full debtor, his character being thus disclosed on the face of the bond itself. But here we must look not merely to the joint promissory note by the two parties, but also to the written obligation in fulfilment of which it was granted. And I think it is clear from that transaction that this £5000 due to the Bank, in consequence of the account there embodied, was, as in a question with the Bank, the proper debt of M'Murray as much as of Durham & Sons. No doubt ultimately M'Murray was entitled to relief against Durham & Sons; but it by no means follows that, because a right of relief arises to one against the other of two co-obligants, therefore the one having that right has the right of a cautioner in the obligation. On the contrary, such a right arises every day where the character of a cautioner does not enter at all. But although Durham & Sons were bound to relieve M'Murray, I am clear that, in a question with the Bank, M'Murray owed the Bank £5000 under this promissory note, as his own proper debt, for which he had received full value. I therefore come to an opposite conclusion from the Lord Ordinary as to the claim of the defender to have a deduction from the sum due under the note.

I must add, however, that if I had been of an opposite opinion as to the nature of the obligation by M'Murray to the Bank as to this £5000, I should have hesitated to say that I concurred with your Lordships in holding that M'Murray had not been liberated by what took place. There was undoubtedly a giving of time on more than one occasion. There was so once or twice with the express consent of M'Murray, and there was so also without his consent having been obtained or asked. I do not say that the case in this branch is not one of considerable difficulty on the evidence; but I do not see that, if M'Murray is entitled to the equities of a cautioner, there is not enough to liberate him. But, holding as I do that he is not entitled to these equities, I arrive at the same result with your Lordships

Agents for Pursuer—Bell & M'Lean, W.S.
Agents for Defenders—A. & A. Campbell, W.S.

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*Friday, July* 1.

## SECOND DIVISION.

### MUNRO *v.* STILL.

*Parent and Child—Filiation—Evidence of Paternity.* Circumstances in which *held* that the paternity of a child had been established against a person who admitted frequent connection with the pursuer, but denied being the father or having had opportunities of access as would infer paternity.

In this action of filiation and aliment the defender admitted frequent connection with the pursuer, who was a young girl in service at Banff, during the months of May, June, and July 1864. He left Banff for Inverness in July 1864, and his allegation was that he did not return until the 10th January 1865; and he admitted renewed intercourse thereafter up to May 1865, when he left Scotland, and did not return until 1868. The child was born on 26th August 1865, and there was evidence of its being rather premature.

The Sheriff-Substitute (GORDON) assoilzied the defender.

The Sheriff-Depute (BELL), on appeal, altered and decerned against the defender. He added the following note to his judgment:—"Frequent, habitual, long continued intercourse is admitted by the defender, and there is no indication of the pursuer having had intercourse with any other man.

"After continuing for months in 1864, the defender admits that this connection was renewed early in January 1865 at a period quite capable of resulting in the birth of a viable and healthy child. And it is proved that opportunity of renewed connection occurred a week or two earlier than its renewal was admitted.

"In order to obtain absolvitor in such a case it would be necessary to prove not merely that the child is living, and like to live, which frequently happens with children born in the eighth month; but farther, that the child was in point, not of conjecture but of actual fact, born after the usual period of gestation.

"In the general case there may be some slight presumption in favour of a party so alleging; but it is extremely uncertain, and quite insufficient to overturn the conclusions which must otherwise be admitted in the circumstances of the present case.

"And as to the proof of maturity, the Sheriff cannot hold that there is any sufficient evidence, more especially when it is considered that the child which surprised the mother in the harvest field was evidently unexpected, 'was a sober weakly looking child,' and 'had scarcely any nails on its fingers and toes.'"

The defender appealed.

R. V. CAMPBELL for him.

BUNTINE in answer.

The Court were of opinion that it did not appear that the child might not be the fruit of intercourse upon the 26th of December. There was no evidence that the defender was not in Banff at that time. In that case the child was born in the beginning of the ninth month, consequently there would not be strong physical appearances of immaturity. The circumstance of the mother having been working in the fields on the day of the birth, and that the child was small and weakly, were in support of this theory. The defender admitted continued intercourse before and after December, but averred that it was impossible for him to be the father of the child. It was incumbent on him to substantiate the fact of his absence, and he had failed to do so. It was not alleged that the woman had been intimate with any other man, her character seemed unexceptionable, and consequently the appeal must be dismissed.

Agent for Appellant—D. Cook, S.S.C.
Agent for Respondent—J. Barclay, S.S.C.

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*Friday, July* 1.

### HINSHAW & CO. *v.* ADAM & SON.

*Artificer—Injury to Goods*—Prima facie *Liability*—Onus—Culpa. *Held* that an artificer, in whose hands goods sustain damage, is *prima facie* liable for the damage, and has the *onus* thrown upon him of showing that the damage accrued from imperfection in the goods, or neglect or fault on the part of the owner by whom they were sent.

Circumstances in which *held* that such *onus* had not been discharged.

This was an appeal from the Sheriff-court of Lanarkshire in an action in which John Hinshaw

& Co., manufacturers in Glasgow, sued William Adam & Son, calenderers, there, for the sum of £220 as the amount of damage done to certain lustre goods sent by the pursuers to the defenders to be finished, and said to have been returned in a damaged condition. The defence substantially was (1) that the process of finishing such goods as those in question was one of delicacy, and necessarily involving some risk, and that, in the presence of any proof of negligence on the defenders' part, the risk lay with the owners of the goods; (2) that the pursuers' claim was not made *tempestive*, and that the defenders were allowed to go on finishing the different parcels of goods in ignorance that any cause of complaint existed.

The Sheriff-Substitute (GALBRAITH), after a proof, decerned against the defenders in terms of the libel. The following is his interlocutor:—"Having heard parties' procurators, finds that this action is raised for payment of the sum of '£220 sterling, being the amount of damages and loss sustained by the pursuers through the defenders having, through want of due care, or due skill, or otherwise through defenders' fault, destroyed or injured 132 pieces or thereby of lustre goods, being a portion of a larger lot or lots put by the pursuers into their hands for the purpose of being finished in the months of December 1865, and January, February, and March 1866; and which goods were returned by the defenders to the pursuers in a damaged condition, with interest': Finds it pled in defence on the merits—the preliminary plea having been already disposed of—(1) that the pursuers had failed, 'upon receipt of the goods, and in direct violation of the rule in the trade, to intimate to the defenders the claim now made by them; and barred themselves from insisting upon it in the present action;' (2) that 'the defenders are not responsible for any damage done to the goods caused by imperfections in the cloth, or previous processes to which the goods or yarn from which the goods were made had been subjected;' and (3) that the defenders are not responsible for any injury or damage in finishing arising from the quality of the goods not being able to bear the process of finishing required by the pursuers:' Finds that the defenders have stated no plea as to their not having by their *culpa* damaged the goods in question, although they have averment to that effect, and that parties have joined issue and led proof on the footing that the defenders deny liability for the damage libelled: Finds, in fact, that the pursuers have instructed the facts averred in the summons: Finds the defenders' pleas untenable, for the reasons stated in the annexed note: Therefore decerns against the defenders in terms of the conclusions of the summons: Finds the defenders liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report, and decerns.

*Note*—There is no doubt, on reading the proof, and considering the evidence of the witnesses Leck, Pattison, Sclanders, Parker, Hinshaw jun., and M'Farlane, and others, and taking their evidence on this branch of the case in connection with that of the witnesses adduced for the defence, that pieces of goods to the number and value as libelled were destroyed or damaged, to a greater or lesser extent, by the defenders in the course of the season 1865–66, when they were finishing those and other goods for the pursuers. The witnesses for the pursuers speak to the results, and the witnesses for the defenders, with slight exception, as to what the results should have been. The evidence on that branch of the case is nearly all on one side, but there remains to be considered the defenders' pleas—viz. (1) That the notice of the damage was not given in writing, according to custom; and (2),—and this was specially relied on in debate—that the process to which the goods were to be subjected was a most delicate process, and that the risk of injury lay with the pursuers. With respect to the first of these pleas, it is not proved that notice of damage must, by custom of trade, be given in writing, and even if those in the trade set up such a plea, the Sheriff-Substitute would have considerable hesitation in giving effect to such a custom. It is enough that notice is given in any form, and in this case notice of the damage is abundantly proved, and that from the very first. Then, with respect to the remaining plea, that the risk of the process was great, and lay with the pursuers, the defenders referred to Story on Bailment, sec. 432; Bell's Prin., sec. 132; Bell's Com., 5th ed. 1.460, and others, to the effect of showing that in law they were not bound to warrant the success of a delicate or exceptional operation. Without disputing the weight of these authorities, the Sheriff-Substitute is of opinion that they have no application. The defenders undertook to do the work. They might have stopped if they had chosen, but at their own pleasure, and presumably for their own profit, they went on until the whole season's work was done. The pursuers told them what they wanted. The defenders undertook the work. They did not say 'we cannot do it.' They tried no doubt their best, but they failed. Another objection was brought up in the proof by the defenders to this effect—that the pursuers had not done their best by the goods, even in their damaged state. In law they were not bound to deal with the goods at all; but it is proved that the pursuers did sell the goods in the best market they could get, and—although the evidence on this point is conflicting—by authority of the defenders. There has been a very long proof led in this case, and a great deal of production made, quite properly, no doubt, in the view of the parties; but the Sheriff-Substitute thinks that he has, in the foregoing short judgment, stated all that is requisite, to his mind at least, for the decision of the case. The goods were sent out sound, except as admitted and allowed for, and were returned practically worthless."

On appeal the Sheriff (GLASSFORD BELL) altered, and found that in the whole circumstances full effect could not be given to the pleas of either party, and that the case was peculiarly one for an equitable adjustment, and therefore decerned for the sum of £86 as in full of the pursuers' claim.

Both parties appealed.

MILLAR, Q.C., and LANCASTER, for pursuers.

WATSON and BALFOUR, for defenders.

Their Lordships held (1) that where an artificer is employed to do certain work, and undertakes to do it, *prima facie* he is liable for the injury he causes in the course of it, and that the defenders here had not discharged themselves by showing that there was any defect in the goods, or incapacity to sustain the process of finishing; (2) that upon the evidence there did not appear to have been a failure to give timeous notice of the damage so as to defeat the pursuers' claim; but (3) that the damage must be estimated as at the date when the goods were received from the defenders, and not at the date, long subsequent, when they were sold, and therefore that

a considerable deduction must be made from the amount of the pursuers' claim. The pursuers were found entitled to their expenses, subject to deduction of one-fourth.

Agents for Pursuers—J. W. & J. Mackenzie, W.S.

Agent for Defenders—James Webster, S.S.C.

## *Saturday, July 2.*

### KETCHEN *v.* KETCHEN.

*Parent and Child—Custody of Child—Petition for Delivery.* A petition at the instance of a husband (who had been divorced from his wife on the ground of adultery) for delivery of his child, *refused. Held* that, in the circumstances, the mother was the proper guardian of the child, who was a girl between four and five years of age, allegations of lightness against the mother not having been substantiated.

This was a petition at the instance of a husband who had been divorced for adultery, craving an order against the mother for delivery of a child between four and five years of age. The mother and child were living at the wife's father's house. The petitioner was about to proceed to India, but offered, in the first place, during the remainder of his residence here to keep the child at home under the charge of a suitable governess, and thereafter, on his leaving the country, to place her at the disposal of his uncle, a gentleman who had occupied the office of Inspector-General of Hospitals. The petitioner further offered, alternatively, that the child, after a short stay with him, should be sent to a boarding school, and he had no objection that reasonable access to the child should be enjoyed by his wife, whose sister is married to a brother of the petitioner. The petitioner made averments of lightness of character against his wife, and of undue intimacy with another gentleman. The petitioner had made similar allegations in his defences to the action of divorce at his wife's instance, and founded upon them pleas of condonation and connivance, but he led no evidence in support of the averments, and did not insist in the pleas. Even before the action these allegations had been withdrawn, and apologised for by the husband, and the wife, in regard to a part of her own conduct, had on her part asked her husband's forgiveness. The child was alleged to be in very delicate health, and the last survivor of five children born of the marriage.

BURNET for petitioner.

LANCASTER in answer.

The following authorities were cited:—Fraser on Parent and Child, 2d ed., p. 73; *Harvey*, 22 D. 1198; *Stewart* v. *Stewart*, 7 S. L. R. 506; *Lang* v. *Lang*, 7 Macph. 446; *Nicolson*, 7 Macph. 1118; *Marsh* v. *Marsh*, 1 Sw. and Tr. 312; *Suggate* v. *Suggate*, 1 Sw. and Tr. 492; *Boynton* v. *Boynton*, 2 Sw. and Tr. 276; *Chetwynd* v. *Chetwynd*, 1 Law Reports (P. and M.), 39.

At advising—

LORD JUSTICE-CLERK—Though a father has the right to the custody of his children, and that right may be rashly asserted, yet by adultery he loses the rights he would otherwise possess, and there is nothing in the ordinary case to take the custody from the mother. The case of *Lang* v. *Lang* was not one of divorce but of misconduct on the part of the husband, which was found not sufficient to deprive him of the custody. I shall not say how far I would agree with Lords Ardmillan and Deas in their remarks in Lang's case in the case of *Nicolson*. That question is not raised here. Here we have a husband who carries on an illicit intercourse with the nurse of this child where they were all living. Then he makes accusations of improper conduct against his wife and retracts them. Then, when negotiations for a reconciliation are going on, he makes professions of sorrow for his conduct, but at the same time is carrying on the illicit intercourse with the nurse. When his wife refuses to resume cohabitation he threatens her. Both on the question of right and the case raised by the circumstances I have no doubt whatever.

The remaining question is whether the mother is a proper person. In the general case no greater calamity can befal a girl of tender years than to be taken from her mother, and the right of the husband cannot be exercised without injury to the child. Here the child is between four and five years of age, and consequently the mother is the only proper person, unless there is something absolutely rendering her an improper guardian. There are some statements as to the wife's intimacy with Dr M'Dowall which are perhaps not satisfactorily explained by her. But, notwithstanding, it is not for the petitioner to bring up these against her. He has retracted every word of the imputations, and it is pretty plain that they were not well founded. I am therefore for refusing the husband's petition. But it is not necessary to decide as to the future. We leave her with the mother for the present.

LORD COWAN founded his opinion on the circumstances of the acts of adultery, and the continuance of it for so long. Mr Fraser only says that a guilty party in an ordinary case of adultery may still have the custody of the child. But that is not applicable to an extraordinary case; and even what is laid down may be doubted. I think that *prima facie* a decree of divorce for adultery against the husband deprives him of the custody of the children, and he must make out a special case to entitle him to their custody. But here the special facts are very strong against him. The woman with whom he committed adultery was the wet-nurse. He kept her in the house as cook when she was not required as nurse, to facilitate the intercourse. She was dismissed when his wife returned, and again returned when she left. In regard to the suggestion that the child should be put in neutral custody, that is not prayed for in the prayer of the petition, and I think that it should be specially prayed for, and founded on special grounds, which should be set forth.

LORD BENHOLME—A father divorced for adultery desires the custody of his daughter, a girl of four or five years of age. There is no case in the books where such has been granted. On the other hand, a living author is quoted, whose dictum seems to imply that still there might be a case where the Court would grant it. I am not prepared to say that in every case where adultery and nothing else has been proved, the Court must deny the father the custody. I can suppose a case where the father's conduct after the divorce would prevent the Court from applying such a rule. But here is