doubtedly one of those concerned in the commission of this particular offence, for he knew that similar offences against the bye-law were being committed by his servants, and was content to allow them to continue unchecked in the same course of conduct. Again, it was said that the driver of the bus might have been unaware of the undue complaisance of the conductress in yielding to the persistence of would-be passengers when the bus was already full. But, while this might have been the case, there is no warrant in the findings to suppose that it was so. On the contrary, the findings imply—if they do not expressly assert—the contrary. The conductress and the driver are found to have been in joint control of this vehicle, and there is nothing out of the way in the driver, just as well as the conductress, being cognisant of what was taking place.

I think the Magistrates were entitled to make the conviction, and that we should answer the questions put to us in the affirmative.

LORD CULLEN—I agree with your Lordship, and have nothing to add.

LORD SANDS—I also agree with your Lordship.

The Court answered the questions of law in the affirmative.

Counsel for the Appellants—Wark, K.C. —King Murray—Agents—Patrick & James, S.S.C.

Counsel for the Respondent—Maconochie. Agents—Norman Macpherson & Dunlop, S.S.C.

COURT OF SESSION.

Saturday, June 21.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

ADAIR *v.* ADAIR.

Husband and Wife — Aliment — Interim Aliment — Wife's Obligation to Aliment Indigent Husband — Married Women's Property (Scotland) Act 1920 (10 *and* 11 *Geo. V, cap.* 64), *sec.* 4.

The Married Women's Property (Scotland) Act 1920 provides—Section 4—"In the event of a husband being unable to maintain himself, his wife, if she shall have a separate estate or have a separate income more than reasonably sufficient for her own maintenance, shall be bound out of such separate estate to provide her husband with such maintenance as he would in similar circumstances be bound to provide for her, or out of such income to contribute such sum or sums towards such maintenance as her husband would in similar circumstances be bound to contribute towards her maintenance."

In an action of separation by a wife against her husband the latter moved for an award of interim aliment in respect of his own indigence and of his wife's possession of a separate income. *Held* that the application was competent, and that the averments disclosed *prima facie* ground for an award.

Mrs Jessie Forbes Simpson or Adair, 5 Abercorn Avenue, Edinburgh, brought an action of separation against James Adair her husband. The defender was admitted to the poor's roll.

On 11th June 1924 the Lord Ordinary (Ashmore) refused the defender's motion for an interim award of expenses but decerned against the pursuer for payment to the defender of 10s. weekly in name of interim aliment.

Opinion.—"This is an action of separation at the instance of a wife against her husband on the ground of his cruelty to her.

"Defences have been lodged stating various pleas and grounds of defence and, *inter alia*, denying cruelty.

"Yesterday at the diet for adjusting the record, the record was closed and the case was sent to the procedure roll. At the same time counsel for the defender (the husband) moved for interim awards of expenses and aliment. Both awards were opposed.

"As regards expenses the defender is on the poor's roll, and I am of opinion that at this stage no award of expenses ought to be made in favour of the defender.

"As regards interim aliment I think that there is *prima facie* ground for an award.

"The pursuer avers that the defender is at present unemployed, and the averment is admitted by the defender. Then the defender avers that the pursuer has an income in the shape of a liferent of £500 a year. According to the pursuer, however, her income is only about £300 per annum, and the pursuer supports or helps to support her daughter, and she states that she is neither able nor willing to contribute to the support of the defender.

"By section 4 of the Married Women's Property (Scotland) Act 1920 (10 and 11 Geo. V, cap. 64) a married woman is made liable to contribute to the maintenance of her husband if he be unable to maintain himself and if she have a separate estate or separate income more than reasonably sufficient for her own maintenance.

"If the husband were the pursuer and the wife the defender in the circumstances above stated I think that an interim award of aliment would be made to the wife, and that being so I think that an interim award ought to be made in favour of the defender in this case.

"There is room for doubt and difficulty as to the amount, but as counsel for the parties were unwilling to try to adjust the figure, I have come to the conclusion that *in hoc statu* the award should be 10s. a week, that being the allowance which, according to the defender, the pursuer made to him for a short period in 1923."

The pursuer reclaimed against the award, and argued—The Married Women's Property Act 1920 did not apply to an award of interim aliment. Even if it did, the Lord

Ordinary had not before him sufficient evidence in support of a *prima facie* case to justify him in holding the condition required by section 4 to be fulfilled—Fraser on Husband and Wife, vol. i, p. 852; *Alexander* v. *Alexander*, 1849, 12 D. 117.

Argued for defender—The Lord Ordinary's award was justified. The Act of 1920 now placed an indigent husband in the same position as an indigent wife. The defender was unemployed and on the poor's roll. He had previously been alimented voluntarily by his wife. A wife's claim to an award in similar circumstances was undoubted—Fraser on Husband and Wife, vol. i, p. 853. Counsel also referred to Fraser on Husband and Wife, vol. i, p. 837; *Hoseason* v. *Hoseason*, 1870, 9 Macph. 37, *per* Lord President Inglis at p. 39; and *Finzies* v. *Finzies*, 28 S.L.R. 6.

LORD PRESIDENT (CLYDE)—This is a reclaiming note in an action of separation by a wife against the husband in which the Lord Ordinary, applying the provisions of section 4 of the Married Women's Property (Scotland) Act 1920, has made an award of interim aliment in favour of the husband.

The first question to be considered is whether this undoubted novelty in the practice of the consistorial Court is covered by the provisions of section 4. According to that section—given certain conditions which the section defines—the wife is brought under obligation to provide the husband out of her separate estate with such maintenance as he would in similar circumstances be bound to provide for her. It is clear that before the obligation can be made operative in any shape, the conditions which are precedent to the obligation must be established. And if this were a question not of an allowance of interim aliment but of a decerniture for future aliment in the final sense, there is no doubt that the conditions which the section prescribes would have to be established by evidence in the ordinary way. But the question of allowing interim aliment constantly arises in the course of proceedings such as these—usually at a stage of the case anterior to any allowance of proof—and the evidence upon which the Court has to proceed in awarding interim aliment is therefore different in quality from that which the Court would require if it were asked to pronounce a final decree. The evidence required to warrant an interim allowance of aliment in a consistorial cause has been described as a *semiplena probatio*, and consists of such materials, submitted to the Court, as present a *prima facie* case. Prior to the Act of 1920 the question of allowing interim aliment did not arise except as the consequence of a claim by the wife. The result of the Act is that it may now equally arise in consequence of a claim by the husband. There is nothing in the section to exclude its application to interim aliment; and I see no reason why the Court, in determining whether the conditions of her liability are fulfilled, should not proceed (in a case of interim aliment) on the same class of evidence as that hitherto relied on in enforcing the husband's obligation in a similar case. It is a mistake, I think, to say that the obligation to provide interim aliment in a consistorial case is an obligation created by the decree. On the contrary, the decree would have neither validity nor justification if it were not that a legal obligation underlay it. What is true is that the decree for interim aliment is an act of regulative administration (in circumstances where the parties' true rights are in suspense) of an underlying and permanent legal obligation. I think, therefore, there is no reason why section 4 should not apply.

The second question is whether the Lord Ordinary had before him sufficient evidence in support of a *prima facie* case to justify him in holding the conditions required by section 4 to be fulfilled. The first of these is that the husband is unable to maintain himself. There was before the Lord Ordinary material, both in the form of averment and admission, bearing upon that question, and he determined that for the purposes of his interim decree the evidence was sufficient to show that the husband was unable to maintain himself. I see no ground for interfering with the Lord Ordinary's decision upon that point. The next is that the wife must have a separate estate, or a separate income, more than is reasonably sufficient for her own maintenance. Again, the record and the admissions of parties contain ample material upon which to form a *prima facie* judgment upon the facts with regard to that matter, and I do not see any ground for interfering with the manner in which the Lord Ordinary exercised his discretion. I think, therefore, that the reclaiming note should be refused.

LORD SKERRINGTON—I am unable to adopt the very narrow and technical view of the meaning of section 4 of the Act of 1920 which the reclaimer's counsel asked us to accept. That construction, so far from assimilating the legal position of an indigent husband to that of an indigent wife in the matter of aliment, would create an important difference between the two cases, and the Court would have no jurisdiction to grant a decree for aliment in pursuance of section 4 until all the material facts had been established by evidence. I agree with your Lordship that it was competent for the Lord Ordinary to pronounce decree for interim aliment, and that no reason has been stated for holding that he exercised his jurisdiction improperly.

LORD CULLEN—I think that the terms of section 4 of the Act of 1920 necessarily engender a discretionary power in the Court to deal with questions of interim aliment by orders such as that which the Lord Ordinary has pronounced here. I think the Lord Ordinary had before him sufficient materials for the exercise of a judicial discretion on the subject, and I see no good ground for interfering with the way in which he has exercised his discretion.

LORD SANDS—I agree. In certain circumstances a wife is entitled to aliment from her husband. In regulating matters of

interim arrangement during a process the Court must proceed upon a *prima facie* view of the facts, and I am of opinion that we must take this course in dealing with the wife's liability to the husband.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer — Maconochie. Agents — Pearson, Robertson, & Maconochie, W.S.
Counsel for the Defender — Macfarlane. Agent—W. S. Farmer, S.S.C.

Friday, June 27.

FIRST DIVISION.

[Sheriff Court at Campbeltown.

DUKE OF ARGYLL *v.* CAMPBELTOWN COAL COMPANY, LIMITED.

Process — Removing — Conventional Irritancy — Action of Removing without Declaratory Conclusions —Competency— Lease Constituted by Several Documents, including Draft Agreement.

An action of removing was based upon a conventional irritancy for non-payment of rent contained in a lease which was constituted by a series of documents consisting of an original lease, in which were the irritant clauses, and several subsequent agreements, the last of which was an unsigned draft agreement upon which, it was alleged, the parties had acted. There had been no previous action of declarator of the lease or of the irritancy, and there were no declaratory conclusions in the action of removing. *Held* that the action was *competent.*

Observations on the necessity of declaratory conclusions in an action of removing proceeding upon a conventional irritancy when there is a serious question as to the existence or legality of the irritancy.

The Duke of Argyll, *pursuer*, brought an action in the Sheriff Court of Argyll at Campbeltown against the Campbeltown Coal Company, Limited, Glasgow, *defenders*, in which he craved the Court "to ordain the defenders forthwith to remove themselves and their servants furth and from the minerals, colliers' houses, and whole colliery premises and others let to the defenders by lease dated 16th and 25th June 1900 granted by the late John Douglas Sutherland Campbell, Duke of Argyll, Marquis of Kintyre and Lorne, to the defenders, and by relative agreements between the said Duke of Argyll, &c., and the defenders dated 17th February and 2nd March 1905, 24th July and 10th August 1907, 19th and 28th November 1907, and 2nd December 1911, that the pursuer or others in his right may then enter to and possess the same, and in the event of the defenders failing to remove, to grant warrant to eject them."

The averments were, *inter alia*, as follows (those in condescendence 2 which are printed in italics having been added by amendment when the case was in the Inner House):—"(Cond. 1) By lease dated 16th and 25th June 1900 the late John Douglas Sutherland Campbell, Duke of Argyll, Marquis of Kintyre and Lorne, &c., as first party, let to the defenders as second party the ironstone, coal, shale, and fireclay within that part which lies in the parish of Campbeltown of the lands and estates now known by the general name of the Inveraray and Kintyre estates of the dukedom of Argyll belonging in property to the said Duke, and also such coal as might belong to him within any other lands in the said parish belonging to other proprietors, and particularly within the lands of Kilkivan and Drumfin. The lease is for twenty-eight years from Whitsunday 1899. The rent is a fixed rent of £250 for minerals, or in the option of the Duke certain royalties, and £50 for colliers' houses. (Cond. 2) The provisions of said lease were in certain respects altered by subsequent agreements entered into between the said Duke and the defenders, which are dated respectively (1) 17th February and 2nd March 1905, (2) 24th July and 10th August 1907, (3) 19th and 28th November 1907. *The parties having agreed on certain alterations on and additions to the said lease and subsequent agreements, the same were embodied in a draft minute of agreement and lease dated 2nd December* 1911. *Under this* final agreement the defenders were to pay as from Whitsunday 1911 a fixed rent of £800, or in the Duke's option certain royalties, and this fixed rent of £800 or royalties was to be payable so long as the company should continue to work certain undersea minerals, of which they had arranged a lease from the Crown. The defenders were also granted permission to convey the undersea coal through the Duke's coal mines for a period of sixteen years from and after Whitsunday 1911, thus having a termination with the principal lease, but under the declaration that in the event of the principal lease being brought to an end at any time prior to its natural termination, the 1911 agreement and the lease should likewise come to an end at the same time and that without any notice. For the wayleave thus granted the company were obliged to pay a royalty of ½d. per ton over and above the fixed yearly or other royalties. It is understood that the undersea coal has not been worked since Whitsunday 1921. *The said draft minute of agreement and lease was prepared by the pursuer's agents, approved of by the defenders, and acted on by both parties.* In particular, the defenders made use of the wayleave thereby granted for the passage of the undersea coal, made payments to account of their obligations thereunder, and obtained a grant of the amount of said rent of £800 from the Coal Controller. So far as inconsistent herewith the statements in answer are denied—(*Ans.* 2) Admitted that by subsequent agreements (hereinafter specified) entered into between the said Duke and