damages in respect of loss which they have incurred owing to having taken shares in a certain syndicate induced by the false and fraudulent representations, as they allege, of the defender. The learned Sheriffs have allowed proof of pursuers' averments, but on appeal a point has been argued to your Lordships which does not seem to have been mooted in the Sheriff Court, viz., as to the competency of the action in respect that the four pursuers are allied together in suing for separate sums of money in respect of misrepresentation to them by the defender. I find that in an old but respected treatise on forms of process by Mr Ivory (Forms of Process, i, 161) the rule is stated that when several unconnected persons have been aggrieved by the same act of the defender, or have a joint interest in the matter libelled, one action in their joint names is perfectly competent, but that cases in which joint action is competent are limited to those of these two descriptions. I do not think the Court has ever departed from that rule. Indeed, so long ago as 1741 an attempt very much like the present seems to have been made in the case of *Gray and Others, His Majesty's Feuars in Orkney* v. *Sir James Steuart of Barray*, June 5, 1741, M. 11,981, where the Lords found "that different parties could not accumulate their actions in one libel unless they had connection with one another in the matter pursued for or had been aggrieved by the same act." I think all the cases that were quoted to your Lordships fell quite distinctly under one or other of these two categories. "Had connection with one another in the matter pursued for" means a case of which a very apt illustration can be found in the case of riparian proprietors. They represent property having a joint interest, and it has been held that they may quite appropriately combine themselves in one action to protect their common interest. "Being aggrieved by the same act" finds its illustration in the various cases quoted of actions of slander, where the ground of action is contained in one statement made once and for all implicating several persons and aggrieving them. I cannot find any amplification of these two principles, and I think it is very obvious that on considerations of expediency it would be regrettable if any amplification had to be allowed. I ventured to put the case in the course of the argument that if the misrepresentation complained of had been contained in a prospectus published in a newspaper we might have had hundreds of persons coming together and all joining in one action for damages which they had sustained by this misrepresentation. The truth is that when the pursuers' averments are looked at there is no real and true community of interest. It is said that it was one and the same false representation. But then it was made to different persons at different times and to a certain extent at different places, and it is impossible to doubt that the words of the communication used to different persons differed at least a little in particulars, which may or may not have great importance when you come to determining whether these representations were false or not. In these circumstances I am of opinion that we have no course but to dismiss the action as incompetent.

LORDS ADAM and M'LAREN concurred.

The Court recalled the interlocutors appealed against and dismissed the action as incompetent.

Counsel for the Pursuers and Respondents —Younger—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Appellant —Munro—J. A. Christie. Agents St Clair Swanson & Manson, W.S.

Saturday, February 25.

FIRST DIVISION.

[Sheriff Court at Airdrie.

M'DONALD *v.* JAMES DUNLOP & COMPANY (1900) LIMITED.

Reparation—Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (2) (*b*)—*Action for Reparation by Person Found not Entitled to Claim Compensation under Compensation Act—Competency.*

An action for reparation at common law and under the Employers' Liability Act is not excluded by the fact that the pursuer in such action has already sought, but has been found to have no title, to recover compensation under the Workmen's Compensation Act 1897.

Blain v. *Greenock Foundry Company*, June 5, 1903, 5 F. 893, 40 S.L.R. 639, and *Rouse* v. *Dixon*, L.R. [1904] 2 K.B. 628, referred to.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) section 1 (2) (*b*) enacts:—"When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act, but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act except in case of such personal negligence or wilful act as aforesaid." Section 1 (4)—"If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable

to pay compensation under the provision of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which in its judgment have been caused by the plaintiff bringing the action instead of proceeding under this Act."

On 8th October 1903 John M'Donald senior and his son John M'Donald junior, miners, in the employment of James Dunlop & Company (1900), Limited, coalmasters, Calderbank, Airdrie, were killed by an accident arising out of and in the course of their employment. Mrs Rachel M'Vey or M'Donald, the wife and mother, presented a petition in the Sheriff Court at Airdrie in which she claimed as compensation under the Workmen's Compensation Act 1897 (1) £192, 18s. 6d. as an individual and as tutor-at-law for her pupil children in respect of the death of her husband, and (2) £73 as an individual in respect of the death of her son. On the 30th December 1903 the Sheriff-Substitute (A. O. M. MACKENZIE) awarded the amount claimed under the first head of the claim. He, however, found as to the second head that Mrs M'Donald was not in the sense of the Workmen's Compensation Act 1897 a dependant of her son at the time of his death, although she actually received a contribution made by him to the family support, in respect that such contribution was in reality made to his father, upon whom lay the obligation of supporting the family.

On 30th September 1904 Mrs M'Donald presented another petition in the Sheriff Court, in which she sought to recover from James Dunlop & Company (1900), Limited, the sum of £500, or alternatively the sum of £197, 18s. 6d. under the Employers' Liability Act 1880, upon averments to the effect that the death of her son was caused by the gross carelessness of the defenders, or by those for whom they were responsible. The defenders took the following preliminary plea—"Pursuer having in the exercise of her option, under section 1, sub-section 2 (*b*), of the Workmen's Compensation Act 1897, elected to claim compensation under said Act from defenders, in respect of the death of her said son (said claim having been disposed of by interlocutor of the Sheriff-Substitute at Airdrie of date 30th December 1903) the present action is incompetent, and should be dismissed with expenses."

On the 15th November 1904 the Sheriff-Substitute (A. O. M. MACKENZIE) repelled this plea and allowed the pursuer a proof.

Note.—[*After narrating the circumstances and quoting the Act*]—"It is argued that this sub-section puts the workman or his dependant, in the case of the injury having resulted in death, to his election between the remedy provided by the Act and that which was open to him before the Act came into operation, and that, his election once made, he is barred from going back upon it, even although it turn out that he is not entitled to the remedy which he has selected. In my opinion this argument is not well founded. If sub-section 2 (*b*) be read in conjunction with sub-section 1, it is, I think, apparent that the case to which sub-section 2 (*b*) refers in the words 'in that case' is the case of a workman who has a good claim both under the Act and independently of it, and accordingly it is with reference to that case that it gives the workman an option to select which of the two available remedies he prefers. It does not, in my opinion, contemplate the case of a workman or dependant upon whom the Act has conferred no benefit, and cannot fairly be read as meaning that the fact of such a workman or dependant having in error made a claim under the Act is to debar him from a remedy to which he had a right before the Act was passed. A reference to that part of the sub-section which gives protection to the employer appears to me to support this view, for what the employer is protected against is not the having claims made against him both under the Act and independently of it, but the being found liable on both heads.

"I do not, however, require to rely on my own opinion of the meaning of the Act, for I think the matter is settled in accordance with the view I have expressed by the case of *Blain* v. *Greenock Foundry Company*, 5 F. 893.

"In that case certain of the children of the deceased William Blain sued his employers for damages on account of his death. In defence it was pleaded, *inter alia*, that one of the pursuers, James Blain, was barred from suing in respect that he had previously made an unsuccessful claim under the Workmen's Compensation Act. This plea was repelled by Lord Kincairney, and his interlocutor was affirmed by the Second Division. The ground on which the claim of James Blain under the Act had been rejected was that he had no title, inasmuch as he had been only partially dependent on his father, and there were other claimants who had been totally dependent. His case was therefore identical for all practical purposes with that of the present pursuer.

"The same view has been taken by the Court of Appeal of Ireland. See *Beckley* v. *Scott*, L.R. (1902), 2 K.B. (Ir.) 504.

"I was referred to the case of *Edwards* v. *Godfrey*, L.R. (1899), 2 Q.B. 333, as an authority to the contrary. In this case it was held that a workman who had unsuccessfully sued his employer for damages, and who had failed to take advantage of the privilege given by section 1, sub-section 4, of the Act of 1897 to have compensation assessed by the Court before which this action was tried, was barred from making any subsequent claim for compensation. The point decided, therefore, was not exactly the same as that raised in the present action. At the same time it must be admitted that the opinion of Lord Justice Smith is expressed in terms applicable to the present case. But if that decision is an authority for the view maintained by the defender, it is in conflict with

the case of *Blain*, and it is the latter case which I am bound to follow.

"I accordingly repel the defenders' first plea-in-law, and as no argument was submitted in support of the plea to the relevancy, I repel it also."

The defenders appealed, and argued—The pursuer could not claim under the Workmen's Compensation Act, and, having failed in that claim, then claim at common law and under the Employers Liability Act, for the policy of the Workmen's Compensation Act was, that once the matter had been threshed out all questions were to be ended. That was seen by looking at section 1 (4), where the converse of the present case was provided for, and under that section it had been held in England—*Edwards* v. *Godfrey*, L.R. [1899] 2 Q.B. 333—that a pursuer could not have one action and when he failed in that bring the other. He must exercise his option, and having done so he must abide by the decision in it. In a subsequent case —*Rouse* v. *Dixon*, L.R. [1904], 2 K.B. 628—the decision was to allow the pursuer to bring the second proceeding, but that was owing to the clearly taken distinction that in the first proceeding he had not prosecuted the matter to a final issue, and *Edwards'* case was there considered and not differed from. The pursuer here having deliberately elected to proceed under the Workmen's Compensation Act, and having pursued the matter to a final issue, was barred from bringing new proceedings. *Blain* v. *Greenock Foundry Company*, June 5, 1903, 5 F. 893, 40 S.L.R. 639—was not an authority on the point, for though it was raised the point was not gone into in the Division.

Counsel for the respondent and pursuer were not called upon.

LORD PRESIDENT—In this case I agree with the opinion of the learned Sheriff-Substitute, who has in his note expressed the ground of his judgment very clearly. Besides that, I think it is almost impossible to distinguish this case from one branch of the case of *Blain*, 5 F. 893. The matter there is undoubtedly dealt with by the Lord Ordinary at the end of his note, p. 897, where he says—"The pursuer James Blain"—it may be noted that James Blain was one of the pursuers, but was not the principal—"is in a special position, because he made a claim under the former proceedings. But the result was that it was found that he had no title. His claim was not repelled on its merits, but his title was denied, and I think his position is therefore not different from that of the other pursuers." That was a decision absolutely in point, and though it is true that no reference was made to this point by the learned Judges of the Second Division when they advised the case, at the same time the interlocutor adhering covers that portion of the Lord Ordinary's judgment as well as the others. And one is fortified by seeing that this was the view taken, though not absolutely necessary for the determination of the case, by the present Lord Chief-Justice in the case of *Rouse* v. *Dixon*, [1904] 2 K.B. 628, because his Lordship there, after quoting the section, says (at p. 631)—"That seems to me to point out plainly what are to be the consequences of the exercise of his option by the workman. They are that the employer is not to be liable to pay compensation more than once. That being so, it seems to me that when a claim is made under the Workmen's Compensation Act which cannot be enforced because the case does not come within the Act at all, the right of the workman to make any other claim is not lost." That also is directly in point; and the matter certainly is strengthened when one comes to consider what the claim here is. The liability under the Workmen's Compensation Act is expressed in section 1 in, so to speak, a passive sense. It is said that if an accident arises the employer shall be liable to pay compensation; and then there is a proviso saving the rights at common law of the workman who is injured, and "workman," as explained by the interpretation clause which follows, means not only the workman himself but, where he is dead, includes his legal representatives or his dependants or other persons to whom compensation is payable. That of course is compensation as provided for in the Act; but the pursuer's action here, in so far as it is a common law action, is an action founded on fault, which under the law of Scotland is not an action of compensation but is an action of damages, founded on the old Scottish doctrine which gave an action for damages to certain near relatives of persons who had been killed. I think that, even if the learned Judges in England had come to an opposite decision from what they did, it would be difficult to find this particular right excluded in a Scottish case. But I do not think it is necessary to rest the case on what must be called a specialty arising out of the difference of the law in the two kingdoms. I think it is enough for us that the result is in accordance with what one may call the common sense of the statute, which apparently means that the employer is not liable to pay twice. It is in accordance with the decision of the other Division of this Court in *Blain's* case, and in agreement with the opinion of the Lord Chief-Justice of England.

LORD ADAM—I am of the same opinion. As I understand, the case arises in these circumstances. The pursuer raised proceedings under the Workmen's Compensation Act for compensation in respect of the death of her husband and her son. She succeeded in getting compensation in that action in respect of the death of her husband, but failed to get damages for the death of her son, on the ground that she was only partly dependent on him, and therefore not entitled to compensation. She failed to make out her case, and having failed to make out her case now raises the present action of damages at common law and under the Employers' Liability Act. It is said that the action is incompetent, because she has made her election of proceeding under the Workmen's Compensation Act, and therefore is barred from proceeding at common law or under the Employers'

Liability Act. I agree with your Lordship that there is no bar at all. It is quite true that if an option is exercised by a person bringing an action of damages, and the person exercising that option fails in that action, then a claim under the Workmen's Compensation Act must be disposed of by the Court at the same time, and for this reason, as it appears to me, that the whole facts of the case are before the Court, upon which the Judge can award compensation; but that is not so in the converse case, and therefore there is no similar provision in the Act for dealing with that case. But I see nothing in that to prevent a claim for damages being made. I also agree with your Lordship that the case has in fact been decided by the case of *Blain* in the other Division. I agree with that decision, and also with the arbiter's views on that case, and with the views expressed by the Lord Chief-Justice in the case of *Rouse*, and I therefore think we should refuse the appeal.

LORD M'LAREN—I also agree. I think that under the Act the claimant is, in a certain state of facts and for certain purposes, put to his election, because the language of the Act is that where two grounds of liability exist the workman may either raise an action for compensation under this Act or may take such proceedings as were open to him before the Act came into force. Now an alternative is there given, and it cannot mean that he is to do both. Therefore I hold it would be contrary to the Act of Parliament to attempt to carry on the two claims concurrently, with the intention, it might be, of abandoning one and proceeding with the one which promised the best results. But, then, while an election exists in that case, it does not follow that it is an irrevocable election, and in the absence of any provision to that effect, and keeping in view the explanatory proviso that the employer shall not be liable to pay under both claims, I come to the conclusion that a workman may if he pleases abandon the claim first made and fall back on the alternative claim. In a case where the election has been to bring an action for damages, express provision is made that the Court, while dismissing the action, may proceed to award compensation under the Act, while the converse case is not expressly provided for. The Act of Parliament provides that the employer shall not be liable under both heads, and the language used appears to me to be consistent with a right on the part of the workman to change his ground, provided the employer is not thereby subjected to a double liability. A decision on a claim for compensation which is given by the statute independently of fault can never be *res judicata* of a claim which is founded on fault. I therefore concur with your Lordships that the decision of the Sheriff-Substitute is right.

LORD KINNEAR was absent.

The Court refused the appeal and remitted the case back to the Sheriff.

Counsel for the Pursuer and Respondent—G. Watt, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Appellants—W. Campbell, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Saturday, February 25.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles.

WILSON *v.* M'MINNIN.

Parent and Child—Aliment of Twin Illegitimate Children—Agreement between the Parents—Mother's Right of Relief against Father for Aliment.

The father and mother of twin illegitimate children agreed to each take the custody of and support one of them. In an action by the mother against the father for a yearly contribution towards the support of the child in her custody, *held* that there was no reason for disturbing the compact between the parents under which each parent was liable for the support of one child.

This was an appeal from the Sheriff Court of the Lothians and Peebles. The facts of the case, about which there was no dispute, were as follows:—The pursuer was Helen Wilson, domestic servant at Dalkeith; the defender was William M'Minnin, gardener at Lasswade. On 26th July 1904 the pursuer gave birth to twin illegitimate children, of whom the defender was the father. By arrangement between the parties each took the custody of and supported one of the children. In these circumstances the pursuer brought an action in the Sheriff Court of the Lothians and Peebles at Edinburgh concluding against the defender for, *inter alia*, the sum of £7 per annum for fourteen years as a contribution to the aliment of the child in her custody. The pursuer did not deny that she was in a position to aliment this child.

The pursuer pleaded, *inter alia*—"The defender being the father of the pursuer's child is bound to contribute for its aliment."

The defender pleaded—"In the circumstances stated the defender is entitled to absolvitor with expenses."

On 20th October 1904 the Sheriff-Substitute (GUY) pronounced an interlocutor assoilzieing the defender.

Note.—"The material facts for the decision of the case are not in dispute. Illegitimate twin children are born as the result of carnal intercourse between the parties. Both father and mother are equally liable to maintain them. They give effect to that equal burden by each taking a child. Now, the mother wishes to disturb the equality of the total burden which rests upon them by causing the father to bear three-fourths of it while she only bears one-fourth. In the usual case where only one child is in