part of his duty to help the other men on lighters through the lock. No doubt it may be said that it might be for his masters' benefit that Gallagher should get through the lock quickly, but he says he was in no hurry, and without further evidence I cannot assume that he interfered with the sluices in discharge of his duty to his master while Gallagher was going through. He was then simply a volunteer doing a friendly act. If therefore a servant volunteers to do a helping action for another servant in difficulties, his master is not liable for any accident arising therefrom. If a footman, seeing a carriage carelessly driven and the horse thrown down, gets off the box of his master's carriage and helps the driver of the horse, he does not do so in discharge of his master's duty. Therefore I have great doubts of the foundation of the case. But apart from this the evidence is perfectly clear that Gallagher asked Monteith to raise the sluice in order that an impetus might be given to his barge, which had stuck in the passage through the lock, and which the horse was unable to move. Mrs M'Guire states that she heard some one from the lock call out to Monteith to open the sluice, and I cannot doubt that this is true.

I am therefore compelled to come to the conclusion that the pursuer cannot succeed. Of course one has great sympathy with the poor widow and children, as well as with an occurrence fatal to the man, but I think it was an accident and misadventure. Therefore on the whole matter I cannot see that Monteith in doing a friendly act is to blame, or that his masters are responsible for that act.

Lord Young—I come very easily to be of the same opinion. The substance of the case is this. An accident occurs while the "Fibre" is being navigated through lock No. 4. I think it is clearly proved that when the vessel got to the level of the lock, and it became necessary to pass on, there was a good reason that it should be shoved forward from behind. A voice was then heard from the barge calling out quite in the usual way to move her a nick or two. It was understood and answered by letting in a little water from behind in order to give the barge an impulse, and it was done in a friendly way by Monteith. Now, I do not think that Monteith was in fault at all, and no case of liability has been established against him as a wrongdoer. Unfortunately an accident occurred, and has not been accounted for, but I cannot say on the evidence which is before us that Monteith was in fault for doing what was a common thing, asked and completed in the usual way. If this be so, then there is no case against the master, because he is only responsible for his servant's fault. But even if Monteith were in fault in respect to this voluntary service, I agree with your Lordships it was not in the course of his master's service. His master did not employ him to assist the "Fibre" or other barges through the lock. Therefore on the whole matter, in my opinion, the action, both on the facts and the law, fails altogether.

Lord Craighill—I am of the same opinion. Liability can only be established against the defenders on the assumption that Monteith was acting in their employment. But this is not proved, and indeed in my opinion the contrary has been established. Monteith never imagined he was doing any duty incumbent on him in his duty towards them. That he only did what he did out of good neighbourly feeling is as clear as it well could be.

Lord Rutherfurd Clark—I concur.

The Court found "that the witness Monteith in the matter complained of acted on the request of Patrick Gallagher, and *separatim* that in doing so he was not acting in pursuance of his employment by the said defenders," and therefore sustained the appeal, and assoilzied the defenders.

Counsel for Appellants (Defenders)—Mackintosh—Guthrie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Respondent (Pursuer)—Campbell Smith—Rhind. Agent—William Officer, S.S.C.

Friday, October 26.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

HODGE (MORRISON'S TRUSTEE) *v.* MORRISONS.

Bankruptcy—Act 1621, *c.* 18—*Disposition by Insolvent in Defraud of Prior Creditors—Conjunct and Confident—Presumption—Provision to Children.*

A tenant of two subjects held on long leases assigned them by assignations bearing to be gratuitous to his son and daughters. Eighteen months afterwards he died insolvent, and his estates were sequestrated. In an action of reduction at the instance of a trustee in his sequestration, who represented creditors prior to the date of the assignations—*held*, after a proof, (1) that the assignation in the son's favour was inept as being undelivered; (2) (*diss.* Lord Rutherfurd Clark) that on the evidence the assignation to the daughters was proved to have been delivered, and that the presumption of insolvency at the date of the assignation, arising from the insolvency at the date of challenge, had been overcome; and (3) (*diss.* Lord Rutherfurd Clark) that the daughters had given value for the assignation in the shape of money contributed by them from their own earnings while living in family with their father.

Duncan Morrison, merchant, Poolewe, was tenant under a minute of lease between Sir Kenneth Mackenzie of Gairloch and himself, dated in 1868, of a piece of ground in the village of Poolewe. The lease was to endure for sixty years from Whitsunday 1865, the rent being 5s. per annum. He was taken bound to erect upon the ground a substantial building of not less value than £50, to be used as a shop. He entered into possession of the ground, and built a shop upon it, which he occupied as trading premises up to the time of his death after mentioned. He also became tenant under Sir Kenneth Mackenzie of a rood of ground in Poolewe for sixty-two years from Whitsunday 1878, at a rent of 10s. per annum. He was taken bound to build upon the

ground a dwelling-house of the value of £200. He entered into possession of this ground also, and built a house upon it of the required value, in which he was living at the time of his death.

On 24th June 1879 Morrison granted an assignation in favour of his son Peter Morrison of the first-mentioned subjects, which bore to be for "the love, favour, and affection which I have and bear to my son Peter Morrison, residing at Poolewe, and for certain other good causes and considerations." Peter Morrison was then a boy of thirteen, and at school. He also on the same date granted another assignation, proceeding on the same narrative as the one to his son, in favour of his daughters Margaret, Mary, and Annie Morrison equally, the last named being in minority, of the lease of the subjects on which the house was built. On 10th February 1881 Morrison, after an attempt to compromise with creditors which proved unsuccessful, granted a mandate in favour of Edward Annan, writer, Glasgow, to apply for sequestration of his estates. He died on 25th February thereafter. Mr Annan presented a petition to the Lord Ordinary on the Bills for sequestration of the estates, and sequestration was awarded on 18th March 1881. At the first general meeting of creditors, which was held in Glasgow on 29th March, the pursuer of this action, Thomas Hodge, accountant in Glasgow, was elected trustee, and his election was thereafter confirmed by the Sheriff. Subsequent to the date of the sequestration of their father's estate, Margaret, Mary, and Annie Morrison had a notarial instrument expede upon the assignation in their favour, which was recorded in the appropriate register of sasines on 18th June 1881. Morrison's widow was examined as a witness in his sequestration, where she exhibited the leases above mentioned, but refused to part with them to the trustee. Hodge then raised an action against her in the Sheriff Court of Ross for delivery of these writs. The widow pleaded in defence that these writs having been assigned by the deceased to his children, she was not the custodier of them. The children were not called as parties to that action, which was accordingly sisted that the trustee might try the question of right with the assignees.

He then raised the present action against Peter Morrison and Margaret, Mary, and Annie Morrison, the assignees, and also against the widow. The conclusions of the summons were for declarator that the pursuer had sole right to the lease of the respective subjects, and for reduction of the two assignations with the notarial instrument following thereon on the second.

The grounds of action averred by the pursuer were—"The said Duncan Morrison was insolvent at the dates of the granting of both the said assignations. Both the said assignations were voluntary and gratuitous, and were granted to conjunct and confident persons, without a just, true, and necessary cause, to the prejudice of prior creditors. The pursuer, as trustee, represents several such creditors. The said assignations were, moreover, fraudulent, being granted by an insolvent person, without onerous consideration, and to the prejudice of his just creditors." He also averred that no change of possession had followed on the assignations, and that they were retained by Morrison undelivered, and were in his repositories when he died.

The defenders' averments in answer were—"(1) That at the dates of the several assignations the granter was solvent; (2) that the same were granted as a provision to his children, the assignees; (3) that the same were followed by possession with the knowledge and consent of the landlord, who accepted the assignees as his tenants; (4) that the assignees have, since Whitsunday 1879, been entered in the valuation roll as proprietors of the subjects, and have been assessed for and paid the public rates and burdens in respect thereof; and (5) that the same are valid and effectual." They denied that the writs were found in the deceased's repositories.

The pursuer pleaded—"(1) The pursuer, as trustee on the sequestrated estates of Duncan Morrison, is now in right of the tenant's part under the minute of lease and lease libelled, and is entitled to decree of declarator to that effect. (4) The assignations libelled are inept, and ought to be set aside, with all that has followed thereon, in respect—1st, that they were undelivered deeds at the date of the granter's death; 2d, that they were not followed by possession on the part of the assignees; and 3d, that they were not completed by intimation or registration prior to the bankruptcy and sequestration of the granter. (5) The assignations libelled are reducible both under the Statute 1621, cap. 18, and at common law, and ought to be reduced accordingly."

The defenders pleaded—"(1) The pursuer has no title to sue, in respect of the excluding and preferable title of the defenders Peter, Margaret, Mary, and Annie Morrison. (5) The title of the defenders, the assignees of the lease and minute of lease, being valid and effectual, the present action is groundless, and they are entitled to absolvitor."

The Lord Ordinary (M'Laren) allowed a proof, which was taken in part on commission in Dingwall, and in part before the Lord Ordinary.

On the question of Duncan Morrison's solvency when the assignations were executed and at the date of his death, the evidence was to the following effect:—The pursuer deponed that he looked into the deceased's books in February 1881 (the month in which he died) at the instanec of his creditors, and that the deceased then offered a composition of 5s. in the pound. Deceased at that time stated his book debts as almost worthless, and gave them at £20. Pursuer himself put them at £150. They actually realised about £14. The deceased afterwards met his creditors in Glasgow, and again offered the same composition, which was refused. He (pursuer) considered it a waste of money to sue for any of the amounts. He estimated the deficiency as at the date of Morrison's death at £233, 16s. 3d., excluding the value of the properties and the expenses of the sequestration. He and deceased together estimated the stock shortly before the deceased's death at £287. It was his opinion, which he had expressed to a creditor after Morrison's death, that the estate was solvent then if it was wound up in the way proposed by him; but the favourable expectations he held out were not realised. It was impossible for him to say in what position the estate was as to solvency in 1879 from the way the books had been kept.—Sir Kenneth Mackenzie proved that Morrison had himself paid the rents for shop and croft up to November 1880. — Morrison's wife and his

daughter Annie deponed that he had been in no way pressed for money in 1879, but that he had been pressed for money shortly before he died, and had stated that he could pay his debts if he had time given him. They were well acquainted with his affairs, the daughter having kept his books.

On the question of the change of possession it appeared that Morrison had lived as a yearly tenant on the croft which formed the subject of the second lease for several years before the lease was granted, first in the old house, and afterwards in the new one, which he occupied with all his family who were at home at the time. It was his ordinary place of residence, and he died there. At and after Whitsunday 1879 the daughters were entered as tenants in the valuation roll. — Sir Kenneth Mackenzie said he never received any formal intimation of the assignation of either lease. There was no change in the relationship of landlord and tenant between him and Morrison up to his death. "Interrogated — Did you ever accept Morrison's sons or daughters as your tenants in room of their father? Depones—There was no formal acceptance. Interrogated — Was there any change in the occupancy of the house between 1878 and the time of Morrison's death? Depones—So far as I know, there was no change." He considered the publication in the valuation roll as sufficient intimation to himself. He raised no objection to the assignees' title. Morrison himself paid the rent and obtained receipts in his own pass-book for two years after his daughters names were entered on the valuation roll.—The inspector of poor knew of the property in question having been transferred by the deceased Duncan Morrison to his daughter, apart from the valuation roll, but did not remember the date on which he became aware of it. When the last rates were paid to him by deceased for his shop, he told him that after that the girls would settle for their own house. That was on 3d December 1880, when the last entry of a payment of assessment by the deceased was made by him in his assessment roll.

On the question of delivery of the deeds, Annie Morrison gave the principal evidence. She deponed—"He handed over the assignations to me, and he said that these were the assignations of the house transferred to me and my sisters, and of the shop to my brother. (Q) Did you read them?—(A) Yes. I read both the assignations through. (Q) What did you do with them?—(A) I then put them by in a desk. That desk was in my bedroom. (Q) Who used that desk?—(A) The desk was ours from my first recollection. I mean my sister's and mine. There were no papers in the desk belonging to my father. (Q) Did you always keep the key of the desk?—(A) Sometimes, and at other times it hung on a pin in the bedroom. My father never went near that room where the desk was kept (Q) When were the assignations next touched?—(A) After my father's death." The assignations (she deponed) were taken out to go with her mother to Glasgow. On her return they were again put in the desk, and after that they were given to their law-agent in Dingwall. Mrs Morrison gave similar evidence.

On the question of just consideration having been given for the assignations, Mrs Morrison deponed that Margaret, the eldest daughter, who had been six years in service as housemaid, and earned about £19 a-year of wages and "chance-money," gave "every penny" she could spare to her father. She knew this was given for the house. Her other two daughters Mary and Annie had been assisting her at laundry work at home for the last three years. They earned all of them together about £50 or £60 a-year. They also earned money by taking in lodgers. These earnings went partly to pay the house and partly to pay her husband's debts. Before the house was built £60 of these earnings was put aside to pay for it. Her husband said he intended to build the house as a home for his daughters because they helped him. Similar evidence on this head was given by the three daughters. Margaret stated that her father had said that when the house was built he was going to make it over to her and her sisters. Annie Morrison said that about £200 was paid by her out of her own and her sisters' earnings towards the building of the house, which sum was chiefly made up of money earned by them in the years 1877-8-9, and was handed over by their mother to their father for the expenses of building the house. Her father said when it was being built that it was to be made over to them when built because of the services they had rendered in building it.

The Lord Ordinary sustained the reasons of reduction in so far as regarded the assignation of the minute of lease made and granted by the deceased Duncan Morrison to and in favour of the defender Peter Morrison, dated the 24th day of June 1879, and reduced, declared, and decerned in terms of the conclusions of the libel thereanent: *Quoad ultra* repelled the reasons of reduction, and assoilzied the defenders from the conclusions of the libel, &c.

"*Opinion.*—I have read the proof taken on commission, and also the documents, and on one part of the case I have no difficulty. I think, with regard to the conveyance of the shop by the deceased Mr Morrison in favour of his son, that that must be set aside, under the Statute of 1621, as being a conveyance by a person who was insolvent, and without a true and sufficient consideration. The only doubt about it would be on the subject of the granter's insolvency; but the decisions, I think, have fixed the rule, that where a challenge is brought by prior creditors, or by a trustee representing creditors whose right is anterior to the deed, and where insolvency exists at the time of the challenge, it is always presumed to have existed at the date of the deed, unless the contrary is proved. The date of the insolvency is carried back retrospectively, unless it can be proved affirmatively that the granter was solvent—that is to say, that upon a balance of his assets and liabilities, according to their fair worth at the time, he would have been able to pay all his creditors 20s. in the pound. Now, in the present case, there can, of course, be no doubt as to the insolvency of the estate at the time the action was brought. It is expected to yield only a dividend of 5s. in the pound, and that result is not varied, in my opinion, by the consideration that at one time apparently the trustee had expected a better result, and that he had been on the point of making an arrangement, with the assistance of a gentleman who was friendly to the bankrupt, by which he hoped to be able to pay

every one in full. With regard to the other assignation in favour of the daughters, that stands in a different position. There the question is as to the adequacy of the consideration. Now, on that matter, we have conflicting evidence; but I think, on the whole, there is evidence to prove that the daughters contributed something approximating to the price of the property. There is no precise evidence as to what the cost of erecting the house amounted to; but, so far as I can judge, the sums are about the same. We have no statement of the tradesmen's accounts; but we are told that the house altogether cost about £200; and the daughters say they contributed as much from their earnings. The youngest daughter, Annie Morrison, gives a very articulate statement of the different sums that were paid year by year, and which, though she has not kept an account of them, she reckons to be about £200—about the value of the building put up on the property. The land itself is of no considerable value. I think 10s. of annual rent was the consideration for it. However, even if it should turn out that the sums paid by those ladies are something less than the value of the building, I do not think it follows on that account that the transaction should be set aside. The question is not whether the full value of the property is given—that has never been the test—but whether a fair price was paid; whether, in short, it was a *bona fide* transaction or fraudulent. It appears to me that at the time the house was built, and the assignation was granted, both the father and the daughters meant a real transaction. The girls certainly had no idea that their father was in difficulty; and I do not think that he himself thought at that time that he was in any danger of insolvency, although it is pretty clear that if a balance had been struck, and he had been obliged to sell his goods by forced sale, he would have been insolvent. But he did not so consider himself; and I do not think he meant any fraud. In these circumstances he enters into an arrangement with his daughters to assign this house to them, which he really had not the means of paying for out of his own money. He expects their earnings to pay the tradesmen's bills, and apparently to a large extent, if not entirely, the bills were paid out of the daughters' earnings. I think that the defenders gave substantial value for the house, and that the conveyance ought to stand. The result will be to reduce, as regards one of the subjects, and to assoilzie as regards the other; and as it is a case of divided success, I think no expenses should be found due by either party."

The pursuer reclaimed, and argued—The presumption of insolvency at date of granting the assignations, which arose from the admitted insolvency of the deceased shortly after their date, had not been overcome by the proof; even if it had, the deeds were *ex facie* gratuitous, and no relevant or sufficient evidence of just consideration had been brought. It was not indeed pleaded in the case of the son's assignation, and in that of the daughters the only evidence of a sum handed over was in the case of Annie Morrison alone. Nor was there any evidence of a change of possession nor of delivery of the deeds sufficient to satisfy the law on these points.

Authorities — Bell's Comm. i. 174, ii. 193; *Clark* v. *West Calder Oil Co.*, June 30, 1882, 9 R. 1017, per Lord President, 1024; *Campbell* v. *Brock*, 5 W. & S. 476; Bell's Prin. 1209-11; *Benton* v. *Craig's Trustees*, July 16, 1864, 2 Macph. 1365; *Miller* v. *Duncan*, May 31, 1825, 4 D. 48; *Fleeming* v. *Howden*, July 16, 1868, 6 Macph. (H.L.) 113; *Rodger* v. *Crawford*, November 9, 1867, 6 Macph. 24.

The respondent replied—The presumptive insolvency at the date of granting the deeds had been sufficiently overcome by evidence of solvency in 1879 and later. The entry in the valuation roll was evidence of change of possession to satisfy the authorities on that point. Delivery also was proved in the case of the daughters.

Authorities—Ersk. Prin. 16th ed. p. 600; *Rust* v. *Smith*, January 14, 1865, 3 Macph. 378; *Orr* v. *Tullis*, July 2, 1870, 8 Macph. 936.

At advising—

Lord Young—There are two distinct questions in this case with respect to each of the assignations referred to—viz., 1st, Whether the assignation was delivered to the assignee, and otherwise, so far as legally necessary, completed as in a question with the cedent? and 2d, Whether it is reducible as a gratuitous alienation by an insolvent debtor to the prejudice of his creditors. On the first question I think there is a distinction between the two assignations. With respect to that of the shop lease in favour of Peter Morrison, I think it was not completed as in a question with the cedent, there being no evidence of delivery to the assignee or of publication, or anything whatever to put it beyond the cedent's power to cancel and recal it at pleasure. The assignee was a boy at school, who, so far as appears, knew nothing of the assignation, which certainly was never delivered to him, or followed by anything to give him a legal claim against his father, the cedent, in respect of it. This is sufficient for the decision of the case so far as this assignation is concerned. For if the property was not thereby put beyond the cedent's power it is necessarily available to his creditors.

With respect to the assignation of the house lease to the daughters, it is, I think, on this question in a very different position. For there is evidence in the first place that it was delivered to the assignees, and in the second place that it was published by entering them as proprietors of the house in the valuation roll, which the over-landlord acknowledges and holds as good intimation to himself. This was, in my opinion, sufficient to complete the transfer as in a question with the cedent, and put it beyond his power to cancel or recal it without the assignees' consent.

But the question remains, whether this last assignation so completed as to be valid against the cedent, is nevertheless bad in a question with creditors as a gratuitous alienation by their debtor to their prejudice when insolvent? On this question the defenders maintain, 1st, that the cedent was not insolvent at the date of it; and 2d, that it was granted for just and reasonable cause. The Lord Ordinary has sustained the second contention. I am disposed to sustain both. I think the reasonable conclusion from the whole evidence is that the cedent was solvent in June 1879, the date of the assignation, and that the insolvency of his estate ascertained after his death in 1881 is accounted for by circumstances supervening after the assignation, and

the manner in which it was realised. Then in considering the question whether the assignation was made for just cause, I am not disposed to separate it sharply from that which I have just dealt with. The law appealed to is a rule of the law of bankruptcy directed against fraudulent alienations to conjunct and confident persons who may be willing to aid an insolvent to put his property beyond the reach of his creditors, and I think it is not applicable here, for on the evidence I am of opinion that in 1879 the cedent was as solvent as he probably ever was during his long life, although his sudden death and a forced realisation of his effects might possibly have proved disastrous then as it did in 1881. He had just built a house at a cost of about £200, chiefly, if not entirely, with the aid of the earnings of his wife and daughters, and his desire to secure the house to his daughters was, I think, quite creditable, and with no favour about it of the kind struck at by the Act 1621, or any rule of the bankrupt law. I do not think it necessary to the defence of the proceeding that it should be represented as a purchase by the daughters for a price paid down. He might possibly, or certainly, have appropriated their earnings without any equivalent, but having taken them to build the house, I am not of opinion that, looking to the evidence regarding his circumstances at the time, he acted dishonestly by his creditors or in violation of the bankrupt law by securing the house so built to them by an assignation of the lease.

I am therefore of opinion that the pursuer is entitled to decree of declarator and reduction against Peter Morrison with respect to the assignation of the shop lease, and with expenses, and that the daughters Mary, Margaret, and Ann Morrison are entitled to absolvitor as regards the assignation in their favour, and, of course, with expenses. With respect to the mother, Mrs Morrison, she appears to me to have no interest whatever in the case except such as she may take as her children's mother, and I am of opinion that she ought to be assoilzied, and with expenses.

Lord Rutherfurd Clark—The two assignations under reduction were executed by Duncan Morrison on 24th June 1879. They bear to be gratuitous deeds. One was granted in favour of his son, a lad about sixteen; the other in favour of his three daughters, two of whom were about twenty-one, while the third was about thirteen. They assigned the only heritable property of which Morrison was possessed, being the greater part of his estate. The one assignation conveyed to the son the lease of the ground on which his shop was built; and the other conveyed to the daughters the lease of the ground on which his house was built. Till his death Morrison carried on his business in the shop, and lived in the house with his wife and such of his family as were not engaged in service. He died in February 1881. Previous to his death he was, according to his own admission, insolvent, and his estates were sequestrated on 18th March 1881.

The assignations are challenged as being in contravention of the Act 1621. They are maintained on the ground, 1st, that at their date Morrison was solvent; and 2d, that they were granted for true, just, or necessary cause as a provision for his children.

1. The Lord Ordinary has held that Morrison was insolvent when the assignations were granted, and I think that he is right. The trustee represents creditors whose debts were incurred prior to the assignations, and which remain unpaid. I hold with the Lord Ordinary that the insolvency which undoubtedly existed at Morrison's death must be presumed to have existed at the date of the assignations, and, in my judgment, nothing has been proved by the defenders to remove the presumption. Indeed, the circumstances that by deeds *ex facie*, and as I think in fact gratuitous, he assigned to his children the leases of the ground on which his shop and house were built, and which constituted the chief part of his estate, seems to me very strongly to indicate, that feeling and knowing himself to be in pecuniary embarrassment he was desirous of putting this property beyond the reach of his creditors.

2. The deeds bear to be gratuitous. I have considerable doubt whether in such a question as this it is open to the granters to allege and prove, contrary to their tenor, that they were granted for onerous considerations. But it is very clear to my mind that if they are allowed to do so, the allegation of onerosity must be very precise and supported by abundant evidence.

The only allegation is that the assignation was granted by Morrison as a provision to his children, or, in other words, that the only onerosity consisted in his obligation to make a provision for their support. In my opinion the allegation is not relevant, and should not have been remitted to proof. An insolvent father cannot make provision for his children at the expense of his creditors. His obligation to provide for them is not a just term or necessary cause within the meaning of the Act 1621. So the Lord Ordinary has held with respect to the assignation in favour of the son.

But the daughters, though they make no other allegation than that to which I have referred, have endeavoured to show by the evidence that they gave a money consideration for the assignation in their favour. They say that from their earnings as laundresses, and from money derived from lodgers, they obtained and gave to their father the money which enabled him to build the house at a cost of £200 to £250. I never heard a more improbable story, or read a more unsatisfactory proof. One of the *pro indiviso* assignees was at the date of the deed a girl of thirteen or fourteen. She could not have earned anything approaching to the value of her share, and I do not understand that her sisters desired to communicate to her a part of their own earnings. Even if I were to hold that the profits of the laundry and lodgers belonged to the daughters, they would not nearly amount to the cost of the house. But I see no reason for thinking that those profits did belong to them. The laundry was carried on in Morrison's house, and the supplies necessary for it were obtained from his shop. The lodgers lodged in Morrison's house, and the daughters gave only such services as were required of them when at home. But during all the time they were maintained by their father, and if the cost of their maintenance was less than the value of their services, the difference must have been inconsiderable. Besides, the profits from both services were partly earned by the labour of their mother, and her earnings of course belonged to her husband.

I am therefore of your opinion that the pursuer is entitled to decree.

But even if the Act of 1621 did not apply, I think that very grave obstacles lie between the defenders and success. I doubt if the assignations were ever delivered. I do not think that possession followed on them. I should be disposed to hold that the father was not divested, that the leases formed part of his estate, and that whatever obligation he may have undertaken to his children, these obligations do not pass against the trustee except for a ranking. But into these matters I do not further enter, as they are not necessary for my judgment.

The Lord Justice-Clerk concurred with Lord Young.

Lord Craighill was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor; sustain the reasons of reduction in so far as regards the assignation dated 24th June 1879, made and granted by the deceased Duncan Morrison, merchant in Poolewe, in favour of the defender Peter Morrison, of the minute of lease libelled, and reduce, declare, and decern in terms of the conclusions thereanent; *quoad ultra*, repel the reasons of reduction and assoilzie the defenders Margaret Morrison, Mary Morrison, Annie Morrison, and Mrs M'Lean or Morrison, from the conclusions of the action," &c.

Counsel for Pursuer (Reclaimer)—Jameson—Guthrie. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders (Respondents)—Campbell Smith—Nevay. Agent—William Officer, S.S.C.

Saturday, October 27.

SECOND DIVISION.

[Sheriff of Perth.

M'DONALD *v.* GLASS.

Parent and Child—Filiation and Aliment—Evidence—Presumption—Intercourse subsequent to Conception of Child.

Where in an action of filiation and aliment the defender admits connection during the term of pregnancy, and it is proved that he has had the same opportunity of intercourse with the pursuer both before and after the date of the conception of the child, that admission, coupled with the pursuer's oath, may be sufficient to induce the Court to grant decree in her favour.

The pursuer in this action of filiation and aliment was a domestic servant in the employment of the defender's father, and alleged in her evidence in the cause that a child of which she was delivered on 28th November 1882 was the fruit of carnal intercourse between her and the defender which began in the month of February, and was renewed at intervals down to the end of April 1882. The defender denied on record the pursuer's allegations as to any familiarity having existed between them, but in the course of his examination at the proof he stated that he had connection with her in July on several occasions on which she had come to his bedroom, and that a few weeks afterwards she said that she was pregnant. He denied having had connection with her before that date. It appeared from the evidence of the pursuer's mother that the defender admitted to her having had connection with the pursuer, and although he denied having made any such admission with reference to the period at which the child must have been begotten, the pursuer's mother deponed that she understood him then to admit the paternity of the child. A lad named Winton, fifteen years of age, whom, as well as another man, the defender alleged to have been improperly intimate with the pursuer, deponed that on one occasion in answer to a question by him the defender had admitted improper intimacy with the pursuer. It was proved that while the pursuer was in defender's father's service he had frequent opportunity of being alone with her in the kitchen.

The Sheriff-Substitute (Barclay) found, "as matters of fact—1st, The pursuer was delivered of a female child on 28th November 1882; 2d, The defender admitted sexual intercourse with the pursuer (not on the record but on oath) in the month of July 1882; 3d, That the facts and circumstances were not sufficient to fix the paternity of the child born in November 1882 on the defender: Therefore assoilzied him from the prayer of the petition.

"*Note.*—This is somewhat of a difficult and doubtful case. It is not unusual for a defender in this class of cases, probably because of some mental operation of casuistry or force of conscience, to admit sexual connection, but guardedly to place it anterior or posterior to the time of conception, so as to avoid the consequences of paternity of the child in question. The pursuer, in the record, averred frequent connection from the months of February 1882 to April the same year. The defender simply denied the statement, but he did not aver or confess connection in the month of July the same year, as he did on oath on his own cross-examination. The pursuer did not aver connection after the month of April, and so in strict pleading the defender was not bound to go beyond the period averred by the pursuer. The omission, however, to state the fact on the record is a circumstance not favourable to the defender. There is an obvious distinction between an admission of connection anterior and one posterior to the time of conception. Where there was the same opportunity of continued intercourse subsequent to the date of admitted connection, it is very difficult to get rid of the presumption of renewed connection corresponding to the date of conception. But where the admission of connection is posterior to the date of conception of the child born subsequently, there must be very clear proof that at the time of conception of the child there was such intimacy that could have fixed the paternity on the defender independent of the admission of connection.

"In this case there is no such proof of familiarities at the time of the conception as could have fixed the paternity of the child conceived at that time. The only proof is the pursuer's mother, and a hasty expression spoken by the defender to an inquiry put to him by Winton. Had this case been otherwise proved, it would have been almost fatal to his defence, seeing that he had no cause for making inquiry at Winton had he himself been