for the support of one child, that being the compact between them, and there being so far as we can see no reason, at least at present, for disturbing it.

LORD KINCAIRNEY—I agree with the judgment of the Sheriff-Substitute, and think it should be returned to as giving effect to what is an equitable arrangement between the parties. I am not sure that I understand the legal grounds of the Sheriff's decision, but it involves the inequitable result of making the father liable for the maintenance of the children to the extent of three-quarters and the mother to the extent of only one quarter.

LORD JUSTICE-CLERK—I agree with the judgment proposed. Of course this arrangement can only continue so long as it is an arrangement between the parties, but the pursuer has not made out any case for disturbing it for the present.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against and assoilzied the defender.

Counsel for the Defender and Appellant—Donald. Agent—Peter Simpson, S.S.C.

Counsel for the Pursuer and Respondent—A. M. Anderson. Agent—George Jack, S.S.C.

Saturday, February 25.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HOOK *v.* M'CALLUM.

Process — Summons — Reparation — Competency of Action for Damages against Husband and Wife Conjunctly and Severally for Separate Slanders.

Held that an action against a husband and a wife "conjunctly and severally or otherwise severally" for a lump sum in name of damages for a slander by the wife and a separate slander on a subsequent occasion by the husband was incompetent.

Barr v. *Neilsons*, March 20, 1868, 6 Macph. 651, *followed.*

This was an action for defamation at the instance of Marion Weston Hook, residing at Wilkieston, in the county of Midlothian, with the consent and concurrence of her father Robert Hook, also residing there, as her administrator-in-law, against Mrs Margaret M'Callum, wife of and residing with James Y. M'Callum, dairyman, 7a Pitt Street, Edinburgh, and the said James Y. M'Callum, as administrator-at law for his said wife, and for his own right and interest. The pursuers sought decree against the defenders "conjunctly and severally or otherwise severally" to make payment to the pursuers of the sum of £400 sterling with interest.

The pursuers averred that on or about 24th November 1903 the female pursuer entered the defenders' employment as a domestic servant on a contract of service for six months.

The pursuers further averred that on or about 21st January 1904, in the defenders' shop in Pitt Street, the defender Mrs Margaret M'Callum falsely, maliciously, and calumniously stated to the pursuer Marion Weston Hook that she was fit only for gossiping and walking the streets, meaning thereby to accuse the said pursuer of being a person of loose, immoral, and vicious habits, or only fit to be a prostitute; that further, on or about 24th January 1904, in the defenders' dwelling-house in Pitt Street foresaid, in the presence and hearing of the said pursuer's fellow-servants, named Isabella M'Phee and Christina Reid, both then residing at the defenders' dwelling-house foresaid, the defender Mrs Margaret M'Callum falsely, maliciously, and calumniously said of and concerning the said pursuer that she was untruthful and deceitful and that the said two fellow-servants ought not to associate themselves with her, or words of a similar import and effect; that on the same date, and in the same place, the defender Mrs Margaret M'Callum falsely and calumniously said of and concerning the said pursuer that she (the said defender) would lock the said pursuer's trunk which lay in the bedroom of the house occupied by the said pursuer and one of her fellow-servants, so that if her fellow-servants' clothes were amissing it would be known where to find them; that by that latter statement the said defender intended to accuse, and did accuse, the said pursuer falsely, maliciously, and calumniously of being a thief or capable of dishonestly secreting and stealing the property of her fellow-servants; that at the time she made that slanderous statement the said defender unwarrantably opened and examined the female pursuer's trunk in the lock of which the key stood at the time; that thereafter she locked the said trunk and placed the key in the shop, all without asking or obtaining the said pursuer's consent; that on 25th January 1904 both the pursuers called at the defenders' shop in Pitt Street; that delivery of the trunk referred to was there and then asked from the defenders; that they refused to give it, and called in a policeman, as if the pursuer Marion Weston Hook had been guilty of dishonestly secreting her fellow-servants' clothes or other property not her own in the trunk; that the defenders were requested to state on what ground the imputations and accusations against the female pursuer's character had been made as hereinbefore stated; but that the defenders refused to explain, and adhered to and refused to withdraw those imputations and accusations. In Cond. 8 the pursuers stated that on the said occasions when the defender Mrs Margaret M'Callum slandered the pursuer as aforesaid, she represented her husband in the shop and business. The said statements were made by her of and concerning the said pursuer maliciously

and recklessly, with an utter disregard for the pursuer's feelings, and in the knowledge that they were not true. Said statements were false and without any foundation. The defender James Y. M'Callum entirely approved of and adopted his wife's said statements. He was present at said interview on 25th January 1904, and identified himself with the defender Mrs M'Callum's statements and actings. He expressed his approval of the language used by his wife towards the pursuer, and further stated that his wife was justified in examining the trunk in the manner and on the occasion mentioned. In the month of February 1904 he received a letter from the pursuers' agent specially stating the charges made by his wife. In his reply this defender repeated the slanderous statement that the female pursuer was deceitful and untruthful. By this and subsequent letters he adopted responsibility for the statements and actings above condescended on, and adhered to them.

The pursuers pleaded—"(1) The defender Mrs M'Callum having falsely and calumniously slandered the pursuer Marion Weston Hook's character as stated, she is liable in reparation therefor. (2) The defender James Y. M'Callum having identified himself with his wife's statements and actings, and having approved of and adopted the same, he is liable in reparation. (3) The said pursuer having, as condescended on, suffered loss, injury, and damage, she is entitled to decree as concluded for, with expenses."

The defenders pleaded, *inter alia*—"(1) The action being incompetent ought to be dismissed with expenses. (2) The pursuers' statements are irrelevant and insufficient to support the conclusions of the summons. (3) The occasions condescended on being privileged, and there being no relevant averments of malice, the action should be dismissed."

On 15th November 1904 the Lord Ordinary (STORMONTH DARLING) sustained the first plea-in-law for the defenders and dismissed the action.

The pursuers reclaimed, and argued, that admitting there was no relevant case averred on record against the husband, the Lord Ordinary was wrong in not allowing an issue against the wife—*Jack* v. *Fleming*, October 15, 1891, 19 R. 1, 29 S.L.R. 5; *Scorgie* v. *Hunter*, February 22, 1872, 9 S.L.R. 292; *Barr* v. *Neilsons, supra*; *Milne* v. *Smiths*, November 23, 1892, 20 R. 95, 30 S.L.R. 105; *Reilly* v. *Smith*, May 24, 1904, 6 F. 662, 41 S.L.R. 516; *Baird's Trustees* v. *Leechman*, January 24, 1903, 10 S.L.T. 515.

Argued for the defenders—An action brought against two defenders for a lump sum for damages for disconnected wrongs is incompetent. A husband is not liable for his wife's slanders. Therefore to sue a husband and wife has the same effect in law as to sue distinct persons—*Taylor* v. *M'Dougall & Sons*, July 15, 1885, 22 S.L.R. 869, following *Barr* v. *Neilsons*, *supra*.

At advising—

LORD JUSTICE-CLERK—We have had a long and interesting debate here. I have come to the conclusion that the Lord Ordinary is right. It is quite plain that the pursuer by his summons intended to attack both the husband and the wife, who are the defenders in this action, and that he desired to obtain a decree which should cover both. The averments against each are quite separate, and it could not be otherwise, because the slanders complained of which were uttered by the female defender were uttered when the male defender was not present. The ingenious mode of bringing him in and making him art and part in the slander said to have been uttered by his wife consisted in taking advantage of what he said or wrote; in this way it is said he adopted the slander uttered by his wife. It appears to me that that is an entire fallacy. If the male defender said or wrote things which showed that he approved of the slander uttered by his wife when he was not present, the saying or writing of these things might amount to slander by the husband on his own account, but it never could make him participant in a slander uttered by his wife some time before when he himself was not present. The illustration was suggested of a joint assault. If two men attack a third, one hitting him on the head and the other on the shins, they may both be jointly and severally liable for the whole injuries, although it may be quite certain what specific part of the injuries was due to each, yet as the whole *res gestæ* come together when both are present, each is responsible for the whole; but if A is assaulted by B and is subsequently assaulted by C, then quite plainly there are two separate wrongs, for one of which B is alone responsible, and for the other of which C is alone responsible, and this even although the two assaults are separated by an interval of only ten minutes, and although B and C have the same ground or supposed ground of quarrel against A. It would be different if B and C were acting in conspiracy, but there must be specific averments of that. Here there are simply an averment of a slander uttered by the wife when the husband was not present, and an averment of a slander uttered on a subsequent occasion by the husband, without any allegation of a conspiracy between the two. The pursuers have now intimated that they have abandoned the action against the husband, but when we look at the averments we have simply a case of different slanders uttered at different times and at different places by each of two defenders. That being so, I think that the action, in accordance with *Barr* v. *Neilsons*, ought to be dismissed as incompetent.

LORD KYLLACHY—If the pursuer's case had been simply that Mrs M'Callum had on certain occasions slandered her, and that Mr M'Callum had identified himself with his wife's slanders so as to make them his own, it could not, I suppose, here be doubted that the action would have been a quite competent action; and further, that it

could not have become incompetent merely because the Court on an examination of the averments found that the case against the husband was irrelevant. That is perfectly clear, and involves nothing contrary to the decision in the case of *Barr* v. *Neilsons*. But when we come to examine the case before us it appears that, after averring as against both wife and husband various joint slanders, the pursuer goes on in condescendence 8 to aver as against the husband a separate slander uttered on a different occasion—a slander by the husband alone, and, so far as the statements show, without any complicity on the part of his wife. The case therefore presented is one of various wrongs committed jointly by two parties, followed by an entirely separate wrong committed only by one of them, and on that case is rested a conclusion for a lump sum of damages against both parties or either of them. Now, I am afraid that this is just the kind of case to which the rule of the case of *Barr* v. *Neilsons* applies, and I think is enough for the decision of the question before us. I agree that the action as laid is incompetent, and that the judgment of the Lord Ordinary should be adhered to.

Lord Kincairney—The case of *Barr* v. *Neilsons* has sometimes seemed to me to present some difficulty, but it is too late to discuss it now. It must be accepted as a conclusive authority, and the question we have to decide is whether it applies in the case before us. If an action for a lump sum is brought against A and B for a wrong done by A and a separate wrong done by B, then the case of *Barr* applies and the action is incompetent. This is the case we have here. There is an averment of a slander by the wife and an averment of a separate slander on a subsequent occasion by the husband, in which the wife was not participant. The case thus falls under the case of *Barr*, and I therefore concur in your Lordship's opinion.

Lord Young was absent.

The Court adhered.

Counsel for Reclaimers—Forbes. Agent—D. Howard Smith, Solicitor.

Counsel for Respondents — Dunbar. Agents—Donaldson & Nisbet, S.S.C.

Saturday, March 4.

FIRST DIVISION.

ARGO *v.* PAULINE AND OTHERS.

Process—Mandatary—Multiplepoinding.

In an action of multiplepoinding raised in the Sheriff Court by the holder of a fund, claims were lodged by certain claimants resident in Australia. These claims having been repelled by the Sheriff, the claimants appealed to the Court of Session. *Held* that they were not bound to sist a mandatary.

By a codicil dated 1st October 1889 the late Miss Elmslie, of Philadelphia, U.S.A., who died on 20th March 1900, made the following provision—"In regard to the residue of my estate I add the name of Gavin E. Argo, of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the time of my death."

At the time of the testatrix's death there were twenty-nine relatives of the same degree to her as Mr Argo who were living and domiciled in Scotland. Besides these relatives there were two other relatives, viz., Annie Elmslie and Isabella Elmslie, of the same degree of relationship to her as the others, both of whom had been resident in Australia for many years. One of them, however—Annie Elmslie—happened to be residing in Scotland at the date of the testatrix's death, and the other, Isabella Elmslie, resided there from 18th April 1900 to 27th December 1901.

The right of the twenty-nine relatives who were domiciled and living in Scotland to participate in the bequest was not disputed, but a question arose as to the right of Annie and Isabella Elmslie to share in the bequest.

An action of multiplepoinding was accordingly raised in the Sheriff Court at Aberdeen at the instance of Mr Argo, in which all the said relatives (including Annie and Isabella Elmslie) were called as defenders in order to determine their rights to the fund.

On 13th December 1904 the Sheriff-Substitute (Henderson Begg) found that the claimant Annie Elmslie was entitled to participate in the fund, on the ground that she was *de facto* resident in Scotland at the date of the testatrix's death, but that the claim of Isabella Elmslie fell to be repelled.

On appeal, the Sheriff (Crawford) recalled the Sheriff-Substitute's interlocutor and repelled the claims of both Annie and Isabella Elmslie.

Annie and Isabella Elmslie, who were resident in Melbourne, Australia, appealed to the Court of Session.

On the case appearing in the Single Bills counsel for the respondents moved the Court to ordain the appellants to sist a mandatary.

Argued for the respondents—The claimants were resident in Australia. Their claims had been repelled, so that this appeal was similar in its nature to a petitory action. The circumstances in the case of *Gordon's Trustees* v. *Forbes*, February 27, 1904, 6 F. 455, 41 S.L.R. 346, were different from the present and were exceptional. In the event of the appellants being unsuccessful the respondents would have the right to ask for expenses, and they were therefore now entitled to have the appellants ordained to sist a mandatary. The requirement of a mandatary applied to all proceedings, not to actions merely, *e.g.*, a claimant in a sequestration had been ordained to sist a mandatary—Mackay's Manual, p. 236. [The Lord President referred to the case of *North British Railway Company* v. *White*, November 4, 1881, 9 R. 97, 19 S.L.R. 59, as to the necessity for sisting a mandatary in a multiplepoinding.]