

Saturday, July 13.

SECOND DIVISION.

BRYDON v. BRYDON.

Parent and Child—Minor and Pupil—Custody of Child—Custody Pending Action of Separation by Wife—Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), sec. 5.

On 7th June 1907 a husband brought a petition to obtain the custody of the only child of his marriage, a boy in his fifth year. He averred that his wife had left his home taking the child with her, that in October 1906 she had threatened to raise an action of separation and aliment, but that the action had not been raised. The wife made specific averments of drunkenness and cruelty on the part of the husband. She also averred that an action of separation and aliment was in process of being raised and her counsel stated that the summons had been served, that it was on his advice, and that the action would be proceeded with as quickly as possible.

The Court sisted the petition pending the action of separation.

On 7th June 1907 Robert Brydon, 4 South Oxford Street, Edinburgh, presented a petition in which he prayed the Court to find that he was entitled to the custody of his child Robert Brydon, and to make an order ordaining his wife Mrs Elizabeth Brydon to deliver the child to him.

The petitioner averred that the marriage took place on 1st August 1898, that the said Robert Brydon was the only child of the marriage, and that he was born on 6th September 1902. He further averred that the marriage had not been a happy one owing to his wife's neglect of her home duties and her frequent absences, and that on one occasion she had consulted an agent as to a separation, but a reconciliation had been effected. "On or about 2nd October 1906 the petitioner, on returning from business, found that his wife had left home taking the child with her and carrying off numerous household furnishings, but without leaving any intimation as to where she had gone. On 6th October 1906 the petitioner was served with a summons in the Small Debt Court at Edinburgh at the instance of 'Mrs Elizabeth Little or Brydon, presently residing at 12 Guildhall Street, Dunfermline,' for twelve weeks' aliment at the rate of 15s. per week, pending judgment in an action of separation and aliment about to be raised in the Court of Session,' as the summons bears. On 17th October 1906 the Sheriff-Substitute (Guy) allowed Mrs Brydon 10s. per week for a period of six weeks, and the amount was duly paid. At the same time the petitioner's agent informed the respondent's agent that they would accept service of the summons in the threatened action of separation and aliment, and requested that the boy should be handed over to his father's custody. . . .

Though several months have since elapsed the threatened action of separation and aliment has not yet been brought into Court."

The respondent averred—"Explained that immediately after marriage the petitioner began to be very intemperate in his habits, and to spend his evenings away from home, returning in a state of intoxication. While in that condition he lost all power of self-control, used abusive language to the respondent, and threatened her with personal violence. His conduct grew worse in the early part of 1904, when time and again when he came home at night the respondent had to take refuge with her child in a neighbour's house. On one occasion he was only prevented from striking the respondent by a friend who accompanied him holding him back. . . . On 1st October 1906 he came home about midnight much the worse of drink, and continued for nearly two hours to use abusive and threatening language to the respondent. He threatened to strike her more than once, and told her to leave the house and take her child and belongings with her. The respondent was afraid of the safety of herself and her child and accordingly left the house next morning. It would be detrimental to the physical and moral welfare of the child to return home to his father. He is a delicate boy, subject to recurrent attacks of croup, and requires constant attention and fresh air. These necessities the petitioner, apart from his habits, cannot give the child, as he is at his work all day. In any case his habits of intemperance have been so confirmed, and his conduct when intoxicated so outrageous, that he is utterly unfit to be the guardian of a child of such tender years, and it would endanger the moral upbringing, the health, and even the safety of the boy, to entrust him to the petitioner's care." She further averred that an action of separation and aliment was in process of being raised.

Counsel for the respondent stated that it was on his advice that the action of separation and aliment had been raised, that the summons had been served, and that the action would be proceeded with.

Argued for the petitioner—In cases of custody the presumption was in favour of the father as the legal guardian of his children. Here the respondent was in desertion and the petitioner was entitled to the custody of the child, now in its fifth year—*Rintoul v. Rintoul*, October 22, 1898, 1 F. 22, 36 S.L.R. 21; *Reid v. Reid*, January 9, 1901, 3 F. 330, 38 S.L.R. 237; *M'Kellar v. M'Kellar*, May 19, 1898, 25 R. 883, 35 S.L.R. 483. The Guardianship of Infants Act 1886, section 5, had not altered the common law, and the husband still remained entitled to the custody unless good cause otherwise was shown—*Sleigh v. Sleigh*, January 20, 1893, 30 S.L.R. 272, per Lord M'Laren. The respondent's averments must be read in the light of the fact that she had threatened in October 1906 to raise an action of separation and had not brought the action until July 1907.

Argued for the respondent—The main question was what would be best for the child—Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), section 5. There were here relevant averments of drunkenness and cruelty, and the child could not be handed over to the petitioner without inquiry—either in the present process or in the action of separation. Pending inquiry the child should remain with the respondent. It was most undesirable that he should be transferred back and forward from one spouse to the other. Further, the mother was the natural custodian of young children—*Reid v. Reid, cit. sup.* The petitioner had himself delayed to bring this petition and was not entitled to found on the respondent's delay in bringing her action of separation.

LORD JUSTICE-CLERK—I do not think that this is a case in which we should pronounce such an order as the petitioner asks for. We have a statement by the respondent's counsel that he has advised his client as to proceeding with the action of separation and aliment, and that the action will be proceeded with as rapidly as possible. In these circumstances I think that it would be wrong to do anything on this petition in the meantime.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court sisted procedure *in hoc statu* and pending the action of separation and aliment raised by the respondent.

Counsel for Petitioner—F. C. Thomson.
Agents—J. B. McIntosh & Son, W.S.

Counsel for Respondent—Constable.
Agents—Galbraith, Stewart, & Reid, S.S.C.

Saturday, July 13.

SECOND DIVISION.

[Sheriff Court at Oban.]

JENKINS v. GASCOIGNE.

Sheriff—Lease—Summary Application—A. S. 10th July 1839, sec. 137—Repair of Fences—Circumstances of a Fugitive Character.

A lease of a farm was entered into for five years from Whitsunday 1904, with a mutual break at Whitsunday 1907. In April 1906 the tenant brought an action in the Sheriff Court against the landlord craving a remit to a man of skill to ascertain the condition of the fences. He averred that the landlord was under obligation to put them in a tenantable condition at entry, and had failed to do so.

In November 1906 the Sheriff-Substitute dismissed the action. The pursuer appealed to the Court of Session, and the case was not heard until July 1907. In the interval the landlord had availed himself of the break at Whitsunday 1907, and had terminated the lease as at that term. *Held* that in the circum-

stances the proposed remit to a man of skill was incompetent, and action dismissed.

The Act of Sederunt for regulating the form of process in Sheriff Courts, of 10th July 1839, sec. 137, provides—"In all cases which require extraordinary dispatch, and where the interest of the party might suffer by abiding the ordinary *induciæ*, application by summary petition may be made to the Sheriff, who on considering the petition may, if he see cause, order it to be served on the person complained of, and to be answered within such *induciæ* as the Sheriff in each case may think proper. And the procedure in such cases shall not abide the ordinary course of the court days, it being always competent to pronounce such *interim* order as the exigencies of the case require."

On 3rd April 1906 William Jenkins, farmer, Gartcharron, Craignish, Argyllshire, tenant of the farm of Gartcharron under missive letters dated in March 1904 which provided for a lease for five years from Whitsunday 1904 with a break at Whitsunday 1907, brought an action against Colonel Gascoigne of Craignish Castle, the proprietor, in the Sheriff Court at Oban. He prayed the Court, *inter alia*—"(*First*) To remit to a person of skill to visit the farm and lands of Gartcharron in the parish of Craignish and County of Argyll, as occupied by the pursuer as tenant under the defender, and to inspect the fences thereof, and to report to the Court the condition thereof, and whether they are in a properly tenantable, habitable, and sufficient condition, and fit for the purposes of the said farm, and, if not, what repairs, alterations, and works are necessary to put the said fences into said condition, and thereafter to ordain the defender to make and execute such repairs, alterations, and works on said fences, at the sight and to the satisfaction of an inspector to be appointed by the Court or otherwise, or failing the defender doing so within such period as the Court shall appoint, to grant warrant to the pursuer to make and execute said repairs, alterations, and works, at the sight and to the satisfaction of said inspector, and on the cost thereof being ascertained to ordain the defender to pay the same to the pursuer, including the costs of said report, and the expenses incurred to and by said inspector in the premises." Alternatively, the pursuer prayed the Court to ordain the defender to concur with him in entering into a reference to arbiters who should determine the question whether the defender had fulfilled his obligations with reference to said fences. There was a further prayer for damages in the event of its being found that the defender had failed to fulfil his said obligations.

The pursuer averred that at the date of the missive letters constituting the lease the fences were not in a tenantable condition owing to natural decay, that the proprietor was bound in terms thereof and at common law to put them in such a condition as at the term of Whitsunday 1904, that he had failed to do so and