

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-

bation unless the complainer consented to her being found entitled to expenses.

The facts of the case, so far as necessary to explain the present point at issue, were these. Sir Robert Menzies is entail proprietor of the lands and others on the north side of Loch Rannoch, and of the islands on the same, and claims exclusive use and possession. Mrs Macdonald succeeded her husband Alexander Macdonald, who died some years ago, as tenant of the Macdonald Arms Inn, upon the estate of Kinloch, under Lady Macdonald. As such tenant, Mrs Macdonald has the right and privilege of keeping and using boats upon the loch. In the year 1857, Sir Robert Menzies had occasion to take out an interdict, which was allowed to pass in absence, against the said deceased Alexander Macdonald, much in the same terms as that now sought for against his widow.

Notwithstanding this, Sir Robert averred that on the 8th June last a boat belonging to, or in the lawful possession of the respondent, which was on Loch Rannoch with the knowledge and sanction and in charge of her servant, Hugh Cameron, and having therein besides the said Hugh Cameron, two gentlemen who were lodgers at Mrs Macdonald's inn, put into a small bay adjacent to the complainer's lands, on which the two gentlemen landed with their fishing tackle and implements, and returned to the inn by land, while the boat went back to the inn in charge of the said Hugh Cameron. Their landing was aided and effected by the said Hugh Cameron, for whom Mrs Macdonald is responsible. The proceedings complained of were done to the great annoyance of the complainer, and injury to his rights and privileges under his titles, and he consequently submitted that he was entitled to interdict as craved, *with expenses*. The respondent, Mrs Macdonald, on the other hand, denied that the said Hugh Cameron was in any way her servant, or that he was in any way amenable to her, or she responsible for him, on the contrary, he was engaged and paid by the two gentlemen alleged to have committed the trespass. She farther asserted that she was not present on the occasion in question; that she had, in the knowledge that Sir Robert had formerly taken out an interdict against her husband as aforesaid, cautioned the gentlemen before starting to avoid landing upon Sir Robert's shore; that they had been farther cautioned by the said Hugh Cameron not to land, but that she believed they had found themselves obliged to land from stress of weather. She also averred that Sir Robert was in this proceeding merely seeking an occasion to obtain interdict against her, in terms thus broad and general; that she did not oppose interdict, but she cannot be made responsible for the future conduct of unnamed parties, to whom such interdict may be meant to apply, provided she continues to warn all and sundry not to land on Sir Robert's ground, and she pleaded that "the complainer's right to his property, and right to prevent trespass upon it, having never been called in question, or in any way violated by the respondent, she is entitled to expenses in this case."

Against the Lord Ordinary's interlocutor the complainer reclaimed.

ADAM for him.

MACDONALD, for the respondent, stated—If Sir Robert Menzies thinks it for the advantage of his estate to obtain an interdict, I am willing that he should have it on paying expenses. If he will not do so, I submit I am entitled to a proof.

At advising—

LORD PRESIDENT—The complainer alleges a trespass by a servant of the respondent; that is the state of the record. Of course, the two strangers were trespassing, but that in itself does not make the respondent liable. Now the respondent denies this allegation entirely, and makes averments which, if substantiated, take away all ground for complaint against her. The parties are therefore at variance as to whether there was or was not a trespass committed for which Mrs Macdonald is responsible. If the complainer succeeds in proving that there was, he will get his interdict and his expenses. If he fails to prove that there was, but makes out that circumstances have occurred warranting him in bringing this action, he may then be entitled to his interdict, but not to his expenses. The question, therefore, cannot be determined without a proof as to whether a trespass was committed or no.

LORD DEAS—If I were clear that Mr Macdonald devolved his lease upon his wife, I should then say that Sir Robert's remedy in this instance was an application to this Court for breach of interdict; but it is not sufficiently stated that the lease did devolve on Mrs Macdonald. Assuming, then, that she is simply tenant under a lease granted to herself, the only relevant allegation here is that the boatman was her servant. She is not directly responsible for the individuals residing in her inn, to whom she may have given her undoubted privilege of boating and fishing. But she says, farther, even supposing he was my servant, this is a case where the gentlemen's landing was a necessity. If that is true, then it is a very complete defence. On the whole matter I think, we have no choice, but allow the proof, if the parties insist on one.

LORDS ARDMILLAN and KINLOCH concurred.

The Court affirmed the Lord Ordinary's interlocutor.

Agents for the Complainer—Tods, Murray, & Jamieson, W.S.

Agents for the Respondent—Paterson & Romaines, W.S.

Friday, November 4.

SECOND DIVISION.

LINDSAY v. FORCETT RAILWAY CO.

Arrestment ad fundam jurisdictionem—Documenta—Commercial Value. In an action against an English Railway Company the pursuer arrested certain plans and documents belonging to the Railway Company in the hands of the Company's agents in Scotland for the purpose of founding jurisdiction. *Held* the arrestments were inept, in respect—(1) That the documents being put into the hands of the arrestees by the pursuers for the special purpose of being transmitted to the defenders, arrestment was incompetent; and (2) that the documents being of no commercial value were not attachable so as to found jurisdiction.

This was an action at the instance of Lindsay, trustee on the sequestrated estate of James Trowsdale & Son, contractors, against the Forcett Railway Company, concluding for payment of the sum of £15,900, 8s. 1d., under deduction of sums paid to account, and also for delivery of the plant used