purposes a domiciled Scotsman. That being so, what I have to consider is whether it involves the loss of his Scotch domicile, and the revival of his domicile of origin, that on the discovery of his wife's misconduct, and some months before the raising of the divorce, he left Edinburgh for London to live with his relatives, and has now, as he frankly says in the witness-box, no intention of returning to Scotland.

"I confess this would be carrying very far the doctrine that a domicile of choice is lost by a change of residence *animo non revertendi*. There are two circumstances which in the present case appear to exclude the application of that doctrine. The one is that it cannot be here affirmed that the pursuer had at the date of the action in any proper sense changed his residence. He still had a house in Edinburgh, in which his wife continued to live, and of which he continued to be tenant up to Whitsunday.

"That is the first consideration. The other is this, that it nowhere appears what the pursuer's intentions were at the date of the action in April last. He says, no doubt now, that he has no intention of returning to Scotland, and it is also true that his furniture has been sold off. But at the date of the action his intentions may have been different, or they may not have been formed one way or the other.

"I confess I do not consider that I am bound in a case like this to draw inferences, more or less doubtful, in order to defeat the jurisdiction. On the whole I do not think at present that either *animo* or *facto* the pursuer had changed his domicile at the date of the action."

Counsel for Pursuer—Strachan—Greenlees. Agent—William Geddes, Solicitor.

Counsel for Defender — Craigie — Abel. Agent—D. R. Grubb, Solicitor.

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*Thursday, July 20.*

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## WHITEHEAD *v.* BLAIK AND OTHERS.

*Reparation—Personal Injury resulting in Death—Title to Sue—Parent and Child.*

*Held* (*rev.* judgment of Lord Kincairney) that a mother had no title to sue an action of damages for the death of her son where the father was alive and had not renounced his right.

Mrs Christina Whitehead, residing at Limekilns near Dunfermline, in the county of Fife, brought an action of damages against Hugh Blaik and others, the registered owners of the steamship "Sicilian," for the death of her son who had been first mate of that vessel, and whose death the pursuer alleged had been caused through the fault of the defenders or those for whom they were responsible. The action bore to be brought "with consent and concurrence of her husband Thomas Whitehead, seaman, residing at Limekilns aforesaid, and at present furth of Scotland on a voyage to Bermuda."

The pursuer averred that her husband had given his consent to the action before he left the country.

The defender pleaded—"(1) No title to sue."

On 23rd March 1893 the Lord Ordinary (KINCAIRNEY) before further answer allowed the pursuer a proof of her husband's consent to the action.

"*Opinion.*—This is a very novel action. It is an action of damages by a married woman for the death of her son. The defenders object to her title to sue, and I was informed from the bar that no example of such an action could be found in our books, and I have not been able to discover any such action, or any action by a father and mother conjointly for the death of their child, or any action by a child for the death of a mother.

"There is very high authority for saying that actions of this kind, which are to a certain extent anomalous, should not be allowed unless supported by precedent, and that the title to sue such actions should not be extended. I have not been able to see, however, that the plea to title can be sustained. I think that the pursuer's title to sue may be deduced from principles which are established and admitted, and that the absence of previous instances may be accounted for.

"It is settled that actions of this nature may be sued where the pursuer and the deceased stood in the relation of husband and wife, or parent and child. There is no case in which the title of a wife to sue for damages on account of the death of a husband, or of a father for the death of a son, or of a son for the death of a father, has been denied. I think there can be no doubt as to the title of a husband to sue an action of damages for the death of his wife, although I am not aware of any such case prior to the case of *Bern* v. *The Montrose Asylum* [30 S.L.R. 748], where the title of a husband to sue for damages on account of the death of his lunatic wife was not disputed. The title in any of these cases does not depend on any allegation or presumption of patrimonial loss. The action will be sustained although it is averred, assumed, or admitted that there has been no such loss—*Black* v. *Caddell*, 9th February 1804, M. 13,905; *Brown*, 26th February 1818, F.C. In *Stone* v. *Aberdeen Marine Insurance Company*, 14th March 1849, 11 D. 1041, an action of damages was sustained by an adult son for the death of his father, who was old, infirm, and on the poor's roll. The case of *Bern* above mentioned furnishes a similar example.

"Our law gives this right when the relation is that of parent and child. There is no statement of the law which limits it to the case of father and child. The right of a mother to sue an action for the death of a child is founded on exactly the same grounds as is the right of a father to sue such an action. There could be no question as to the right of a widow to sue on

account of the death of her child—*Fraser* v. *Younger & Son*, 13th June 1867, 5 Macph. 861, is an example of such an action.

"So, also, if the child of a married woman by a prior marriage was killed, there could, I think, be no doubt about the title of some one to sue for damages. The title would, I suppose, be in the second husband by virtue of the assignation by marriage, if his *jus mariti* was not excluded, but in the mother of the child, with his consent, if the *jus mariti* was excluded.

"The right of a son to sue on account of the death of his widowed mother would, I think, not be disputed, although I know of no example of such an action. But if so, then his title to sue for the death of his mother, though she had been married either to his father or to a second husband, appears to follow.

"It was contended that the title in this case was bad, because there had existed no mutual obligation for aliment between the pursuer and her deceased son, so long as the pursuer's husband was alive. But in the first place, it does not appear to me to be laid down that the existence of such a mutual obligation is essential where the relations are those of parent and child, or husband and wife, and, in the second place, I think that within these relations the obligation for aliment always does exist, although it may not at any particular time be prestable, and although it may be that the obligation of a mother to support her child is not precisely of the same character as the obligation of a father (Bell's Principles, section 1632; *Fairgrieve* v. *Henderson*, October 30, 1885, 13 R. 98). When a consideration of patrimonial interest enters into this question, the point is not, as I think, whether the deceased was at the date of death liable to aliment the pursuer, but whether he might have become so had he continued to live. In short, the mutual obligation for aliment between a mother and child exists always, although it may be masked by the more immediate and higher mutual obligation between a father and child.

"The reason why there have been few such cases, if there have been any, seems probably to be this—that in most cases before the Married Women's Property Act 1881 the right to recover, and therefore the right to sue was in general vested in the father *jure mariti;* but under the provisions of the 3rd section of that Act the *jus mariti* of a husband is excluded from all estate to which the wife may acquire right after the passing of the Act. I cannot see any sound principle on which this claim, and any money which may result from it, can be denied to be estate to which the pursuer has acquired right.

"The defenders referred to *Eisten* v. *The North British Railway Company*, July 13, 1879, 8 Macph. 980; *Weir* v. *The Coltness Iron Company*, July 27, 1891, 16 R. 614; and in particular to *Clark* v. *Carphin*, July 27, 1891, 18 R. (H.L.) 63; and *Darling* v. *Gray*, May 31, 1892, App. Cas. 576.

"In the latter of these cases Lord Watson made observations which seem to indicate his opinion that no more than one action in such cases would be permitted. I have difficulty in seeing how such a rule could receive effect in many cases which might be figured. But the principle, if it be one, would not exclude this, a first action, to which the husband is said to be a consenter, and who would be excluded by this principle from bringing a second action.

"Having in view therefore the change in the position of a married woman effected by the Act of 1881, I am unable to see how this right of action can be denied to the pursuer, and therefore I cannot sustain the defenders' plea of no title to sue.

"At the same time I cannot in the present state of the process repel it, because the defenders dispute that the action has been raised with the authority of the pursuer's husband; and she, although formally called on to do so, has produced no mandate.

"Entertaining these views, I can do nothing but allow the pursuer a proof that her husband has consented to the action (Fraser on Husband and Wife, i. 565). At the same time, as the point of title was argued, I have thought that it might be convenient to the parties that I should state the opinion which I had formed upon it."

The defenders reclaimed, and after the case was in the Inner House the pursuer produced two letters from her husband, Thomas Whitehead, to Mr Turner, her agent, these letters being dated at George Town, Demerara, on 4th May 1893.

In one of these letters Thomas Whitehead, after explaining why he had not answered a letter of Mr Turner's sooner, wrote as follows—"However, it is a case of law with my wife Christina Whitehead against Messrs Blaik & Company of the s.s. 'Sicilian' for the death of my son. . . . Now, I have read your closed law record which you were pleased to send me, also your letter which I have signed with two witnesses, and I grant you my full liberty to go on with the action you have raised in my name if it is required." . . .

In the other letter, which was signed by Thomas Whitehead before two witnesses, he wrote—"I wired you to-day and beg now to confirm that you have my full authority for the action in the Court of Session at the instance of my wife Mrs Christina Stark or Whitehead with my consent and concurrence against Hugh Blaik and others . . . and to follow forth the same with all despatch, and to act thereanent with all the powers that I have myself. Accordingly you are vested with the power of not only following forth the action, but of granting all necessary discharges and receipts for whatever money is recovered, to compromise and compound, and in every other manner of way to act for me as my agent not only in this matter but in all matters, as if I were personally present, hereby committing to you the fullest plenary powers that can be given or are conceivable. The fullest power is hereby conferred on you to raise any further action or actions in the name of myself, my wife, or my family, all or any of them, and to follow forth the same to a con-

clusion, as is above indicated in reference to the current action." . . .

The defenders argued—The pursuer had no title to sue, the right being vested in the father, who had not renounced it. The title to sue depended on the presumption of patrimonial loss, and only existed where there was a mutual obligation of support, and the Court was averse to increasing the number of persons to whom such an action was competent—*Eisten* v. *North British Railway Company*, July 13, 1879, 8 Macph. 980, *per* Lord President Inglis, p. 984; *Wood* v. *Gray & Sons*, May 31, 1892, L.R., App. Cas. 576, and 19 R. (H. of L.) 31. No mutual obligation of support existed between mother and son during the father's lifetime. The obligation of a mother to support her child was also at no time of as high a character as that of a father—*Fairgrieves* v. *Hendersons*, October 30, 1885, 13 R. 98, *per* Lord President Inglis, p. 100. There was no action like the present in the books, and the fair inference was that such a claim had been regarded by the profession as invalid. The Lord Ordinary had based his judgment on the Married Women's Property Act 1881, but the preamble of that Act afforded no good ground for holding that it had extended new rights of action to the wife. Under the old law the wife was never a conjoint pursuer along with the husband in actions of this kind.

Argued for the pursuer—The pursuer had a title to sue, for a reciprocal obligation of support existed between her and her son, though it was not prestable during the lifetime of her husband—*Wood* v. *Gray & Sons*, L.R., 1892, App. Cas. 576, *per* Lord Watson, p. 581. The husband had abandoned his claim by giving his consent to this action; and the pursuer was in a position to give a sufficient discharge, either by virtue of the Married Women's Property Act or of the letter of consent which was now produced —*Horne* v. *Sanderson & Muirhead*, January 9, 1872, 10 Macph. 295, *per* Lord President Inglis, p. 298.

At advising—

LORD PRESIDENT—It was observed by Lord President Inglis in the case of *Eisten* v. *The North British Railway Company*, that "as the existence of such claims in our common law is a peculiarity in our system, it is not desirable to extend this class of actions unless they can be justified on some principle which has been already established."

Now, no one concerned with this case has ever heard of an action of damages by a married woman for the death of her child, or of any action by a father and mother jointly for the death of their child.

The pursuer has produced a letter from her husband consenting to the action. But the husband does not renounce his own claim.

We can only sustain the title to sue this action if we think that in every case a married woman has an independent right of action for the loss of her son. This proposition does not seem to me to be involved in the recognition of those rights of action for the loss of relations which are known to the law; and accordingly, in the spirit of the late Lord President's doctrine, I think the Lord Ordinary's interlocutor should be recalled, the defenders' plea to title sustained, and the defenders assoilzied.

LORD ADAM—I am of the same opinion. This is a case of an action by a married woman for the death of her son, brought with the alleged consent of her husband. We know very well that in such a matter as this the father has a good action, but this is the first time I ever heard of an action being insisted in by a mother, who was at the same time the wife of the father. The Lord Ordinary thinks it is entirely novel, and it was admitted at the bar that no instance of such a case was ever known or heard of or brought before the Court. In these circumstances I agree with your Lordship that we should not allow the introduction for the first time of a claim of such an entirely novel and peculiar character.

LORD M'LAREN—I would only add that in the last case that went to the House of Lords—the case of *Wood*—it was plainly laid down by the noble Lords who decided the case that there can be only one action arising out of the same injury. Now, as the father is the person who at least has the best right to institute an action of compensation for the loss of his son, if he is neither a party to the action, nor is in the position of having renounced his rights, I think it is clear that no other person can institute the action for him. It may be a question whether in the event of the father renouncing his claim or being unable from incapacity to prosecute a claim the right might arise to the mother, but in the ordinary case it does not, and I accordingly concur with your Lordships.

LORD KINNEAR—I have come to the same conclusion, I must say with some regret, because, although the instance is defective, I think the defect might have been cured without any kind of prejudice to the defender. But we have no power to sist the husband as a pursuer along with his wife without the defender's consent, and therefore we must consider this action upon the footing on which it is presented to us, as an action at the instance of a married women claiming a separate and independent right to recover damages for herself in consequence of the loss of her son. Now, looking at it from that point of view, I agree with all your Lordships that it is an unprecedented action. The proper party-pursuer to an action of that kind is undoubtedly the husband, and I do not think we are in a position to hold that the husband is either formally or substantially the pursuer of this action, and that if we sustained it we should be excluding his claim.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defenders, and assoilzied

them from the conclusions of the action, with expenses.

Counsel for the Pursuer—Dewar. Agent—Daniel Turner, L.A.

Counsel for the Defenders—Jameson—Salvesen. Agents — Boyd, Jameson, & Kelly, W.S.

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*Thursday, July 20.*

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## G. MACKAY & SON *v.* POLICE COMMISSIONERS OF LEVEN.

*Arbitration — Contract — Clause of Reference.*

A firm of contractors offered to construct certain waterworks in terms of a specification issued by the police commissioners of a burgh, which provided that the contractor would get possession of ground "immediately after acceptance of tender," and that he must enter into a formal contract. The tender was accepted on 11th September 1889, and a formal contract was thereafter executed between the parties, which, while declaring that the specification was incorporated therewith, provided that the commissioners reserved right "to appoint the time when the second parties may enter on the lands and proceed with the works." The contract further provided that in the event of any dispute arising between the parties "in relation to the execution, construction, or completion of the said whole works contracted for, or any of them, or any part or portion thereof, or as to the quality or quantity of the work or the materials thereof, or as to the settling of accounts, or as to any points or matter whatever in regard to the works, or as to the contract, or the true intent, meaning, or effect thereof, or of the plans, drawings, specification, or conditions," the same should be referred to the decision of an arbiter named.

The contractors did not get entry to any part of the lands until June 1890, and they subsequently claimed damages from the commissioners on the ground that the latter were bound to have given them entry on acceptance of their tender, or shortly thereafter, and that they had failed to give timeous entry in terms of the contract. They maintained that the question whether timeous entry had been given should be referred to the arbiter.

*Held* that that question did not fall to be referred to the arbiter, in respect (1) that the clause of reference did not give the arbiter power to assess damages, and that it only gave him power to determine the meaning of the contract, where such power was necessary to enable him to decide points of dispute specially referred to him by that clause; and (2) that the pursuers had not made any relevant statement of a dispute as to the meaning of the contract—*diss.* the Lord President, who *held* that a question was raised as to the meaning of the contract, and that it fell to the arbiter to decide it.

In July 1889 the Police Commissioners of the burgh of Leven, through their engineers Messrs Leslie & Reid, issued a specification of the work to be done in connection with the execution of proposed waterworks for that burgh, and invited tenders. The specification contained, *inter alia*, the following general conditions—"The contractor will get possession of the ground immediately after acceptance of the tender (p. 4 of App.) . . . He must enter into a regularly stamped contract containing all the ordinary legal clauses."

By letter, dated 10th August, G. Mackay & Sons, contractors, offered to construct the works, and their offer was accepted by the Police Commissioners on 11th September 1889.

A formal contract was subsequently concluded between the parties, of date 4th and 14th October. This contract proceeded on the narrative that Mackay & Sons had offered to construct the works in terms of the specification, "which specification, with the general clauses therein stated, is hereby incorporated as part of these presents;" that the Commissioners had decided not to proceed in the meantime with a certain branch pipe, but to have the other works "carried out now;" that Mackay & Sons had agreed to execute the whole works in accordance with the conditions stated in the specification and contract, and that the Commissioners had accepted their offer, provided that Mackay & Sons had therefore become bound, and thereby bound and obliged themselves, to complete the works to the satisfaction of the Commissioners or their engineers Leslie & Reid, according to the true intent and meaning of the specification, plans, and contract, "providing always (p. 9 of App.) that the first parties (the Commissioners) reserve right to appoint the time when the second parties (Mackay & Sons) may enter upon the lands and proceed with the works, the second parties being entitled to a similar extension of time to complete the works," as that between 1st September 1889 and the date when entry was given. On their part the Police Commissioners bound themselves to pay the stipulated price. The contract further provided as follows—"And it is hereby provided and declared that in the event of the said works being stopped by interdict or other legal proceedings at the instance of any party, and damage arising thereby to the said second parties for which the first parties may be responsible, the amount to be awarded to the second parties on account of such damage shall be ascertained, and is hereby referred to arbitration as after provided for: And in the event of any dispute or difference arising between the said first