

Liability Act. I agree with your Lordship that there is no bar at all. It is quite true that if an option is exercised by a person bringing an action of damages, and the person exercising that option fails in that action, then a claim under the Workmen's Compensation Act must be disposed of by the Court at the same time, and for this reason, as it appears to me, that the whole facts of the case are before the Court, upon which the Judge can award compensation; but that is not so in the converse case, and therefore there is no similar provision in the Act for dealing with that case. But I see nothing in that to prevent a claim for damages being made. I also agree with your Lordship that the case has in fact been decided by the case of *Blain* in the other Division. I agree with that decision, and also with the arbiter's views on that case, and with the views expressed by the Lord Chief-Justice in the case of *Rouse*, and I therefore think we should refuse the appeal.

LORD M'LAREN—I also agree. I think that under the Act the claimant is, in a certain state of facts and for certain purposes, put to his election, because the language of the Act is that where two grounds of liability exist the workman may either raise an action for compensation under this Act or may take such proceedings as were open to him before the Act came into force. Now an alternative is there given, and it cannot mean that he is to do both. Therefore I hold it would be contrary to the Act of Parliament to attempt to carry on the two claims concurrently, with the intention, it might be, of abandoning one and proceeding with the one which promised the best results. But, then, while an election exists in that case, it does not follow that it is an irrevocable election, and in the absence of any provision to that effect, and keeping in view the explanatory proviso that the employer shall not be liable to pay under both claims, I come to the conclusion that a workman may if he pleases abandon the claim first made and fall back on the alternative claim. In a case where the election has been to bring an action for damages, express provision is made that the Court, while dismissing the action, may proceed to award compensation under the Act, while the converse case is not expressly provided for. The Act of Parliament provides that the employer shall not be liable under both heads, and the language used appears to me to be consistent with a right on the part of the workman to change his ground, provided the employer is not thereby subjected to a double liability. A decision on a claim for compensation which is given by the statute independently of fault can never be *res judicata* of a claim which is founded on fault. I therefore concur with your Lordships that the decision of the Sheriff-Substitute is right.

LORD KINNEAR was absent.

The Court refused the appeal and remitted the case back to the Sheriff.

Counsel for the Pursuer and Respondent  
—G. Watt, K.C.—Munro. Agents—St Clair  
Swanson & Manson, W.S.

Counsel for the Defenders and Appellants  
—W. Campbell, K.C.—Hunter. Agents—  
W. & J. Burness, W.S.

Saturday, February 25.

## SECOND DIVISION.

[Sheriff Court of the Lothians  
and Peebles.

WILSON v. M'MINNIN.

*Parent and Child—Aliment of Twin Illegitimate Children—Agreement between the Parents—Mother's Right of Relief against Father for Aliment.*

The father and mother of twin illegitimate children agreed to each take the custody of and support one of them. In an action by the mother against the father for a yearly contribution towards the support of the child in her custody, held that there was no reason for disturbing the compact between the parents under which each parent was liable for the support of one child.

This was an appeal from the Sheriff Court of the Lothians and Peebles. The facts of the case, about which there was no dispute, were as follows:—The pursuer was Helen Wilson, domestic servant at Dalkeith; the defender was William M'Minnin, gardener at Lasswade. On 28th July 1904 the pursuer gave birth to twin illegitimate children, of whom the defender was the father. By arrangement between the parties each took the custody of and supported one of the children. In these circumstances the pursuer brought an action in the Sheriff Court of the Lothians and Peebles at Edinburgh concluding against the defender for, *inter alia*, the sum of £7 per annum for fourteen years as a contribution to the aliment of the child in her custody. The pursuer did not deny that she was in a position to aliment this child.

The pursuer pleaded, *inter alia*—"The defender being the father of the pursuer's child is bound to contribute for its aliment."

The defender pleaded—"In the circumstances stated the defender is entitled to *absolvitor* with expenses."

On 20th October 1904 the Sheriff-Substitute (GUY) pronounced an interlocutor assoiicing the defender.

*Note.*—"The material facts for the decision of the case are not in dispute. Illegitimate twin children are born as the result of carnal intercourse between the parties. Both father and mother are equally liable to maintain them. They give effect to that equal burden by each taking a child. Now, the mother wishes to disturb the equality of the total burden which rests upon them by causing the father to bear three-fourths of it while she only bears one-fourth. In the usual case where only one child is in

question, the parent having the custody of the child, and expending what is necessary for its maintenance—in most cases the mother—has a right of relief for a half from the other parent as the proper contribution under the liability which rests equally on both parents. Although in most cases the mother has the custody, there seems no reason why if the father takes the custody he should not have a right of relief against the mother for her contribution. In the case of *Alexander v. Robertson*, January 15, 1883, Guthrie's Select Cases (2nd series), p. 13, decree was given in this Court by Sheriffs Rutherford and Davidson against a mother for aliment of an illegitimate child maintained by the father. In the present case, if the mother has a claim against the father for half of the cost of maintenance of one child, that claim is exactly met and extinguished by the claim which the father has against her for her half of the cost of maintenance of the other child. The pursuer's averments as to her ability to maintain the child do not in my opinion affect the question. Her action is one of relief based upon the position that she is maintaining the child."

The pursuer appealed to the Sheriff (MACONOCHE), who on 9th November 1904 pronounced an interlocutor recalling the interlocutor of the Sheriff-Substitute, and granting decree against the defender in terms of the conclusion of the petition.

Note.—"The defender admits the paternity of the child in question and further admits that the pursuer and he are liable to aliment it 'jointly.' His sole defence is that the pursuer and he arranged that one of them should provide for one child (there happen to be twin illegitimate children), and that the other should provide for the other child. In these circumstances the defender maintains 'Any claim the pursuer may have against the defender is met by a counter claim on the part of the defender for the half-maintenance of the one he is providing for.' The Sheriff-Substitute has found in law that the defender is not liable to contribute towards the maintenance of the child which is in the pursuer's keeping on the ground that the 'mutual claims for contribution to the aliment of the respective children compensate one another.' I do not think that there is any room for the plea of compensation being given effect to. The debt sued for is a debt due not to the mother but to the child (*Clarke v. Carfin Coal Company*, July 27, 1891, 18 R. (H.L.) 63, see Lord Watson, p. 68), and the result of sustaining the defender's plea here would be to hold that the parents of an illegitimate child could by a contract entered into between themselves effectually deprive the child of the right to be alimented by both parents. Possibly (I give no opinion on the point) owing to the terms of the agreement averred there may be a question between the parents as to whether the defender is entitled to be repaid any part of the amount which he has expended on alimenting the illegitimate children, but that is a question which cannot, in my

opinion, be decided in a case in which a debt due to one of the children is being sued for. I may in conclusion refer to the case of *A B v. C D*, February 12, 1842, 4 D. 670. There the mother had granted to the father a discharge of inlying expenses, 'and of all claims and demands competent to the said child on account of . . . aliment, due or to become due.' The Court there held that the mother was barred from claiming inlying expenses or past due aliment, but refused to hold that the child was barred from raising through its administrator a claim for future aliment. There Lord Medwyn said—'If this action were for the benefit of the mother alone I should hold it incompetent, but as regards the future aliment of the child I think it is a good claim.' Here no arrears are claimed, and on the authority of that case, and on general principle, it seems to me that with regard to future aliment the claim is good, and that the sole defence stated is irrelevant."

The defender appealed to the Court of Session, and argued—The mother was the true pursuer in this action, as the claim was one of relief against the father; the father was jointly liable with the mother for the support of their illegitimate children, and therefore any claim by the mother for aliment for the child she was supporting was set off by the corresponding claim of the father—*Thomson v. Westwood*, February 26, 1842, 4 D. 833, at p. 841; *Bine v. Stiven*, December 5, 1863, 2 Macph. 208, at p. 223; *Den v. Lumsden*, November 10, 1891, 19 R. 77, 29 S.L.R. 76; *A B v. C D*, February 12, 1842, 4 D. 670; *Corrie v. Adair*, February 24, 1860, 22 D. 897, at p. 900.

Argued for respondent—The claim was on behalf of the child, not a claim of relief on behalf of the mother; the child was entitled to aliment from the father, and no arrangement between the parents should be allowed to interfere with its claim—*Fraser on Parent and Child*, p. 125; *Clarke v. Carfin Coal Company*, July 27, 1891, 18 R. (H.L.) 63, 28 S.L.R. 959.

LORD KYLLACHY—In this case I am satisfied with the judgment of the Sheriff-Substitute. The case is somewhat peculiar, and the precise question involved has never, so far as I know, come up for decision. The position, I think, is this—twin illegitimate children are born, and an arrangement is come to between the parents that the father shall take one while the other remains with the mother. So far as appears this arrangement has as regards the children's interests worked well, and there has been no change in the circumstances of the parties from the time at which it was entered into—at least it is not alleged that any such change of circumstances has occurred. In these circumstances I do not think that any question arises here such as would arise if the mother became, for instance, disabled and could no longer support or contribute to the support of the child in her custody. There is nothing here to suggest that she is not as well able to support the child now as when she undertook the responsibility. I think therefore that as between the parties each is liable

for the support of one child, that being the compact between them, and there being so far as we can see no reason, at least at present, for disturbing it.

LORD KINCAIRNEY—I agree with the judgment of the Sheriff-Substitute, and think it should be returned to as giving effect to what is an equitable arrangement between the parties. I am not sure that I understand the legal grounds of the Sheriff's decision, but it involves the inequitable result of making the father liable for the maintenance of the children to the extent of three-quarters and the mother to the extent of only one quarter.

LORD JUSTICE-CLERK—I agree with the judgment proposed. Of course this arrangement can only continue so long as it is an arrangement between the parties, but the pursuer has not made out any case for disturbing it for the present.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against and assoilzied the defender.

Counsel for the Defender and Appellant—Donald. Agent—Peter Simpson, S.S.C.

Counsel for the Pursuer and Respondent—A. M. Anderson. Agent—George Jack, S.S.C.

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Saturday, February 25.

SECOND DIVISION.

[Lord Stormonth Darling,  
Ordinary.

HOOK v. M'CALLUM.

*Process — Summons — Reparation — Competency of Action for Damages against Husband and Wife Conjunctly and Severally for Separate Slanders.*

Held that an action against a husband and a wife "conjunctly and severally or otherwise severally" for a lump sum in name of damages for a slander by the wife and a separate slander on a subsequent occasion by the husband was incompetent.

*Barr v. Neilsons*, March 20, 1868, 6 Macph. 651, followed.

This was an action for defamation at the instance of Marion Weston Hook, residing at Wilkieston, in the county of Midlothian, with the consent and concurrence of her father Robert Hook, also residing there, as her administrator-in-law, against Mrs Margaret M'Callum, wife of and residing with James Y. M'Callum, dairyman, 7a Pitt Street, Edinburgh, and the said James Y. M'Callum, as administrator-at law for his said wife, and for his own right and interest. The pursuers sought decree against the defenders "conjunctly and severally or otherwise severally" to make payment to the pursuers of the sum of £400 sterling with interest.

The pursuers averred that on or about 24th November 1903 the female pursuer entered the defenders' employment as a domestic servant on a contract of service for six months.

The pursuers further averred that on or about 21st January 1904, in the defenders' shop in Pitt Street, the defender Mrs Margaret M'Callum falsely, maliciously, and calumniously stated to the pursuer Marion Weston Hook that she was fit only for gossiping and walking the streets, meaning thereby to accuse the said pursuer of being a person of loose, immoral, and vicious habits, or only fit to be a prostitute; that further, on or about 24th January 1904, in the defenders' dwelling-house in Pitt Street foresaid, in the presence and hearing of the said pursuer's fellow-servants, named Isabella M'Phee and Christina Reid, both then residing at the defenders' dwelling-house foresaid, the defender Mrs Margaret M'Callum falsely, maliciously, and calumniously said of and concerning the said pursuer that she was untruthful and deceitful and that the said two fellow-servants ought not to associate themselves with her, or words of a similar import and effect; that on the same date, and in the same place, the defender Mrs Margaret M'Callum falsely and calumniously said of and concerning the said pursuer that she (the said defender) would lock the said pursuer's trunk which lay in the bedroom of the house occupied by the said pursuer and one of her fellow-servants, so that if her fellow-servants' clothes were amissing it would be known where to find them; that by that latter statement the said defender intended to accuse, and did accuse, the said pursuer falsely, maliciously, and calumniously of being a thief or capable of dishonestly secreting and stealing the property of her fellow-servants; that at the time she made that slanderous statement the said defender unwarrantably opened and examined the female pursuer's trunk in the lock of which the key stood at the time; that thereafter she locked the said trunk and placed the key in the shop, all without asking or obtaining the said pursuer's consent; that on 25th January 1904 both the pursuers called at the defenders' shop in Pitt Street; that delivery of the trunk referred to was there and then asked from the defenders; that they refused to give it, and called in a policeman, as if the pursuer Marion Weston Hook had been guilty of dishonestly secreting her fellow-servants' clothes or other property not her own in the trunk; that the defenders were requested to state on what ground the imputations and accusations against the female pursuer's character had been made as hereinbefore stated; but that the defenders refused to explain, and adhered to and refused to withdraw those imputations and accusations. In Cond. 8 the pursuers stated that on the said occasions when the defender Mrs Margaret M'Callum slandered the pursuer as aforesaid, she represented her husband in the shop and business. The said statements were made by her of and concerning the said pursuer maliciously