the pursuer by reason of the disqualification of the notary. But the marriage followed upon it, and I think that we accept the statement of Mr M'Farlan, which is in accordance with the reasonable and legal inference that the marriage would not have taken place if the contract had not been executed. In sustaining the marriage-contract in question we are within the rule of the case to which I have referred, and we are merely acting on the well-established principle which applies to marriage-contracts, as it applies to all other contracts, that informality in legal execution is cured *rei interventu.*

The LORD PRESIDENT and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

The Court recalled the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—Balfour, Q.C.—C. S. Dickson. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—Gloag—C. Johnstone. Agents—T. & W. A. M'Laren, W.S.

Saturday, March 16.

SECOND DIVISION.

WEIR *v.* COLTNESS IRON COMPANY (LIMITED).

Reparation—Parent and Child—Title to Sue—Action of Damages for Loss of an Illegitimate Child.

Held that a woman has no title to sue an action of damages for the loss of her illegitimate child.

Margaret Grant or Weir, residing in Harthill, Lanarkshire, wife of Robert Weir, miner, brought an action in the Sheriff Court of Lanarkshire at Airdrie against the Coltness Iron Company (Limited), concluding for the sum of £500 as damages for the loss of her illegitimate son James Grant, aged fifteen, who had died from an accident sustained in the defenders' pit.

The pursuer had been twice married. She had children by her first husband, who were still alive and grown up. Her two sons by this marriage lived with the pursuer, and earned between them 8s. per day. Her illegitimate son was born while she was a widow, and her present husband, who was not the father of that son, had been living separate from her for ten years. He did not contribute to her support, and was not a party to this action.

The defenders pleaded, *inter alia*—"(1) No title to sue; and (2) *separatim*, the pursuer's husband should be a party, or at all events a consentor to the action, and it therefore falls to be dismissed."

The Sheriff-Substitute (MAIR) on 13th February 1889 repelled *hoc statu* the first and second pleas stated for the defenders, and before answer allowed to the parties a proof of their averments.

"*Note.*—. . . The first of these pleas raises the question whether the mother of an illegitimate child has a title to sue an action of damages and *solatium* for the death of the child. So far as I am aware this question has never been authoritatively decided by the Supreme Court. Cases of reparation have hitherto been confined to fathers and mothers and their lawful children, and in the two cases of *Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860, and *Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, the Court has refused to sustain the title of brothers or sisters to sue such actions. In the latter case, however, the Lord President (Inglis) observed—'It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination our law has held that a person standing in one of these relations to the deceased may sue an action like this for *solatium* where he can qualify no real damage, and for pecuniary loss in addition where such loss can be proved.'

"In the present case the deceased was the pursuer's illegitimate son, and there can be no doubt as between the two there existed during life a mutual obligation of support in case of necessity. In the recent case of *Samson* v. *Davie*, November 26, 1886, 14 R. 113, it was held that a bastard son was liable to maintain his mother. This, in my opinion, is sufficient for the disposal of the defenders' plea. But the question was raised in the case of *Renton* v. *North British Railway Company*, 1869, to be found only in the 6th volume of the Scottish Law Reporter, 255, in which it was held by Lord Jerviswoode (Ordinary) that the mother of an 'illegitimate child has a title to sue an action of damages and *solatium* for the death of her child.' So far as appears, the judgment of the Lord Ordinary was acquiesced in, but I cannot help thinking, when I find that the counsel for the defender in that case was the present Lord Shand, if his Lordship had thought there was anything in the plea raised by the defenders they would have taken the judgment of the Court upon it. As it is, I must hold the Lord Ordinary's decision as binding on me." . . .

The pursuer appealed to the Second Division of the Court of Session for jury trial, and lodged an issue.

At the suggestion of the Court the husband by minute sisted himself as a party to the action.

The defenders again maintained their plea of no title to sue, and argued—The law recognised no claim for the loss of a relation, not being an action of assythment, except by husband and wife and by parents for the loss of their legitimate children, and *vice versa*. No action could be brought by collaterals for *solatium*—*Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860—nor even for pecuniary loss—*Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980. Such actions as the present were unknown in practice, and the only authority for them was sought to be found in the case of *Renton*, where Lord Jerviswoode had repelled a plea of no title to sue. That was only an Outer House case, and could not be held decisive on the subject. The case of *Samson* was an action of a totally different character. Even if a woman had a claim

against her illegitimate children it was only a secondary claim, but here the pursuer was not dependent upon her illegitimate son's wages, but had both a husband and legitimate children able and bound to support her.

The pursuer argued—There was no need to examine the question of collaterals. The question here was settled. The objection taken had been disposed of by Lord Jerviswoode in the case of *Renton* v. *North British Railway Company*, January 1869, 6 S.L.R. 255, and by this Division in the recent case of *Samson* v. *Davie*, November 26, 1886, 14 R. 113, which was directly in point, for if an illegitimate child was bound to support his mother, his mother surely had a title to sue an action for the loss sustained by his death.

At advising—

Lord Young—This is an action by the mother of an illegitimate child for injuries that child received in the defenders' pit. Two preliminary defences are stated, the first being that she has no title to sue, and the second that her husband, who is still alive, is not a party to the action. The husband has become a party to the action, so that the Court has no further occasion to consider that plea. The other plea ("no title to sue") remains for our consideration. It has been decided by the Sheriff-Substitute that the pursuer has a title to sue—that is, that the mother of an illegitimate son is entitled to recover damages for any fault whereby he is injured. The Sheriff-Substitute in his note says—"The first of these pleas raises the question whether the mother of an illegitimate child has a title to sue an action of damages and *solatium* for the death of the child. So far as I am aware this question has never been authoritatively decided by the Supreme Court. Cases of reparation have hitherto been confined to fathers and mothers and their lawful children, and in the two cases of *Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860, and *Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, the Court refused to sustain the title of brothers or sisters to sue such actions. In the latter case, however (*Eisten* v. *North British Railway Company*, 1870), the Lord President (Inglis) observed—'It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination our law has held that a person standing in one of these relations to the deceased may sue an action like this for *solatium* where he can qualify no real damage, and for pecuniary loss in addition where such loss can be proved.'" I have read that passage because it accurately states that there has hitherto been no such actions sustained. There is an exception which the Sheriff-Substitute notices, and to which I shall refer immediately, but there is no instance of any such action having been prosecuted. The question has never been authoritatively decided by the Supreme Court, and I think it is true that cases of reparation of that kind have hitherto been confined to fathers and mothers and their lawful children. That is the customary law of the land. There is no custom that is common law extending beyond fathers and mothers of legitimate children. I am not aware that there is any statute upon the subject. In fact there is none. This matter stands in England upon statute—Lord Campbell's Act—and it is the most recent legislation on the subject, not for Scotland but for England. The law there stands upon statute, and thereby no action is given to a parent for injury to an illegitimate child. This we may take to be the view of the Legislature in the most recent instance of any legislation upon the subject. There is no statute therefore in Scotland to support such an action as this, and it is not according to any practice, for there has not been such an action hitherto, and there is no custom to support it. There was an action of that sort by the mother of an illegitimate child for the death of the child under similar circumstances brought before Lord Jerviswoode, and he repelled the plea of no title to sue. The case does not appear to have gone any further. The Sheriff-Substitute notes that Lord Shand was counsel in the case, and did not carry that judgment to the review of the Court, and that he must have been of opinion that it was sound. I do not say anything in disparagement of this view at all. Lord Shand's opinion even then would be entitled to respect, but I do not deduce from the circumstance that the case went no further what Lord Shand's opinion was. It may very well have been prudent—the almost certainty is that it was prudent—not to have any further litigation about a claim which may have been settled for less than the expense of taking the case to the Inner House or to the House of Lords. But the opinion of Lord Jerviswoode in that case has been referred to. There is no other authority. I think that leaves the question entirely open for our consideration. I think that single expression of opinion by a Lord Ordinary is not evidence upon the customary law upon this subject. I think there is no customary law upon this subject. The custom has been against it, and it cannot be otherwise without express decision, and there has been no such action sustained subject to the instance to which I have just referred.

Another case brought forward in argument, and referred to by the Sheriff-Substitute, is a case in this Division of the Court—the case of *Samson* v. *Davie*—in which it was held that a legitimate son was liable in relief to the poor law authorities who had made advances for the relief of his mother. If that case were decisive of this I think we should require further argument, and probably further consideration, if not a reference to more Judges. But I think very clearly it is not. I may say in passing with reference to that case—although we decide nothing against it here, for we do not require to say anything upon that subject—that in my humble opinion it merits consideration. The action was brought by the inspector of poor for £3 odds advanced to the mother. He was allowed to prove that the defender was the illegitimate son of the pauper, and therefore liable to him in that relief. It was decided that although during a pretty long life he had only seen the woman twice, and did not know she was his mother, yet she was, and he must pay. I dissented from that judgment at the time. I thought then, and think still, that

it altogether merits further consideration. I believe it is the fact, and it strengthens my view for further consideration, that upon an appeal being taken to the House of Lords the case was settled upon the footing that the judgment should be held as reversed, and with costs. But the question here regards the title to sue an action of damages upon such facts as are set forth here, and my opinion is that there is no title to sue in this action. We have limited the title to sue in our practice hitherto to legitimate parents and legitimate children, and I think we have no authority to extend it. If it is thought desirable to extend it there must be an appeal to the Legislature. Whether they would think it fitting to deal with Scotland differently from England in the matter it is not for us to determine. In England they thought fit very recently to determine that there should be no such action, and the probability is that that would be their view for Scotland also. These actions are of an anomalous character altogether. I suppose that where children sue for the death of their father they must sue as a body—as a family. It was argued that wherever feelings are wounded there ought to be *solatium* by those who cause that pain or suffering. The law has not recognised that, for it has refused actions at the instance of a brother for the death of a sister, or of a sister for the death of a brother. The brother and sister may have lived together all their days, and there may been as much attachment, love, and interest between as is possible in this world. Still there is no action. It is not according to custom. It has not been allowed. It has never been allowed here, and it was not allowed by the Legislature in England when dealing with the subject. If it were allowed the case of bastards would be very perplexing indeed. I do not know what limit there is to the number of bastards a woman may have. I remember Lord Mackenzie saying upon this bench that there is no limit at all after she has had one. There may be any number of them, and any number of fathers. Well, if she could sue for the death of one of them, any one of them could sue for her death, and if any one of them, then every one of them. There must be a limit, and I think the limit we must take is that which is according to the custom heretofore—that is, the common law and practice in the matter. That has not extended it beyond legitimate parents and their children, and I am therefore of opinion that we ought to sustain the first plea for the defenders, that the pursuer has no title to sue, and to dismiss the action.

The Lord Justice-Clerk and Lord Lee concurred.

Lord Rutherfurd Clark was absent when the case was heard.

Counsel for the Pursuer—Young—M'Lennan. Agent—Thomas Liddle, S.S.C.

Counsel for the Defenders—Comrie Thomson—Dickson. Agent—W. G. L. Winchester, W.S.

Saturday, March 16.

FIRST DIVISION.

[Sheriff-Substitute of Forfarshire.

M'NAB AND OTHERS *v.* CLARKE.

Bankruptcy—Cessio—*Notour Bankruptcy—Insolvency—Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. cap.* 34), *secs.* 6 *and* 8.

By the 8th section of this Act it is provided that "any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856 . . . or of this Act," may present a petition to the Sheriff of the county in which is his debtor's domicile, praying for decree of *cessio* against the debtor; and "with the petition shall be produced evidence that the debtor is notour bankrupt." By the 6th section it is provided that where imprisonment is rendered incompetent by the Act, "notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by expiry of the days of charge without payment."

In a petition for his debtor's *cessio* a creditor produced a charge expired without payment as evidence of the debtor's notour bankruptcy. A suspension of the charge had been raised, and the note had been refused. It appeared from the circumstances that the creditor might reasonably hope for the ultimate payment of his debt, although the debtor was unable to make present payment thereof. *Held* that there was *prima facie* evidence of the debtor's notour bankruptcy.

By bond and disposition in security, dated 13th and recorded 14th October 1876, David Wilkie Clarke and David Crabb, both residing in Dundee, bound themselves as trustees and individuals, and also conjunctly and severally, and their heirs, executors, and representatives whomsoever, also conjunctly and severally, and without the necessity of discussing them in their order, to repay the sum of £2000 to Jane M'Nab, Martha M'Nab, John M'Nab, and James Cuthbert, and to pay interest thereon at the rate of 4½ per cent. till payment, and in security of repayment they further disponed certain lands.

The bond was registered in the Books of Council and Session on 12th January 1888, and on 24th January Clarke was charged to make payment of the sum due thereunder within six days, with interest from the term of Martinmas till payment was made. On 31st January Clarke raised a suspension of the charge, and on 14th March the Lord Ordinary on the Bills refused the note of suspension, and on 26th May the First Division adhered.

The present petition was thereafter presented in the Sheriff Court of Forfarshire at Dundee by the creditors in the above mentioned bond, viz., Jane M'Nab, Martha M'Nab, John M'Nab, and James Cuthbert, for the *cessio* of the said David Wilkie Clarke.

The pursuers, after setting forth the fact of the charge having been made, and the proceedings in the suspension, averred, *inter alia*, as follows—"Since the term of Whitsunday (15th