say it must stop, even in the meantime, from the date of the action. If there are good grounds for suspecting *mala fides* on the part of the husband, interim aliment should go on till that be ascertained, in place of leaving the wife to starve. It appears to me that it ought to be continued; while of the competency of the action I have no doubt whatsoever.

LORD ARDMILLAN—I have no doubt that payment of the contract-aliment may be enforced up to the date of the action. The counsel for the defender says truly that the law frowns on the separation of husband and wife, but it is upon the act of separation, and not upon the contract for aliment during separation, that it frowns. If they are to separate, the aliment is not the evil part of the separation. Yet here the defender maintaining the fact of separation says that the law frowns upon the contract. That is neither law nor sense, and the case of *Malcolm*, quoted, is sufficient authority against it, if authority be required. I have more difficulty on the other part of the case. The *bona fides* of the husband is a question of evidence. Viewed as a question of first impression, it might be treated unfavourably for the husband; but we are not entitled to take it as a question of first impression, and I am satisfied that we should continue the aliment and enquire into the *bona fides* of the husband.

LORD KINLOCH—I have a clear opinion that this is a competent action, and that is, I think, the only question before us. The suit is now, since the amendment of the summons, a suit expressly laid for interim aliment. I should have thought it competent, even had there been no contract of separation. If a husband, separating himself from his wife, lives apart from her by his own choice, and furnishes her with no maintenance, that is a sufficient ground for enforcing interim aliment against him. But there is further here the contract of separation, and I have no doubt that the wife can sue upon it until it is brought to an end. Until revocation by the husband, it is a good contract to found an action at the instance of the wife. In this case, then, we have both circumstances combined—firstly, the husband keeping himself separate from the wife and refusing her aliment; and secondly, the contract of separation binding him to aliment his wife. There may be a good defence on the merits; as, for instance, that he is willing to receive her; that he has revoked the contract of separation, and so forth; but these being defences on the merits, are to be enquired into hereafter, not now.

The Court accordingly sustained the appeal, and recalled the Sheriff's interlocutor, and gave decree for the aliment sued for, up to the date of the action; and, before proceeding farther, appointed the defender to satisfy the Court as to the measures he intended taking for the support of his wife, and for enabling her to join him abroad.

Agent for Pursuer—Andrew Fleming, S.S.C.

Agents for Defender—Henry & Shiress, S.S.C.

Saturday, November 5.

MENZIES *v.* MACDONALD.

Process—Interdict—Expenses. Interdict will only carry expenses when the trespass alleged is proved or admitted. Circumstances in which interdict was craved with expenses, and the complainer contended that interdict should be granted, and expenses given without a proof. The respondent was ready to let interdict pass without expenses. *Held* that, the parties being at variance on the subject of trespass, the complainer could only get his expenses if he succeeded in proving trespass. If he failed in so doing, the circumstances might be such as to entitle him to interdict, but he could not then get his expenses. If he insisted in his expenses in any case, proof must be allowed.

This was a suspension and interdict brought by Sir Robert Menzies of Menzies, Bart., against Mrs Macdonald, innkeeper, of the Macdonald Arms, Kinloch Rannoch, seeking to interdict and prohibit the respondent, "her servants, friends, guests, lodgers, family, and dependants, or others in her name and employment, or acting under her authority or permission, or as in her right, from entering, landing, or in any way trespassing upon any part of the lands adjacent to, and the islands situated in the lake or loch, called Loch Rannoch, in the shire of Perth, forming part of the estate of Rannoch, the property of the suspender, and also from drawing nets or boats upon, or landing oars or nets or fishing implements, or tackle, or any other articles upon, or in any way making use of the said lands or islands;" and praying their Lordships "to find the respondent liable in expenses."

The note was passed without caution, and interim interdict granted. The record was closed upon the reasons of suspension and answers, and the parties were heard in the procedure roll, when the Lord Ordinary (MACKENZIE) pronounced an interlocutor of this date, October 28, 1870, allowing the parties a proof of their averment on record, in respect that, although the complainer was willing to renounce probation, the respondent refused to renounce pro-