Now, has Robb made any such allegations against the grounds assigned by the School Board as to form the subject of inquiry? I do not think he has, and I look upon the proposal for further inquiry as out of the question.

One prominent fact is not disputed, and that is, that for some time the school has been without a single scholar, and any attempt on the pursuer's part to explain away that fact has failed. That of itself is sufficient; but when there is added the ground of dismissal assigned by the School Board, I am bound to come to the conclusion that the schoolmaster has no case, and that we must adhere to the interlocutor of the Lord Ordinary.

Lord Deas—I am of the same opinion. I adhere to what I said on a former occasion, that a schoolmaster should not be called upon to prove that he was not in fault in the first instance. But your Lordship's proposal does not interfere with that principle, for the fact alone that there are no scholars throws an *onus* on the schoolmaster to explain that that is not his fault.

I agree with your Lordship that the pursuer has given no intelligible explanation or relevant answer to the distinct statement of the School Board.

Lords Ardmillan and Mure concurred.

The Court adhered.

Counsel for the Pursuer—Scott and Young. Agent—George Begg, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark) and Keir. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, May 25.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'DONALD *v.* M'DONALD.

Husband and Wife—Separation and Aliment—Sheriff.

When a wife is living in family with her husband it is not competent for the Sheriff to award the wife an allowance of interim aliment on the ground of the husband's cruelty. If she has a case for separation and aliment, she must raise an action in the Court of Session.

This was an action raised on 16th December 1873 in the Sheriff Court of Lanarkshire by Mary Hume or M'Donald, residing at 373 Bath Street, Glasgow, wife of David M'Donald, tailor and clothier there, pursuer, against the said David M'Donald, defender, concluding "for alimont aye and until a permanent arrangement of the rights and interests of the parties shall be made by a competent Court, with expenses. The pursuer being compelled to live separately from the defender by reason of the defender conducting himself towards her in such a harsh, cruel, and tyrannical manner as to endanger her health and life, and more particularly upon the 11th day of December current, within the house occupied by them at 373 Bath Street, aforesaid, struck her with his fists upon the face and other parts of her person to her serious injury and effusion of blood, and also having on various previous occasions ill-used her."

A diet of proof was fixed on 28th January 1874, and evidence was led on 2d April, 30th May, 25th and 26th October; and on 5th December 1874 the Sheriff pronounced this interlocutor:—

"*Glasgow, 5th December* 1874.—Having heard parties' procurators, and made avizandum, finds that the pursuer and defender are husband and wife, and that on the 11th day of December 1873, within the house occupied by them, the defender struck the pursuer with his hand on the head to the effusion of blood, and that she has since and is now living separate from him: therefore decerns against him for the sum of 12s. a-week in name of interim aliment for the maintenance and support of the pursuer, commencing payment of the said aliment as on the 11th day of December 1873, and so on weekly thereafter in advance, aye and until a permanent arrangement of the rights and interests of the parties shall be made by a competent Court; finds the defender liable to the pursuer in expenses.

"*Note.*—The record of evidence in the present case discloses a story of domestic unhappiness between husband and wife such as does not often come before a court of law. The conduct of the pursuer, almost ever since her marriage with the defender, has been characterised by almost every feature unbecoming in a wife. Vexatious and irritable temper, petty annoyance, grave dereliction of duty, studied insult, personal violence even, have formed prominent incidents in her behaviour. With one exception only, the defender seems to have shewn great command of temper and forbearance, carried, perhaps, to an extent that was hardly consistent with his duty of ruling well his own household. Most men of more firmness of character would have at an early period of the marriage taken legal but efficient means to teach and compel the pursuer to obedience and duty. That she has, at least, relieved him of her society, is a result which he ought to be the last to regret. Still, whatever the provocation received, it has wisely been laid down by the law that a man shall not in any circumstances, except the imperative necessity of self-defence, lift hand to his wife. This, by his own letter, No. 6/1 of process, the defender is proved to have done, though after a long course of misconduct on the part of the pursuer, which, while it cannot justify, may go far to palliate, his rash act. The Sheriff-Substitute is anxious it should be understood that were it not for the admission in this letter he would have been inclined to place very little reliance in the pursuer's own statement, but would have been inclined to hold that when the defender struck her he was acting in self-defence."

The defender appealed, and the Sheriff adhered.

The defender appealed to the Court of Session.

At advising—

The Lord President—I have had occasion more than once to express opinions on the powers of Sheriffs exercised in cases of separation and aliment in granting interim aliment. It is a useful jurisdiction, and one which I should be unwilling to interfere with if exercised in circumstances suitable for its operation. But there

great risk of the Sheriff interfering in cases where there is no necessity, and where he cannot approach the subject without trenching on ground which is only suitable for the Supreme Court.

When this action was raised the pursuer was living in family with her husband in his house, which was the domicile of the marriage. It was an essential preliminary to granting aliment that she should prove her right to separation, and this she could only do by a consistorial process, an action of separation and aliment in this Court. It would have been quite different if the spouses had been long separate, or had been living separate under a joint arrangement. Then it might be supposed that the parties consented to an allowance being made to the wife. But so far from this being the nature of the case, the pursuer continued to live with her husband after defences were lodged, and after proof was allowed. Then, for the first time, when she considers herself safe of obtaining interim aliment, she thinks fit to leave the house. Nothing could more clearly illustrate the abuse of the power of granting interim aliment than the conduct of the pursuer here. It was just because she saw she was going to obtain her aliment that she left the house. I think that the action is incompetent under the circumstances, and should be dismissed.

The other Judges concurred.

The Court pronounced this interlocutor:—

"Recall the interlocutors of the Sheriff-Substitute and Sheriff complained of; find that when the action was raised in the Sheriff-court the pursuer and defender were living together in the defender's house; find that they continued so to live together during the dependence of the action down to the 17th of March 1874, when the pursuer left the defender's house, and has since lived separate from him; find that, in these circumstances, the action for aliment was and is incompetent; dismiss the said action, and decern."

Counsel for the Pursuer and Respondent—Mr Balfour. Agents—J. & R. D. Ross, W.S.

Counsel for the Defendant and Appellant—Mr Rhind. Agent—Wm. Kelso Thwaites, S.S.C.

Wednesday, May 26.

FIRST DIVISION.

[Sheriff of Roxburgh.

DUKE OF ROXBURGH AND OTHERS *v.* MARQUIS OF LOTHIAN.

Process—Appeal—Competency—16 *and* 17 *Vict., c.* 80, § 24—31 *and* 32 *Vict., c.* 100, § 53.

In a petition for division of the area and sittings of a church, a question arose as to the rights of certain heritors whose lands had been disjoined from the parish under a previous decree of disjunction and erection *quoad sacra*. The Sheriff pronounced an interlocutor disposing of this question, but containing no finding as to expenses. On appeal to the Court of Session, an objection to the competency of the appeal, on the ground that the interlocutor did not dispose of the whole merits of the case, *repelled.*

This was an appeal from an interlocutor of the Sheriff of Roxburgh (PATTISON) in a petition at the instance of the Marquis of Lothian, as principal heritor of the parish of Jedburgh, and William Millar, solicitor, Jedburgh, clerk of the heritors of the said parish, for and as representing said heritors, craving division of the area of the new parish church of Jedburgh. This church had been erected in conformity with an agreement entered into in 1869 between the late Marquis of Lothian, the petitioner's predecessor, and the heritors of the parish, by which the Marquis undertook to be at the whole expense of building a new parish church on St Mary's, or Virgin Glebe of Jedburgh, in lieu of and exchange for the then existing Abbey Church, which was thereafter to become his property. Previously to this, in the year 1855, following on a decree of the Court of Teinds, a considerable portion of what was then the parish of Jedburgh had been disjoined *quoad sacra* from that parish, and, along with small portions of neighbouring parishes, had been erected into the parish church of Edgerston; and one of the questions which fell to be determined by the Sheriff under the petition was whether those heritors whose lands were so disjoined were entitled to a proportion of the area and sittings in the new church corresponding to the valuation of their whole land, or merely to that of the part, if any, of their lands which was not included in the *quoad sacra* parish.

The Sheriff, on 30th April 1875, issued an interlocutor in the cause, finding, *inter alia*, "that, in so far as regards the dividing and apportioning of the area and seatings of the new parish church of Jedburgh recently erected, the heritors of the lands so disjoined and erected into the parish of Edgerston *quoad sacra*, are not to be considered as heritors of the parish of Jedburgh." Other findings followed, and the interlocutor concluded without any award of expenses.

Several of the heritors appealed, and on the case being called in the Single Bills an objection to the competency of the appeal was taken.

Argued for the respondents—The appeal is incompetent, because the interlocutor is not one falling under sec. 24 of 16 and 17 Vic., cap. 80, nor under sec. 53 of 31 and 32 Vic., cap. 100. It cannot be interlocutor disposing of "the whole merits of the case," because the question of expenses is entirely omitted.—*Gordon* v. *Gray*, 1 R. 1081.

No appearance by appellants in answer to objection.

At advising—

LORD PRESIDENT—The process before us is one of a peculiar kind, and was not in the mind of the Legislature when the statutes 16 and 17 Vic., cap. 80, and 31 and 32 Vic., cap. 100, were framed. Still, the rule as laid down in these statutes falls to be applied to the present case, and the 53d section of the Court of Session Act of 1868 must be the standing enactment on the subject. By that section a final judgment is one "which either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause," &c. The petition before us plainly raises a competition