

ported into the charter-party, subject to the condition that the master is to have power to fix the time allowed to the merchant for unloading. The master thus authorised fills up the clause in the bill of lading by stating that five and a-half days remain for unloading, and takes the cargo on the condition so expressed. It is therefore out of the question for the shipowners to say they are not bound by the master's act, or that the statements amount to anything else than a stipulation as between the onerous indorsee and the owners that the former is to have five and a-half days for unloading before demurrage begins to run.

Next as to the period when the laying-days began. That is fixed by the information given by the shipowners' agents that the ship would be ready to discharge at 6 a.m. on the 27th. That is conclusive against them. On the question of fact I agree with your Lordships, and have nothing to add.

The Court dismissed the appeal.

Counsel for Pursuers and Appellants—  
Jamieson—Younger. Agents—J. & J. Ross,  
W.S.

Counsel for Defender and Respondent—  
Dickson—Ure. Agents—Webster, Will, &  
Ritchie, S.S.C.

Friday, January 15.

## SECOND DIVISION.

[Sheriff of Dumfries and  
Galloway.]

M'QUILLAN v. SMITH.

*Husband and Wife—Affiliation and Alim-  
ent of Illegitimate Child—Wife Suing  
without Husband's Concurrence—Title to  
Sue.*

Held that a married woman whose husband was abroad and had not been heard of for six years, had a title to sue an action of affiliation and aliment for a child borne by her, without the concurrence of her husband, and without having a curator *ad litem* appointed.

Mrs Susan Armstrong or M'Quillan, residing in Lennox Close, Portpatrick, brought an action of affiliation in the Sheriff Court at Stranraer against James Smith, fisherman, Blair Street, Portpatrick, for aliment for an illegitimate child born on 19th December 1890, of which she averred that the defender was the father.

It was stated in the condescendence that her husband "Joseph M'Quillan, a seaman, sailed for Australia seven years ago, and has not since been heard of by the pursuer, and she has no knowledge as to whether he is dead or alive."

The defender pleaded—"(1) The pursuer being a married woman is not entitled to sue this action without the consent and concurrence of her husband. (2) The child in question being the offspring of a married

woman, her husband is presumably the father thereof; therefore it is incompetent to prove the paternity against the defender without making the husband a party to the action."

Upon 28th May 1891 the Sheriff-Substitute (WATSON), before answer, allowed the pursuer a proof of her averments.

"Note.—The pursuer of this action of filiation is a married woman. She avers that her husband sailed for Australia about seven years ago, and has not since been seen or heard of by her. The defender does not admit the truth of that averment, but pleads that the pursuer has no title to sue unless she either brings positive proof of the death of her husband or obtains his consent to and concurrence in her action. The defender's contention was founded mainly on certain *dicta* of Lord Justice-Clerk Moncreiff and Lord Young in the case of *Wilkinson*, November 9, 1880, 8 R. 72. These *dicta*, however, were uttered prior to the passing of the Married Women's Property Act 1881, and even under the former law they seem hardly reconcilable with some earlier decisions of the Court, such as *Jobson*, May 31, 1832, 10 S. 594. In that case a wife whose husband had been abroad for several years was found entitled to sue for aliment the alleged father of a child begot before but born after the marriage. It is true that in that case a curator *ad litem* was appointed to the wife, and the husband was also called in the summons for his interest. But it appears to the Sheriff-Substitute that the reasons which made these precautions necessary under the former law do not now exist, for the husband has now no right of administration in reference to such a claim as the present. The Sheriff-Substitute is therefore of opinion that if the pursuer's averment in regard to her husband is true, she has a good title to sue. He has accordingly allowed a proof before answer."

The defender appealed to the Sheriff (VARY CAMPBELL), who upon 19th June 1891 refused the appeal.

"Note.—Assuming that the pursuer can prove that her husband has been absent from her for seven years without contributing to her support, and that it is now uncertain whether he is living or dead; further, that if he is alive, she does not know where he is to be found—I cannot refuse to sustain her title to sue. If the husband is dead, there can be no question of her right. If he turns out to be alive, nevertheless I think there is authority for sustaining an action of this nature by a married woman. The class of cases to which I refer are those relating to the actions and obligations competent to and against a married woman thrown upon her own resources either by wilful desertion of her husband or by his permanent separation from her without keeping up a home for her or making any provision for her support.

"A woman in such a situation must have some legal capacity to act and contract, to sue her debtors and be sued, else she must starve. Such capacity has accordingly

been recognised in the well-known cases of *Chirnside*, M. 6802; *Orme*, 12 Sh. 149; *Ritchie*, 7 D. 819. The pursuer, in her present position as alleged, might, if she had been slandered, have sued for damages without her husband's concurrence, and the same would hold if she had a claim of reparation for personal injuries sustained by her in a railway collision.

"This is not an action of *status* either to dissolve the marriage for adultery or to declare the child to be or not to be the husband's lawful child. To such actions the husband is a necessary party. No doubt the defender will have the benefit for his defence of the presumption arising from the pursuer's marriage, but this presumption will be overcome if the pursuer can prove her averments—*Montgomery*, 8 R. 403; *Steedman*, 14 R. 1066; *Stephen's Digest of the Law of Evidence as to Affiliation Orders*, art. 98. This is an action which might have been brought by anyone who was maintaining the child in order to enforce payment by the defender of his share—*Thomson v. Westwood*, 4 D. 833. Brought as it is by the mother, it has no further effect than this in her favour, and it may serve, probably enough, by enforcing the defender's contribution to prevent her from having to apply to the parish. Questions of *status* may have to be dealt with incidentally in this, as in many similar cases, in order to reach the practical judgment sought from the Sheriff—*M'Donald*, February 18, 1891, 28 S.L.R. 404, but the husband and child will not be barred afterwards from raising any action as to *status* by this woman seeking decree against the present defender, or by her registering the child as a bastard—*Tennant*, 17 R. 1205. Justice to the woman, to whom the burden of this child may make all the difference between parochial chargeability and self-maintenance, and the regular administration of the Poor Law Act (sec. 80), seem to render it right and proper, according to the authorities referred to by the Sheriff-Substitute and by me, not to sustain the defender's first and second pleas to the effect of excluding the action. These pleas cannot, on the other hand, be repelled until she proves her deserted position as alleged by her. The authorities of the common law above mentioned have been extended by the letter and spirit of recent legislation in 1861, 1874, 1877, and 1881 as to married women. If the child is being supported, as I suppose is the case, out of the pursuer's wages and earnings, then such wages are by the Act of 1877 her own, exclusive of both *jus mariti* and right of administration, and this is truly an action relative to and for the protection of such separate estate from a burden which the defender as alleged ought to share. An action relative to such estate a married woman might raise at common law without concurrence of her husband. It does not appear that she when of full age needs a curator *ad litem* in an action such as this. At all events, there are authorities—*Fraser on Husband and Wife*, pp. 569, 570, 572, 1516—dealing with actions by married women

whose husbands are abroad or in reference to their separate estate, which do not seem to render it *pars judicis* to add to the expense of this action by requiring the appointment of a curator to the action. If either party moves for the appointment of such a curator (and it may be advisable for the pursuer to save any technical question by so doing), the Sheriff-Substitute will probably grant the motion and allow the curator to see the process in common form before proceeding with the proof."

After a proof the Sheriff-Substitute found in fact that the pursuer's husband had left this country and sailed for Australia in 1883, that she had not heard of him since 1885, and that she had made reasonable endeavours to trace him, but without effect; and found in law that in these circumstances pursuer was entitled to sue this action alone, and repelled the first and second pleas-in-law stated by the defender. Upon the merits the Sheriff-Substitute found that the pursuer had established her case, and gave her decree accordingly.

The defender appealed to the Second Division of the Court of Session, and argued—The defender's preliminary pleas should be sustained. In finding that the pursuer had a title to sue alone the Sheriffs had disregarded the case of *Wilkinson v. Bain*, November 9, 1880, 8 R. 72. In any case a curator *ad litem* should have been appointed to the pursuer—*Cullen*, November 19, 1830, 9 S. 31; *Jobson*, May 31, 1832, 10 S. 596.

Argued for the respondent—The judgment should be affirmed. The case had been correctly set forth by the Sheriffs.

At advising—

LORD JUSTICE-CLERK—The only real and practical question in this case is, whether the pursuer is in a position to sue this action in her own right, and without the consent of her husband. Upon the merits of the case there is no doubt that the judgment of the Sheriff-Substitute is right.

In the first place, what are the circumstances of the case. The pursuer was married thirteen years ago, and her husband, who was a sailor, left her on a voyage to Australia in 1883, and since then she has never seen him. The last she heard about him was in 1885, when she got a letter from someone saying he had seen the pursuer's husband in Australia, but since then she has heard nothing about him. It has been found, no doubt very properly, that the pursuer has made reasonable endeavours to trace him.

The question then is, whether if the pursuer in such circumstances should prove unfaithful to her marriage vow and have an illegitimate child, she can insist as in her own right in an action calling upon the alleged father to pay his share of the child's support? It must be kept in view that we are not dealing with a question of *status* at all, the only question that can arise is, whether the pursuer by her evidence can overcome the presumption which exists in the case of a married woman if she gives

birth to a child that the father of the child is her husband.

Now, it is not doubtful that a woman in such circumstances as the pursuer in placed in here is entitled to deal with other persons in her own right, and to incur debt on her on account; indeed, it is almost essential that she should be able to do so, and in law she has such a right, so that with the exception of matters affecting *status* she can act as if her husband was dead.

Now, this case raises a question of debt, and nothing else. The question is, whether a debt is due to the pursuer by the defender because she has to take charge of and provide for the upbringing of the child. She calls upon the defender to pay his share of the expenses so caused as a debt which he owes to her. I therefore think we cannot sustain the preliminary pleas of the defender, and should adhere to the interlocutor in the Court below.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuer and Respondent—A. S. D. Thomson. Agent—

Counsel for Defender and Appellant—M'Lennan. Agent—Robert Broatch, L.A.

Saturday, January 16.

## SECOND DIVISION.

[Lord Wellwood, Ordinary.

HILL v. THOMSON.

*Reparation—Slander—Ship—Log-Book Entry—Merchant Shipping Act 1854 (17 and 18 Vict. cap. 104)—Issue—Malice—Probable Cause.*

In an action of damages for slander by the chief officer of a merchant vessel against the master, the pursuer averred that the defender had on one occasion expressed his wish that a certain seaman should not be permitted to steer when his turn for wheel-duty came round. About six hours later it again came to this seaman's turn at the wheel when the pursuer was in charge of the ship; the pursuer for the time entirely forgot the verbal order he had received, and permitted the seaman to take the wheel. The defender came on deck, ordered the pursuer off duty on the ground of wilful disobedience, and made an entry in the log to the effect that the pursuer had wilfully and intentionally disobeyed his orders.

The Merchant Shipping Act requires the master of a vessel to enter on the log any instance of wilful disobedience, and to report the same to the authorities by delivery of the log within

forty-eight hours of arrival at the final port of destination.

*Held* (1) that an issue in such a case must include malice and want of probable cause; and (2) that the pursuer's averments showed that the defender had probable cause for his statement; and the action *dismissed* as irrelevant.

The Merchant Shipping Act 1854 (17 and 18 Vict. cap. 104), sec. 243, provides for the punishment of certain offences by seamen, including "(4) Act of Disobedience—For wilful disobedience to any lawful command he shall be liable to imprisonment for any period not exceeding four weeks, with or without hard labour, and also at the discretion of the court to forfeit out of his wages a sum not exceeding two days' pay."

Sec. 244. "Upon the commission of any of the offences enumerated in the last preceding section an entry shall be made in the official log-book, and shall be signed by the master and also by the mate, or one of the crew, and the offender, if still in the ship, shall before the next subsequent arrival of the ship at any port, or if she is at the time in port, before her departure therefrom, either be furnished with a copy of such entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit, and a statement that a copy of the said entry has been so furnished, or that the same had been read over as aforesaid, and the reply if any made by the offender, shall likewise be entered and signed in manner aforesaid, and in any subsequent legal proceeding the entries hereinbefore required shall, if practicable, be produced or proved."

Sec. 231. "Every entry in every official log-book shall be made as soon as possible after the occurrence to which it relates." . . .

Sec. 232. "Every master of a ship for which an official log-book is hereby required shall make or cause to be made therein entries of the following matters, that is to say—(3) Every offence for which punishment is inflicted on board, and the punishment inflicted."

"Sec. 236 provides for official logs being delivered to shipping masters within forty-eight hours of the arrival of the ship at her final port of destination."

Thomas Hill, master mariner, lately chief officer of the steamship "Felicianna" of Glasgow, sued George B. Thomson, master mariner, Glasgow, late master of the said vessel, for damages for alleged slander contained in an entry in the ship's log.

The pursuer averred—" (Cond. 6) . . . The vessel upon 17th September proceeded upon her voyage to London. About eight o'clock the same evening, when a seaman was at the wheel, named James Harty, the defender expressed to the pursuer his wish that Harty should not be permitted to steer the ship when his turn for wheel-duty again came round. No reason was given by the defender for this order, nor was it entered by the defender in the night order book written up for the guidance of the