

Agnew Wallace, Esquire, of Lochryan, with consent and concurrence of the Procurator-Fiscal. It is said that this is bad, because an incorporated company cannot make a good instance unless they are coupled with some officer who may appear in Court and act on their behalf. I have not been able to see that that is a good objection. The conduct of the case in Court is another matter, but I do not see how they can be said not to have a title to prosecute. In the case which was quoted to us it seems to have been said that in practice it was in use to conjoin one of the company's officers. I do not see how that makes the instance any better, nor do I see why there should be any difference between the rules which prevail in civil cases and those which prevail in criminal matters.

But apart from that, the instance of Mr Wallace in this case was perfectly good, and he could not be prevented from going on with the case if, for example, the other prosecutor did not come to take part in the proceedings. . . .

There is one objection which in one view may be of a more serious character. The Sheriff-Substitute has told us that "in the course of the proof the agent for the appellants objected to the production of 'a book' which was put in evidence by the respondents," and the objection was disallowed. That is rather an ambiguous statement. It is said that the agent objected to the production. It is afterwards said that the book was put in evidence. It is clear that, inasmuch as one of the questions here was whether fishing with a seine net came within the proviso of the section a contravention of which is charged, and the book dealt with the action of such a net, it was material on the question whether it answered the description of the instrument given in the statute. And it is clear that if this book was improperly put in evidence the Sheriff-Substitute was making up his mind upon evidence which was not evidence in the case. On the other hand, if what was done was that the book was shown to a witness and he was asked whether he agreed with a statement in the book, that was a proper thing to do. The proper sequel to that would be, in a civil case, if the book was put in anywhere, that it should be put in process, not in evidence. In a criminal case there is no list of process separate from the list of things put in evidence. The book was simply put in. If I found that that was the only use made of it I should deem it a very strong thing to overturn a decision because the book was put in evidence. But as the parties are not agreed as to what is the state of the facts on this matter it is necessary that we should make a remit to have them ascertained before we can proceed.

LORD M'LAREN and LORD KINNEAR concurred.

The Court answered question 2 in the negative, and subsequently, on 5th December, after considering a report from the

Sheriff-Substitute, from which it appeared that the Fishery Board's report was produced merely to a witness to know whether his opinion agreed with what was therein stated, answered question 4 in the negative, and dismissed the appeal.

Counsel for the Appellants (Respondents)—Orr, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents (Complainers)—Dickson, K.C.—Munro. Agents—Gardner & Robertson, S.S.C.

COURT OF SESSION.

Tuesday, December 5.

SECOND DIVISION.

[Sheriff Court at Edinburgh.]

TURNBULL v. BRIEN.

Aliment—Pupil—Presumption—Donation—Debt.

A labourer in 1907 raised an action in the Sheriff Court against his brother-in-law for payment of a sum of money, averring that in 1897 he took him at a time when he was a destitute orphan of eleven into his home, and alimanted him there for a period of two years until he earned enough to support himself. The sum sued for represented the amount expended by the pursuer on the defender's aliment.

Held that the pursuer's averments were irrelevant, because they showed that the aliment had been given *ex pietate* and as a donation, and with no intention of constituting a debt.

James Turnbull, a labourer, brought an action in the Sheriff Court at Edinburgh against John Brien, a mason, in which he sued for the sum of £26 sterling.

The pursuer averred—“(Cond. 1) The pursuer is a labourer, and resides at 22 Albert Street, Edinburgh. The defender, who is a brother of the pursuer's wife, being bereft of a home by the death of his father, the pursuer agreed with the defender to take him into his home as a boarder, and accordingly the defender went to reside there on 13th May 1897. (Cond. 2) For two years after the said 13th May 1897 the defender, who was then between eleven and twelve years of age, continued to reside with the pursuer and contributed nothing towards his own maintenance. He attended school during said period, and the pursuer at his own expense maintained the defender. The pursuer estimates said maintenance at 5s. per week, which he considers fair and reasonable, and for 104 weeks at said rate amounts to £26, being the amount sued for. (Cond. 3) The defender thereafter in due course served an apprenticeship as a mason, and continued to reside with defender, and contributed towards his mainten-

ance until 30th June 1906, when he left the pursuer's house and went to reside elsewhere. During his residence with pursuer the defender repeatedly promised to pay the pursuer for said maintenance, but he has failed to implement said promise. He has been repeatedly requested to make payment thereof to the pursuer, but he has refused or delayed to do so, and the present action has therefore been rendered necessary."

The defender pleaded, *inter alia*—"(1) The action is irrelevant."

On 21st January the Sheriff-Substitute (GUY) pronounced an interlocutor sustaining the plea.

The pursuer appealed.

In argument the following authorities were cited:—For the pursuer — Elchies' Notes on Stair, p. 48; Ersk. iii, 3, 92; Bell's Prin., sec. 533; Fraser on Parent and Child (3rd ed.), pp. 116–120; *Steven v. Simpson*, March 20, 1791, M. 11,458; *Wilson v. Archibald*, February 15, 1701, M. 11,427; *Mongreenan v. Blair*, February 3, 1624, M. 11,432 and 8918; *Gourlay v. Urquhart*, November 17, 1697, M. 11,438; *Lady Lugton v. Hepburn and Crichton*, June 13, 1672, M. 11,435; *Cunningham v. M'Gachen*, February 17, 1831, 9 S. 472; *Drummond v. Swayne*, Jan. 28, 1834, 12 S. 342; *Forbes v. Forbes*, Nov. 4, 1869, 8 Macph. 85, per Lord Cowan at p. 91, 7 S.L.R. 49; *Campbell v. Macfarlane*, March 6, 1885, 12 R. 713, 22 S.L.R. 515. For defender—*Ligertwood v. Brown*, June 25, 1872, 10 Macph. 832; *M'Gaus v. Galloway*, November 10, 1882, 10 R. 157, Lord Justice-Clerk Moncreiff, p. 162, 20 S.L.R. 108.

LORD STORMONTH DARLING—The Sheriff-Substitute has sustained the first plea-in-law for the defender, which is that the action is irrelevant, and has dismissed the action. I think that the Sheriff is right. The pursuer is a labourer, and the husband of the defender's sister, and he says that in May 1897 he took the defender, who was then an orphan of eleven, into his house, and continued to support him until he began to serve his apprenticeship as a mason. The pursuer now sues the defender for the amount of the aliment furnished up to May 1899. After that date, as I understand, no claim is made, because the boy contributed enough to cover his maintenance until 1906, when he left the pursuer's house. The claim is thus obviously made in respect of aliment afforded to a pupil. I am of opinion that aliment allowed to a pupil by a person who is not under a natural obligation to support him must be considered to have been afforded *ex pietate*, and that there is no relevant claim against the pupil, even if he succeeds to a small sum of money in after life. If it be said that the defender is under a moral duty under these circumstances to reimburse the pursuer for his expenditure, I am afraid that the answer is that we have nothing to do with moral duties, and that a legal obligation cannot be incurred by a person who is not a legal *persona*. The pursuer further

avers that the defender promised to pay for his maintenance, but I think that that averment is irrelevant, because there is no statement as to the terms of the promise or as to the time at which it was made. I propose therefore that the appeal should be dismissed and the judgment of the Sheriff-Substitute affirmed.

LORD LOW—I am of the same opinion. It has always been recognised that cases of this description must be treated each according to its own special circumstances. The special circumstances of this case as averred by the pursuer, are as follows:—In 1897 the pursuer's brother-in-law, aged between eleven and twelve years, was left an orphan and destitute owing to his father's death. The pursuer took him into his own home and maintained him there for two years, until he obtained an apprenticeship and was able to pay for his board and lodging. Now, the plain inference from these facts seems to me to be that the pursuer acted from a very natural and proper sense of duty without any ulterior motive, and without any idea of making a subsequent claim. The circumstances of the case seem to me to preclude the idea that the pursuer thought at the time that this boy was incurring a debt which he might afterwards be called on to pay. I am convinced that the idea of claiming repayment is an afterthought, suggested by the fact that the young man has now come into a little money. I am therefore of opinion that the Sheriff-Substitute has rightly decided this case.

LORD ARDWALL—I concur. The question is whether the aliment afforded by the pursuer to the defender was supplied *animo donandi*, or with the intention that a debt should be created against the defender. We had a careful and interesting citation of old authorities from Mr Steuart in support of the latter alternative, and there are dicta which to a certain extent support his contention. But I think that the tendency of the more recent authorities is to consider the question whether in cases such as the present the aliment supplied was intended to be a donation or a debt as one depending on the circumstance of each case, and not on any fixed rules or presumptions of law. And in the present case a consideration of the facts disclosed on the record leads me to the conclusion that the aliment, repetition of which is now sued for, was given *ex pietate* as a donation, and with no intention that it should form a debt against the defender. I therefore agree with the judgment of the Sheriff-Substitute.

The LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal.

Counsel for the Pursuer (Appellant)—G. C. Steuart. Agents—Mackay & Young, W.S.

Counsel for the Defender (Respondent)—Morton. Agent—R. J. Calver, S.S.C.