JUNE 29, 1861.

JOHN WEEMS, *Appellant*, *v.* Mrs. LOVE and Others, *Respondents*.

Master and Servant—Reparation—Solatium—Parent and Child—*M., a workman, was killed by the fall of a piece of machinery owing to a defect caused by the master's negligence. M.'s mother raised an action for compensation against the master.*

HELD (affirming judgment), *That as parent and child are bound mutually to support each other, and M. did in fact support his mother, she had a right of action.*[1]

This action was raised in the Sheriff court of Renfrewshire, by Janet Houston Mathieson, a widow, and concluded against the appellant for damages in respect of the death of William Mathieson, her son, and on whom she was mainly dependent for her support.

William Mathieson was a journeyman tinsmith, in the employment of the appellant, a plumber and tinsmith in Johnstone, in the county of Renfrew. On Monday the 12th of November 1855, Mathieson was killed instantaneously by the fall of a cylinder belonging to the appellant, under which he was working, and which had been suspended by means of a chain from three poles by the appellant, or under his order and direction. The action was founded on an allegation of defect in the apparatus, by means of which the cylinder was suspended, and want of due skill and attention on the part of the appellant, or of those for whom he was responsible in suspending it. A proof having been led, the Sheriff substitute pronounced a judgment, by which he assoilzied the appellant. This interlocutor was recalled by the Sheriff, who found that the injury had occurred through defect in the apparatus used by the appellant, and he found the appellant liable in £125 of damages to Mrs. Mathieson.

The appellant having advocated the case to the Court of Session, the Lord Ordinary (Kinloch) confirmed the Sheriff's finding, and the Inner House adhered. Mrs. Mathieson having died, the Court sisted the present respondents as parties in the cause.

Weems appealed, maintaining in his *printed case*, that the judgment should be reversed—1. Because the late Mrs. Mathieson, the pursuer in the Sheriff court, in whose right the respondents now stand, has not set forth any title to sue the action; and 2. Even on the assumption, that the death of her son had been caused by the fault of the appellant, no relevant case has been set forth for awarding damages by way of reparation to her, or to the respondents, as her representatives. *Greenhorn* v. *Addie and Miller*, 17 D. 860. 3. Because the judgments appealed against contain no findings in point of fact relevant or sufficient to support the conclusion in point of law, that the appellant was liable in damages to Mrs. Mathieson, even assuming the death of her son to have been occasioned by the appellant's fault. 4. Because the judgment of the Lord Ordinary adopted by the Court, appears, from his Lordship's own statement of his views, to have been pronounced on an erroneous view in reference to the law. *M'Naughton* v. *The Caledonian Railway*, 21 D. 160; *Paterson* v. *Wallace*, 1 Macq. Ap. 748, *ante*, p. 389; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. Ap. 266; 30 Sc. Jur. 597, *ante*, p. 785. 5. Because the only finding in fact in the judgments of the Lord Ordinary and of the Inner House under review, in which allusion is made to the appellant personally in connexion with the apparatus or with the facts of the accident, is altogether outwith the conclusions of the summons, and therefore the Court were not entitled to pronounce said finding. 6. Because the defects in the apparatus and its mode of suspension, which are the only grounds of action stated in the summons, so far as found by the Court, are not found in point of fact to have arisen, as alleged in the summons, from want of due skill or attention on the part of the defender, or some person or persons for whom he is responsible, and therefore it does not follow in point of law, as found by the Court, that the death of William Mathieson was occasioned by the fault of the appellant, and that the appellant is in respect thereof liable in damages.

The respondents in their *printed case* supported the judgment on the following grounds:—1. The findings in fact in the interlocutor of the Lord Ordinary, adopted by the Court, are final by force of statute, and cannot be reviewed by the House of Lords. 2. The findings in law in that interlocutor follow legitimately from the final findings in fact. 3. The appellant did not use due precaution for the safety of his workmen, either in the construction or the use of the apparatus, and Mathieson was killed in consequence of the want of such precautions. 4. The cylinder fell through the defect of the machinery used to suspend it, that defect arising from the negligence

[1] S. C. 4 Macq. Ap. 215; 33 Sc. Jur. 621.

and want of skill of the appellant, and the appellant was bound to provide sufficient and secure machinery. 5. The appellant invented the machinery, examined and approved of it when it was constructed, and used it; and therefore he alone is responsible for the consequences of its insufficiency. 6. Any defence that the death of Mathieson was caused by the fault of any party other than the appellant, is excluded as a ground of appeal by the findings, in the interlocutor of the Lord Ordinary, of the facts which caused the accident, and which findings are by statute final. 7. The evidence in the case affords no ground for the defence, that the death of Mathieson was caused by the fault of any party other than the appellant.

Sir F. Kelly Q.C., and *Anderson* Q.C., for the appellant.—This judgment of the Court below was not in conformity with the Judicature Act, 6 Geo. IV. c. 120, § 40, for it contains no specific and relevant finding of the facts sufficient to import liability on the part of the appellant—*Wemyss* v. *Wilson*, 6 Bell's Ap. 394. Moreover, the summons is bad for want of the relevant allegations, and no finding can make it good. It states a mere tissue of alternatives—*Finnie* v. *Logie*, 21 D. 825. There is no allegation of any duty or obligation on the master to see, that the bolts were sufficient. There is no allegation, that the master was bound to take reasonable care that everything was sufficient. Moreover, without respect to the merits, a mother cannot maintain an action for *solatium* and damages, by reason of the death of her son, caused by negligence. The son was here earning his own livelihood; he was *sui juris*, and owed no obligation to his mother.

[LORD CHANCELLOR.—Do you say it makes no difference that the son was, in fact, at the time supporting his mother?]

We do not go so far as that; but it does not clearly appear he was so supporting her. There must always, at least, be actual expense incurred by the person suing—*Millar* v. *Harvey*, 4 Murr. 385. The mother here does not sue as the son's representative or executor. In *Greenhorn* v. *Addie*, 17 D. 860, the question was discussed, and an action of this kind was held not to lie at the instance of collateral relations. It is true nothing was said about a father or mother suing, but on principle they are equally excluded. A son is not bound at common law to support his parent. If the rule applies to lineal relations, then the grandfather and grandmother could equally sue. There is no precedent for such an action as this.

Lord Advocate (Moncreiff), and *R. Palmer*, Q.C., for the respondents (who were directed to confine themselves to the question of title to sue).—The point of title to sue was not raised below, or, if so, was abandoned. There was no doubt on the point. A child is legally bound at common law to support his parent, and can be compelled to do so, if competent—Ersk. 1, 6, 37; 2 Fraser, P. R. 35; *Maule* v. *Maule*, 1 W.S. 266; *Maidment* v. *Maidment*, 6 Dow, 257. *Greenhorn* v. *Addie*, assumes the point.

It is clearly shewn here, that the son was actually supporting his mother up to the time of his death.

LORD CHANCELLOR CAMPBELL.—I am sure I may congratulate your Lordships upon the able assistance which you always have in disposing of every case which is brought to your bar. In this case we have had every assistance that could be rendered to us on the one side and the other. After having had that assistance, I think your Lordships can have no difficulty in coming to the conclusion, that there is no ground for this appeal.

With regard to the formal objections that have been raised, I really must say, that they are wholly untenable. The first objection raised is, that the Court of Session do not find *in extenso* the law and facts which are relied upon by the respondents, and that they have not complied with that which is required by the act of 6 Geo. IV. cap. 120. But they find, in the clearest manner, both the law and the facts, in the terms found by the Lord Ordinary. They do not, in their interlocutor, repeat what the Lord Ordinary had found, but they refer to his finding, which was contained in a written document, and they adopt that as their own. I think it is precisely the same as if they had, in express words, repeated those of the Lord Ordinary.

Then the appellant contends, that the summons is insufficient, and that the finding of the Lord Ordinary is insufficient. It seems to me, that there is no ground of objection to either the one or the other. With regard to the summons, it was observed in the early part of the argument by a noble and learned Lord, that there is no warranty in such a case, that the machinery shall be so complete, that no injury shall be incurred by the workmen; but it must be alleged and shewn, that there is negligence on the part of the employer, and for that purpose, it is alleged hereafter, giving a description of the machinery, that the gland or bolts, from want of due skill or attention on the part of the defender, or some person or persons for whom he is responsible, were insufficient in strength or construction, or were unskilfully applied to the purpose of suspending the heater, or that it was, by reason of the want of reasonable care on the part of the defender, or of some person or persons in his employ, that the chains were negligently or unskilfully attached to the gland, in consequence of which the death occurred.

There is therefore an allegation of negligence on the part of the defender, with reference to insufficient strength or construction of the gland, and its being unskilfully applied to the purpose of sustaining the weight. To support that allegation, it would be necessary, not only to shew,

that this machinery had been insufficient, but to shew, that this deficiency did not arise from any inherent secret defect, and that it was known, or might, by the exercise of due skill and attention, have been known, to the defender, who was the employer of the deceased.

Then we come to the finding of the Lord Ordinary. The charge here being, that there was negligence on the part of the defender, the Lord Ordinary finds, that the fall of the cylinder on the said William Mathieson, and his consequent death, arose in consequence of the defender not having taken due precaution to secure the safety of the workmen emplòyed by him, in connexion with this cylinder, and of the apparatus for suspending the same being defective and insufficient, more particularly, inasmuch as the loop and bolt used as parts of the said apparatus were, in the circumstances, insufficient for the due suspension of the cylinder, and the lifting chain was attached to the loop in an unskilful and insufficient manner.

My Lords, I say, that this is a finding within the terms of the summons. The summons imputed want of skill and want of due attention, and insufficiency in the machinery, arising from the default of the defender, and that this was the cause of the death of the deceased. We are not, in such a case, to apply any subtle rules of construction as to what meaning may possibly be extracted from the words. Taking them in their natural and reasonable construction, and reading this interlocutor in that manner, it appears to me clearly to come within the terms of the summons. The only point upon which I have entertained any doubt is with respect to the liability of the defender to make good this loss to the mother of the deceased; and, that doubt arose from the allegation that, by the law of Scotland, there is no legal obligation on the part of the child to maintain the parent. I was a little startled to hear that, for I thought the law was otherwise. Even if it had not been so, there was always certainly the imperfect obligation, which would be sufficient to raise an action. It was proved, that, under that imperfect obligation, the son actually was maintaining his mother, and was her only support at the time of his death. But it is now proved by the clearest authority, cited by the Lord Advocate, to which Mr. Palmer thought it unnecessary to add anything, and I perfectly agree with him, that, by the law of Scotland, there is a reciprocal obligation on the part of the parent and child to support each other, when there is destitution on the one side and ability on the other. Therefore, what Sir Fitzroy Kelly relied upon fails him altogether, for here there is proof of legal obligation, and under this legal obligation, this son of the age of twenty-one, who was able to maintain his mother, and was maintaining her, might have been compelled to do so by process of law.

It seems to me, therefore, that there is no foundation for this appeal, upon any of the grounds which have been taken, and that it must be dismissed with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view that he takes upon both the material points in the case, namely, upon the question arising upon the pleadings, and upon the other question, whether or not this action lies. Upon the second point, I had some doubt originally, and was very glad to have the matter argued, as it was done with his usual ability, by the Lord Advocate. It appears to me to be clearly established, not only, that, in point of fact, this son did maintain his mother, but that, in point of law, he was bound to maintain his mother, in those peculiar circumstances, to the extent of his ability, that ability amounting to sufficient to provide some maintenance for her. I therefore think, that there was a clear patrimonial interest. My only doubt was, whether, without patrimonial interest, such an action could be maintained. It is not necessary that we should now decide, that without that interest an action could be maintained. The Court below seems to have had no doubt whatever upon this point. I apprehend, that it was not very much argued below, but that it was mainly raised here by the counsel for the appellant. I have no doubt, therefore, that this judgment is well founded, and, that the appeal ought to be dismissed with costs.

LORD CRANWORTH.—My Lords, I am entirely of the same opinion. With regard to the liability of a son to maintain a mother, or rather the right of a mother, after the death of a son, to maintain such an action as this, I think the authorities quoted by the Lord Advocate put that matter beyond doubt.

I confess that, in the course of the argument, I had some doubt as to the relevancy of the summons. That is the only point upon which I felt any hesitation; and I think it right to state, that, however distressing it might be to this House, as the ultimate Court of Appeal, to let such a matter go off upon a point of form, the facts having been found which undoubtedly create a liability, yet I think it would have been our duty to do so, if we had come to the conclusion, that the summons was not relevant; because we cannot regard this as analogous to the case of disputing a question of fact after verdict, for this is the first time that the party could make his appeal upon such a ground. I think, that, looking at the summons, and fairly construing it,—admitting that it is very ungrammatical,—yet nevertheless we may say, that there is a relevant ground of complaint stated. "Which gland or bolts," (now observe this applies to every one of the allegations that follow,) "from want of due skill or attention on the part of the defender, or some person or persons for whom he is responsible, were insufficient in strength or construction, or were unskilfully applied to the purpose of suspending the heater." Mr. Anderson seemed to admit, that it was a reasonable construction to apply those words imputing want of due skill and attention

to that second position, but he contended, that it was not applicable to the third, because it goes on, "or the chains were negligently or unskilfully attached to the gland." Now it must be observed, that that clause is quite ungrammatical, and I think the only fair way of construing it is, that, having first applied the allegation of want of due skill or attention, on the part of the defender, to the gland or bolts to which the first two positions in the summons relate, it then takes the third, viz., "the chains;" and I think you must read that in the same way as the others, "or the chains from want of due care or attention on the part of the defender, were negligently and unskilfully attached to the gland." It is ungrammatical, no doubt, but it seems to me, that this is the fair and reasonable construction.

LORD WENSLEYDALE.—My Lords, I agree with my noble and learned friends who have preceded me. I felt considerable doubt at one time with respect to the construction of the summons, as to whether the last alternative put in the summons was properly alleged, but I certainly think, that the part of the interlocutor depending upon that last alternative must be understood, according to its true construction, as resting entirely upon the preceding allegation of the defender not having taken due precaution to secure the safety of the workmen employed by him in connexion with the cylinder. The interlocutor is not very grammatically expressed, but I take the meaning to be, that the accident arose in consequence of the defender not having taken due precaution to secure the safety of the workmen employed. And if that is proved, he is responsible, according to the cases decided in your Lordships' House, particularly the last case, which was decided some years ago, the case of the *Bartonshill Coal Company*, *ante*, p. 785; where the matter was fully considered, and an elaborate and very proper judgment was pronounced by my noble and learned friend, LORD CRANWORTH. Now, reading that final interlocutor according to the reasonable construction, and looking at what the intention of the Lord Ordinary was, I take it to be clear, that he meant only to make the defender responsible for what he was responsible in point of law, namely, the defect on his part in not providing good and sufficient apparatus, and and in not seeing to its being properly used. I think, that it is to be considered as pervading the whole of the finding of facts in the interlocutor, and that it does not mean to rest upon anything done or omitted to be done by the workmen themselves. I take it to be perfectly clear, that, in these cases, there is no warranty. All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen, in a fit and proper manner. I think it is clear, that this judgment was pronounced solely upon the ground of negligence on the part of the defender. Therefore, upon that point, I think the judgment is right.

With respect to the rest of the case, I take it to be clear, that there is a remedy in this case by the mother for the death of her son, who was bound to support her if he could, and who it is clear had the means of doing so. Therefore, I agree with my noble and learned friends in thinking, that the interlocutor ought to be affirmed.

LORD KINGSDOWN.—My Lords, I entirely agree. I cannot say, that I have myself entertained any doubt upon any part of the case from the beginning to the end of it.

Interlocutors appealed against affirmed with costs.

For Appellant, J. F. Elmslie, Solicitor, London; James Bayne, S.S.C., Edinburgh.—*For Respondents*, Deans and Rogers, London; A. J. Dickson, Edinburgh.

JULY 17, 1861.

Mrs. AGNES FARMER or GALLOWAY, *Appellant*, *v.* ROBERT CRAIG, *Respondent*, in M.P., at instance of THOMAS THOMSON, *Raiser*.

Husband and Wife—Donatio inter virum et uxorem—Bankrupt—Policy of Insurance to Wife—*A. insured his life, and paid the premiums, the policy being taken in the name of his wife, her heirs, executors, or assigns. He afterwards became bankrupt. There was no antenuptial contract, and the wife had no separate estate.*

HELD (reversing judgment), *That the life policy was in the nature of a provision for the wife, and being reasonable in amount, if it was made when A. was solvent, it belonged to the wife and not to the trustee for A.'s creditors.*[1]

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[1] See previous report 22 D. 1211; 33 Sc. Jur. 553. S. C. 4 Macq. Ap. 267: 33 Sc. Jur. 649.