Thursday, December 8.

FIRST DIVISION.

[Sheriff Court at Fort-William.

MACLURE *v.* MACLURE.

Husband and Wife—Property—Husband's Right to have Wife Removed from His Property — Marital Authority to Fix Residence of Wife—Husband's Right as Curator of Wife.

The tenant of an hotel requested his wife to remove from the hotel, but offered to pay aliment. On her refusing to do so, he raised an action in which he craved the Court to ordain her to remove from the hotel, and to interdict her from returning thereto.

Held that the pursuer was entitled to the warrant and interdict sought,—*per* Lord President and Lords Kinnear and Mackenzie—on the ground that he was entitled to exercise his right of property in the hotel against his wife as if she had been a third party; *per* Lord Johnston, agreeing with the opinion of the majority of the Judges in *Colquhoun* v. *Colquhoun* (1804), M. App. Hus. and Wife, No. 5, on the ground that the removal of his wife from his place of residence fell within the scope of his curatorial right over her.

On 10th March 1910 Malcolm Maclure, hotelkeeper, Arisaig Hotel, Arisaig, Inverness-shire, raised an action in the Sheriff Court at Fort-William against Mrs Ann M'Intyre or Maclure, his wife, residing with him in the hotel, and in the initial writ he complained that his wife was of intemperate habits, and that she refused to leave the hotel although he was willing to make her an alimentary allowance. He averred that his business of hotel-keeping was being seriously injured in consequence, and he craved the Court "to ordain the defender, his wife, to remove from the hotel at Arisaig aforesaid occupied by the pursuer, on a charge of seven days, and, in the event of her failing to remove within the above period, to grant warrant to officers of Court summarily to eject her from the said hotel, and further to interdict her from returning to said hotel or such other hotel or dwelling-house the pursuer may occupy, or from molesting or interfering with pursuer or any member of his family, and in the event of her opposing this application to find her liable in expenses."

The following narrative is taken from the opinion of the Lord President, *infra*:—"In this case the pursuer is a hotel-keeper and the defender is his wife, and the crave of the writ is that the Court should ordain the defender to remove from the hotel on a charge of seven days, and in the event of her failing to remove should grant warrant to officers of Court summarily to eject her from the hotel, and further, should interdict her from returning to the hotel.

"The averments on which this crave is based explain that the defender has been for a long time persistently of intemperate habits, and that her presence in the hotel is detrimental to the business which the pursuer carries on in the hotel. The pursuer admits that the hotel is his home, and that he lives there with the defender and her children; and he offers to pay a sum of aliment at the rate of £60 per annum for so long as he excludes the defender from living with him in the hotel. The defender put in defences, in which, while admitting intemperance to a certain extent, she denied that the intemperance had been of such a character as to prevent her attending to her duties, and maintained her right to remain in family with the pursuer and the children.

"The Sheriff-Substitute (Davidson), before whom the case depended, allowed a proof on this matter of the intemperance, and also on the question of the pursuer's income, and he eventually [on 23rd June 1910], after certain findings, which I may say affirm generally the pursuer's rather than the defender's view as to the intemperance, finds in law 'That the foregoing findings in fact warrant and entitle the pursuer to remove the defender from the Arisaig hotel, and to apply for and obtain the authority of the Court to that effect; therefore ordains the defender to remove from the said hotel upon a charge of seven days from and after the date of charge; and in the event of her failing so to do grants warrant to officers of Court to summarily eject her from the said hotel, subject to the condition that the pursuer shall before extract find caution to the satisfaction of the Clerk of Court for the regular payment of £5 per month to the defender while the pursuer's circumstances continue substantially as at present, and until such time as the pursuer shall receive the defender into his house, or until the rights of the parties shall be finally settled in a court of law; further, grants interdict as craved.' An appeal was taken against that judgment to the Sheriff (Wilson), who [on 11th August 1910] affirmed *simpliciter* the interlocutor of the learned Sheriff-Substitute, and the present case is an appeal from that interlocutor of the Sheriff to your Lordships."

Argued for the appellant (the defender)—The action was incompetent. There was no authority for it, and the decree which the pursuer sought was radically opposed to the matrimonial obligation to adhere at bed and board. The Court would not interfere with the fulfilment of that obligation except by a decree of separation or divorce—*Chalmers* v. *Chalmers*, March 4, 1868, 6 Macph. 547, Lord President Inglis at 550, 5 S.L.R. 357; Fraser, Husband and Wife, 877; Erskine, i, 6, 19; Stair, i, 4, 9. The pursuer was not entitled to a separation or divorce, but the decree here sought would have the same effect as a decree of separation or divorce, for it would compel the wife to live apart. There was no authority for such a decree. The case of *Colquhoun* v. *Colquhoun*, 1804, M. App. 1, Husband and Wife, No. 5, relied on by

the pursuer, merely decided that the Court would not take any active steps to interfere with a husband in his actings towards his wife. In the same way, although the Court would enjoin the duty of adherence in an action of adherence, it would not actually enforce specific performance of the duty, and *a fortiori* it would never intervene by a decree such as the pursuer sought which would specifically authorise a breach of the duty of adherence. The other case relied on by the pursuer, viz., *Webster or M'Intyre* v. *M'Intyre*, Hume's Session Papers, Summer 1829, No. 26, also did not support his contention, because in that case the house was not the home, and the question in it was merely one of property. If the decree which the pursuer sought were granted, it would make it impossible ever after for the defender to obtain a separation or divorce on the ground of desertion. With regard to the pursuer's right of property in the hotel, whatever this right might be, it could not determine the question in the present case, which was one of status. Moreover, all rights of property were qualified by any contracts the owner of the property might have entered into, and the pursuer's right of property in the hotel must be held to be qualified by the contract involved in his marriage. In any event the pursuer's right of property as well as his curatorial right must necessarily suffer limitation if it encroached on the equally well-founded duty of adherence. *Nimmequen* v. *Teviot*, 1703, 4 Brown's Supp. 568, was referred to.

Argued for the respondent (the pursuer)—This was a perfectly competent action—*Webster or M'Intyre* v. *M'Intyre*, *cit. sup.*; Fraser, Husband and Wife, 870. The paramount right of each of the spouses was absolute liberty—*The Queen* v. *Jackson*, [1891], 1 Q.B. 671, Lord Chancellor Halsbury at 680—and the law had no special regard for the matrimonial home. The case of *Colquhoun* (*cit. sup.*) recognised the right of a husband to put his wife out of the house, and it supported the pursuer's contention that the rights of a husband in his property were not different from those of other owners of property. In giving assistance to a husband in connection with his civil rights there would be no trenching on the consistorial rights of either spouse and the decree which the pursuer sought would not be *res judicata* on any question of status. It would not entitle the pursuer to neglect his conjugal duty of going to see his wife and cohabiting with her from time to time, and it would not bar an action of separation or divorce at her instance—*M'Ewan* v. *M'Ewan*, 1908 S.C. 1263, 45 S.L.R. 923. *Mackenzie* v. *Mackenzie*, December 21, 1892, 20 R. 636, *aff.* May 16, 1895, 22 R. (H.L.) 32, 30 S.L.R. 276, and 32 S.L.R. 455, was referred to.

At advising—

LORD PRESIDENT—[*After the narrative, ut supra*]—The argument of the defender was chiefly rested upon this proposition, that the Court would never pronounce a decree which in its nature went radically against the duty of adherence upon both the spouses—a duty which, in an appropriate process, the Court would pronounce a decree enjoining, although from reasons of public policy the Court would never enforce specific performance of those duties. I think that that argument is really based upon a misapprehension and that the interlocutor of the Sheriff is right.

In the first place, the matter appears to me to be really settled by the authority of the case of *Colquhoun*. That case was decided long ago, but its authority has never been doubted. It has been quoted as the ruling authority by, I think, all writers on the subject since that date, and it was accepted by the late Lord Fraser as an authority in his well-known work on Husband and Wife. The circumstances in *Colquhoun* were that Colquhoun intimated to his wife that he did not intend to allow her to come into his house, and that he invited her to take up her abode in a separate residence which he had procured for her in Edinburgh. Lady Colquhoun then raised an action in which she asked the Court to interdict Colquhoun from keeping her out of his own residence, but that petition was refused. Now your Lordships will see that the circumstances there are really precisely the same as in the present case, with just these two differences—first, that the offer to the lady there was the offer of a specific dwelling-place, whereas here, on the other hand, she had been offered money to procure herself lodgings. I think that that obviously cannot make any difference. The second difference is that, so far as the Court proceedings were concerned, Lady Colquhoun in that case was the petitioner, and here the husband is the petitioner or pursuer. It was argued to us at the Bar that that did make a difference, and that the Court should do nothing to aid the husband in excluding the wife from his house. As to this I think that it would be a very curious result that the determination of the matter should depend upon the mere accident of who stood pursuer before the Court. In other words, that Colquhoun having been clever enough or strong enough to manage to keep his wife out of the house, should then be successful in resisting any efforts which she made in asking the Court to put her in again; while, on the other hand, in a case where a husband did not, as it is phrased in one of the books, take his wife by the shoulders and put her out, he should not have the assistance of the Court simply because he did not choose, so to speak, to assault his wife. I do not think that that is a state of matters that would commend itself to us; and accordingly I confess that I think that *Colquhoun* is a direct authority upon the point.

But I should like to say a word or two more about the case of *Colquhoun*, for this reason: The actual judgment is merely given in result, but there is a long report in Morison which purports more or less to give the observations of the Judges upon both sides (for there was a division in the

Court on the matter), and it is certainly the case that from the observations of the Judges it would seem that they proceeded upon the curatorial power of the husband. That seems to have been the basis of the judgment. I am content to take it at that. But I am myself strongly of opinion that there is really a safer ground of judgment in this matter, and it is this—I think that the husband's right to ask for what he seeks here depends, not upon his right as a husband, but upon his ordinary right of property in the house. When I say property, I mean his right of possession in the hotel—for he is only a tenant—but that does not matter as against third parties, and he has as against them just as complete a right as the landlord. Now it seems to me that he is entitled to turn his wife out if she molests him in the conduct of his hotel, just as he would be entitled to get an interdict against any third party who molested him. It is really a confusion of thought to say that a decree for the removal of his wife if she is molesting him in the hotel has anything to do with the question of the duty of adherence. The Court in this matter is not really acting in a consistorial capacity at all. It is not a necessary consequence of turning the wife out of the hotel that the husband will necessarily be in default in matrimonial duty. If the wife chose to establish herself, or if the husband chose to establish her, in a house near the hotel, and if from time to time he went to that house and performed the conjugal duty of seeing his wife and the other conjugal duty of cohabiting with her, I do not think that an action of restitution of conjugal rights or (to use a Scots term) an action of adherence would be successful. The Court has never gone in for what I may call the nice measuring or weighing of the precise amount of the conjugal duty which the husband is bound to give to his wife or a wife to her husband. It will declare the obligation of the spouse in general terms where it is evident upon the facts of the case that the obligation has been breached. More than that it will not do, because it cannot enforce specific performance of such duties. It was said in argument that there is no house near this hotel at Arisaig. I do not think that we can possibly go into such matters. A decree ordaining the wife not to molest the husband in his occupation of the hotel leaves open absolutely the question of fact whether the husband will perform his conjugal duties to her; and it also leaves the matter in law precisely as it stands with all spouses, namely, that if the husband does not perform his conjugal duties the wife has the right of action of adherence, and that if the husband neglects these conjugal duties for a period of four years he may be divorced for desertion.

Accordingly I think—and I would say this with great confidence were it not for the eminence of the learned judges who long ago decided the case upon the other ground—that it is safer to rest the matter upon the mere right of property, and not to mix it up with that with which, in my opinion, it has nothing to do, namely, the question of the inter-conjugal relations which are enforced by consistorial process. Of course it follows for similar reasons that a wife could have the assistance of the Court in turning her husband out of a house which belonged to her. No doubt the exact opposite of this was decided in the old case of *Webster*, which is not reported; but then that decision was given at a time when the *jus mariti* was in full force, and one can easily see that that case was decided simply on the ground that the husband through his *jus mariti* had such a regulation of his wife's property that he could insist upon her quitting her own house. But now that the *jus mariti* no longer exists, I think that the result would be exactly the opposite.

Accordingly I think that the judgment of the Sheriff is right. But his interlocutor is not quite right. The crave of the pursuer, I think, goes too far. After asking that the defender should be ordained to remove and that a warrant should be granted to eject her, the crave proceeds, "and further, to interdict her from returning to said hotel or such other hotel or dwelling-house the pursuer may occupy, or from molesting or interfering with the pursuer or any member of his family." I think that that goes too far. In the first place, to interdict her from "such other hotel or dwelling-house" is looking too much to the future. One does not know that she would molest him in any other hotel or dwelling-house; and accordingly I think those events must be left until they occur. And then "from molesting or interfering with the pursuer or any member of his family" is also inexpedient, more especially as there are here children of very tender years. Now it is quite clear that we are not here in any consistorial matter, and therefore we are not to decide, and cannot decide, upon the question of access to children. That, if parties do not agree about it, will have to be regulated in the ordinary way in a consistorial application.

I should like to add also that although, as I have put it, the matter depends upon patrimonial rights and nothing else, still I do not think this Court is ever bound to exercise an equitable jurisdiction (which it always does when it deals with interdict) without being sure that the result of its own judgment is not necessarily to cause another wrong; and accordingly I think here that we should not have pronounced such an order if there had not been at the same time an undertaking on the part of the husband to give a certain sum in name of aliment to the wife. The Sheriff-Substitute has thought that the sum preferred is sufficient, and that is quite enough, I think, for the Court. But here again I would point out that we are not sitting in a consistorial application, and that the question of the true amount of aliment is one that necessarily must be left open. If the parties do not agree with what has been done, it must be left open for determination in a proper process.

I propose therefore that your Lordships should recal the interlocutor as it stands and repeat the interlocutor down to "grants warrant to summarily eject her from the said hotel," and grant interdict against her returning to the said hotel, and there stop. I do not think it is necessary to put in the matter about finding caution to the satisfaction of the Court, because I think we shall be content if we get now, from the counsel at the bar, an undertaking that the sum of £60 a-year will be regularly paid until, of course, either the husband takes the wife back again, or the wife has the matter settled by an application in Court. I understand that counsel will give that undertaking; and for the rest I think the interlocutor should stand.

LORD KINNEAR—I agree with your Lordship. I think that the application went too far, and that the limited right which your Lordship proposes to sustain on the part of the husband must rest upon his right to the peaceable occupancy of the house in which he is living and is carrying on business. The Sheriff-Substitute finds as a matter of fact (and I think this finding, assuming it to be right, really affords the sole basis for the pursuer's complaint) that the defender has for a lengthened period been of intemperate habits, and has so conducted herself as to destroy the pursuer's peace of mind and the comfort of his household and to injure his business. In these circumstances I agree with your Lordship that there is sufficient to make it right for the Court to pronounce the order to the limited extent to which your Lordship proposes it should be adhered to.

I agree that it is very material to keep in view that this is not a consistorial action and that we are not in a position to deal with or to determine the rights as between husband and wife at all. If it is necessary, this may be determined, in so far as it is necessary, in a proper action for that purpose. We are not to decide anything as to the defender's right to maintenance, or to the custody of her children or access to her children, or the extent to which the duty of adherence may be enjoined upon the husband. All these are matters for a different process. But in the meantime the pursuer is entitled to protect his home and his business from the disastrous intrusion which she makes.

LORD JOHNSTON—I concur in the judgment which your Lordship proposes in this matter, and I should not think it necessary to add anything but that I prefer the views in which the majority of the Court proceeded in the case of *Colquhoun* (1804, M. App. 1, Husband and Wife, No. 5) to the grounds on which I understand your Lordship to base your opinion. I fully acknowledge the husband's right to require his wife to leave his house, although I think that right is founded on his right of control rather than on his right of property. But this right is one which he cannot appeal to the Court as matter of right to aid him in enforcing. There are many incidents arising out of the contract of marriage with which the Court cannot, and many with which, unless in exceptional circumstances, they ought not to interfere. The present case is in the latter category—whether the Court ought to intervene must be, I think, entirely a matter of circumstances, but there are circumstances in which, as indicated in the case of *Webster or M'Intyre* v. *M'Intyre* (Hume's Session Papers, Summer 1820, No. 26, a very good précis of which is to be found in Sheriff Napier's judgment in *Hislop* v. *Hislop*, 1878, Guthrie's Select Cases at p. 209), it is more decorous that the husband should apply to the Sheriff than that he should, even though entitled to do so, take the law into his own hands. Such circumstances have, I think, been shown to exist here.

Further, the Court ought not to interfere if their action in preventing a public impropriety in one direction is to result in a shock to public decency in another. They must, I think, require assurance that if they intervene to remove the wife from her husband's house her immediate wants will be provided for until she can have these regulated either by agreement or by a proper action for aliment.

It is true that there is no direct example of an application precisely the same as the present, but I think that the course which your Lordship proposes to take is in accordance with the judgment in the cases of *Colquhoun* and *Webster* to which I have referred.

But the fact that the Sheriff has entered upon the question of provision for the wife's wants, too much as if he were determining a question of permanent aliment, necessitates the alteration of his interlocutor which your Lordship has suggested. Otherwise he has, I think, come to a just conclusion in the case before him.

LORD MACKENZIE—I am of the same opinion. I think that the case of *Colquhoun* is clearly an authority for the judgment which is proposed in the present case. It is, no doubt, true that the judgment there proceeded upon the exercise by the husband of his curatorial power. I have come (although, I confess, not without some difficulty) to the conclusion that the true ground upon which to base the judgment of the Court in the present case is that of patrimonial right. It cannot be based upon the allegations made against the wife, because we have not heard counsel on the evidence. Accordingly the judgment, in my opinion, should be based upon the fact, which is undisputed, that the house is the property of the husband—that is to say, that he is possessing it under a contract of lease, and that he is entitled to exercise all the rights of a tenant against his wife just as if she was a third party.

I should like, however, to point out that in my opinion the matters are in a different position now from what they were when the case of *Colquhoun* was decided. Since the passing of the Married Women's Property Act it is quite possible that the wife may be proprietor, and she may desire to

exercise the rights which the Court now hold the husband can put in force. The same ground upon which the husband may get a warrant to eject his wife will equally entitle the wife, if the circumstances permit, to get the same warrant to eject her husband, with the accompanying interdict against his return. On these grounds I agree with your Lordships in thinking that the interlocutor of the Sheriff should stand, but limited in the manner proposed.

LORD PRESIDENT—With regard to what Lord Mackenzie has said, I should like to make it clear that in my opinion I did not use the proof for coming to any conclusion upon the drunkenness. But I did use the proof for this purpose (on which I fancied there was no dispute between counsel), namely, that the husband wishes the wife to go and the wife wishes to stay.

LORD KINNEAR—In regard to the same matter I expressed no opinion on the question of fact. My view was that as the appellant did not ask us to consider whether the Sheriff was right or wrong on the question of fact, we must determine whether his law could be sustained, assuming his finding in fact to be correct.

The Court pronounced this interlocutor—

". . . Recal the interlocutors of the Sheriff and Sheriff-Substitute dated respectively 11th August 1910 and 23rd June 1910: Find in fact that the pursuer is tenant of the Arisaig Hotel described in the initial writ, and has requested the defender to remove from said hotel, but she declines to remove: Find in law that the pursuer is entitled to a warrant ordaining the defender to remove from said hotel: Therefore of new ordain the defender to remove from said hotel, and that on a charge of seven days: Interdict her from returning thereto: Remit to the Sheriff to proceed as accords: Of new find the pursuer liable in expenses of process prior to said 23rd June 1910, subject to modification by the Sheriff-Substitute if he shall think proper after taxation: Grant authority to him to modify and decern for said expenses accordingly: *Quoad ultra* find no expenses due to or by either party, and decern."

Counsel for the Pursuer (Respondent) — Maclennan, K.C. — Black. Agents — Forrester & Davidson, W.S.

Counsel for the Defender (Appellant) Constable, K.C.—James Stevenson. Agents —P. Gardiner Gillespie & Gillespie, S.S.C.

HOUSE OF LORDS.

Wednesday, December 7.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lord Macnaghten, Lord Atkinson, Lord Shaw, and Lord Robson.)

ANDERSON AND OTHERS (BINNIE'S TRUSTEES) *v.* PRENDERGAST AND OTHERS.

(*Ante*, January 21, 1910, 47 S.L.R. 271, and 1910 S.C. 735.)

Succession—Gifts to Classes—Division per stirpes or per capita.

A testator directed as to the share of his estate falling to his daughter Agnes, the interest to be paid to her "and failing her to be paid and apportioned to her children equally, share and share alike, in liferent . . . and to the issue of her said children in fee," with a destination-over failing issue of the children. In a codicil he directed "and failing the children of my said daughter Agnes leaving lawful issue of their bodies, then I direct and appoint the fee of her said share . . . to be paid to the lawful issue of her said children, and that equally, share and share alike," with a destination-over failing issue of the children. Later in the same codicil, in dealing with accretion to Agnes's share, he directed that such accretion "as in the case of her own share of my means . . . shall . . . be retained and the interest" paid as previously stated, "and failing her children leaving lawful issue, then the fee . . . shall, as in the case of her the said Agnes's own share of my means . . . be allotted and paid equally among the issue of her children, and that equally, share and share alike."

Held (*rev.* judgment of the Second Division) that the division amongst the issue of Agnes's children was *per capita* and not *per stirpes*.

This case is reported *ante ut supra*.

Alexander C. Anderson and others, claimants and reclaimers, appealed to the House of Lords. Mrs Prendergast and others appeared as respondents.

At the conclusion of the argument—

LORD CHANCELLOR—The question in this case is whether the share of the testator's daughter Agnes is to be distributed between her grandchildren stirpitally or *per capita*.

There are two documents which are relevant for this decision. The first is the codicil or settlement of 1832, which provides that Agnes's share "shall not be payable to her or her children; but I do hereby direct and appoint that the interest or produce of the same shall be paid and apportioned to her in liferent for her liferent allenarly, and failing her to be paid