had not been determined by the Presbytery whether he was or was not guilty. In these circumstances, the Assembly were of opinion, and he could not say he differed from them, that there had been a total departure from the duty of the Presbytery in not going on with and exhausting the libel; and accordingly, although there was no regular complaint or appeal, they might exercise their supereminent jurisdiction in finding that the Presbytery had proceeded irregularly in quashing the proceedings, and remitting to the Presbytery to exhaust the libel. Could it be said that this was irregular, or that there was any case here of a man being tried twice? He thought it was merely securing that the man should be tried once. Therefore the strength of the case, as involving a double trial, failed, he thought, entirely. If the case had been more doubtful than it was upon the facts, he believed he should have concurred in the opinion that the Court had no jurisdiction. He considered that within their own department, in the trial of ecclesiastical offences, the law of the land gave the Assembly an exclusive and a final jurisdiction. He thought the whole constitution of the Assembly stood upon statute as well as the constitution of the Court of Session or the Court of Justiciary. The whole constitution of the Assembly appeared to him to render them independent of any interferference at the instance of the Court of Session within their own jurisdiction. They might do in justice, but they did it under their own constitution, and the Court of Session had no right to interfere with that which they did within their own jurisdiction. In the present case he could not say that he could see any injustice at all, or that they had done more than redress what appeared to them, and what appeared to him, a very irregular proceeding on the part of the Presbytery. On these grounds he adhered to the Lord Ordinary's judgment.

Lord Neaves was not prepared to say that there might not be proceedings of the General Assembly which the Court of Session might interfere with. If the Assembly sustained a sentence deposing a man for praying for the Queen, he should be inclined to say that was so outrageously unconstitutional that the Court might interfere. But when they were dealing with matters of mere procedure in a matter purely ecclesiastical, he quite agreed that the Court had no power. They were not the judges of ecclesiastical proceedings. Ecclesiastical proceedings were very anomalous altogether. The prosecutor and the judge were the same. That had always been the ecclesiastical law ever since there was any constitution. The Inquisition was both prosecutor and judge, and all Church Courts were more or less inquisitorial. They began by accusing a man upon a *fama clamosa;* they decided whether there was a *prima facie* case for inquiry; and after that the party was libelled; and a great deal took place that the Civil Court could not judge of, and were not entitled to interfere with. Therefore he thought that in the present case nothing had been shown on which the jurisdiction of the Court of Session could be sustained. But at the same time, he thought the case had completely broken down in the way in which Lord Benholme had explained, upon the substance of it. He could not say that it was tholing an assize that a charge against a man was abandoned by the prosecutor's not proceeding with it. On the matter of the fornication, it neither came to guilty nor not guilty. The accused pleaded not guilty, and there the matter dropped. As to the other charge, he must say he quite concurred with the Assembly. It would appear that the law, ecclesiastical or other, had not got into full observance in the Presbytery of Dunkeld. For what was done by that Court? A libel was brought forward containing two charges—the one, fornication; the other, indecent and scandalous familiarity by a minister of the Gospel with a woman, to the disgrace of the sacred profession. The relevancy was objected to, and the libel was found relevant; that was to say, the indecent and scandalous familiarity was found relevant. The Presbytery then proceeded to commune with the accused. He denied the fornication entirely; he denied also the indecency on soul and conscience; but he said he was willing to confess to scandalous familiarity. The word "scandalous," as often used in common conversation, was a vituperative epithet, but looked at strictly, it merely meant a thing that led others to stumble. Now, whether a scandalous familiarity which was innocent and denied anything of guilt formed a relevant charge, he could not take it upon him to say; it certainly was not found so; it was essentially a different charge that was found relevant. An innocent familiarity with a woman that led to scandal or offence to some weak brother or sister standing by was a very different affair from an indecent and scandalous familiarity. Now it was to the modified charge that the accused was willing to plead in a kind of way, and the Presbytery took that plea; allowed the charge to be docked down to that, without a new interlocutor of relevancy; and so the whole thing was got rid of, and sentence pronounced. Now he must say, when that was noticed by any person interested in the parish, it was competent for the Assembly to go back and revise the procedure. He for one should have concurred in holding, if canon law was the same as civil law, that the Presbytery's sentence was null and void—that the plea on which it proceeded was null and void. A plea to part of the charge, denying the indecency, and merely pleading to the scandal, was what in the criminal court would have been regarded as a plea of not guilty. And yet upon such a plea the accused was sentenced. He thought such a sentence was rightly set aside. With regard to tholing an assize, he did not think the complainer tholed an assize on either of the charges. If he had suffered, he had suffered by a null sentence, which by appeal he could have got rid of. In any aspect of the case, it seemed plain that there were no grounds for interference on the part of the Court.

The Court accordingly adhered unanimously to the interlocutor of the Lord Ordinary, with expenses.

Agent for Suspender—W. Spink, S.S.C.
Agent for Respondents—A. J. Menzies, W.S.

Thursday, June 30.

FIRST DIVISION.

NISBET *v.* NISBET.

Judicial Separation—Adultery—Proof. In an action of separation and aliment, one witness alleged that she had seen one act of adultery between the defender and his servant. The

latter gave birth to a still-born child, and during her confinement the defender showed the greatest solicitude — went himself for a doctor, and paid his fees. He concealed the fact of the birth from the girl's parents, who lived in the same town, and retained her in his service. *Held* that the wife was entitled to decree of judicial separation.

This was an action of separation and aliment, at the instance of Mrs Waldie or Nisbet against her husband, on the ground of his adultery with his maid-servant Maria Court. A proof was led before the Lord Ordinary (ORMIDALE). It appeared from the evidence that the pursuer and defender had been living apart under a voluntary agreement of separation for some years past. The defender had only one servant, Maria Court, who lived in the house along with him and his two sons. The only witness who saw any improper familiarity between the defender and Court was Mrs Williams, who came once a week to assist in cleaning the house. The other evidence was to the effect (1) that Court was delivered of a still-born child in the defender's house on 15th October 1869; (2) that the defender showed great solicitude during the illness—went himself for the doctor, and paid his fee; (3) that although Court's mother and stepfather lived in Edinburgh no communication was made to them by the defender, who still retained her in his service.

The Lord Ordinary pronounced decree of judicial separation, reserving the amount of aliment for which the defender should be found liable.

The defender reclaimed.

The SOLICITOR-GENERAL and MANSFIELD for him.

WATSON and HENDERSON in answer.

The Court unanimously adhered.

Agent for Pursuer—William Mitchell, S.S.C.

Agent for Defender—Robert Mure, S.S.C.

Thursday, June 30.

SIR LEOPOLD ARTHUR, PETITIONER.

Antenuptial Settlement—Alienation—Reasonable Provision—Vesting. By an antenuptial marriage contract "the said Charles Montolieu Burges binds and obliges himself, and his heirs, executors, and successors whatsoever, to settle and secure, and for that purpose to take the rights and securities of the just and equal half of all lands and heritages, and moveable goods and effects, debts and sums of money, and in general of all real and personal estate, whether in Scotland, England, or elsewhere, already belonging to him, or which he shall conquest and acquire or succeed to in fee-simple during the subsistence of the said intended marriage, to or in favour of himself in liferent, and to the children of the said intended marriage in fee." *Held*—on a construction of the deed—(1) that Burges remained absolute owner of his estate during his life, with every privilege of proprietorship, except that he could not prejudice the rights of his childrens' succession by gratuitous alienation, whether by deed *inter vivos* or disposition *mortis causa*; (2) that he had a right to settle a portion of his estate on his wife and children by a second marriage, provided that the provision was reasonable, and that he had no other fund available for the purpose; (3) that the right of the only child of the marriage, under the marriage-contract, had not vested at his death (which took place before that of his father), and consequently was not carried by his *mortis causa* disposition.

This was an Amended Case, remitted by the High Court of Chancery for the opinion of the Court of Session, in petition of Sir Leopold Arthur and another.

In 1815 Sir Charles Lamb, a domiciled Englishman, now deceased, intermarried with Lady Montgomerie, widow of the eldest son of Hugh Earl of Eglinton, and in contemplation of this marriage a marriage-contract was entered into between the parties, containing the following clause:—"In contemplation of which marriage, the said Charles Montolieu Burges binds and obliges himself, and his heirs, executors, and successors whatsoever, to settle and secure, and for that purpose to take the rights and securities of the just and equal half of all lands and heritages, and moveable goods and effects, debts and sums of money, and in general of all real and personal estate, whether in Scotland, England, or elsewhere, already belonging to him, or which he shall conquest and acquire or succeed to in fee-simple during the subsistence of the said intended marriage, to or in favour of himself in liferent, and to the children of the said intended marriage in fee; but declaring that it shall be in the power of the said Charles Montolieu Burges to divide and apportion the said half of his means and estate hereby provided among the said children of the said marriage in such shares and proportions as he may think proper; or failing such division by him, then it shall be competent to and in the power of the said Mary Lady Montgomerie, in case of her surviving him, to divide the same as aforesaid; and failing any of these divisions, then the said means and estate shall fall and belong to the said children equally, share and share alike."

The only issue of the marriage was Charles Montgomerie Lamb, who survived his mother. He married in 1842, and died in 1856, leaving issue. By his last will he appointed Archibald Lord Eglinton and others his trustees, and to them he left all his means. In the year 1859 the said Archibald William Earl of Eglinton and Winton (since deceased), and the plaintiffs Sir Frederick Leopold Arthur and Henry Danby Seymour, as the surviving executors and trustees of the will of Charles James Savile Montgomerie Lamb, in accordance with the leave for that purpose given to them by the said order of the 7th day of July 1859, filed their bill in Chancery as plaintiffs against the said Sir Charles Montolieu Lamb, praying, amongst other things, that the defendant thereto, the said Sir Charles Montolieu Lamb, might be decreed specifically to perform the said obligation or stipulation on his part, contained in the said antenuptial contract of the 30th day of January 1815; and that to such extent as the said obligation or stipulation might be then incapable of specific performance or execution, the plaintiffs in such suit might be declared to be entitled to compensation, or a full equivalent in the way of damages, and that the said defendant Sir Charles Montolieu Lamb might be decreed to pay or make good the same accordingly. Pending this suit, Sir Charles died, leaving his widow Dame Frances Lamb his executrix, and she became a defendant in the suit. In 1867 Vice-Chancellor Malins re-