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

conscious of innocence. It is also to be taken into consideration that a worthless and abandoned woman might seek the embrace of a man after conception with the view of fathering on him her child, conceived by another man who had left the country or was unable to meet the woman's demands. But certainly there are no such circumstances in this case. The defender ought not to have raised the side issues. A defender in this class of cases ought to stand on his own innocence, and not seek to shield himself by inculpating others. In this case the defender has certainly failed in his proof, more especially from the extreme juvenility of one of the supposed parents.

"On the whole, as has already been said, the Sheriff has found the case one far from being free of difficulty, but, on the whole, the evidence does not fully support the pursuer's case of the child born in November 1882."

On appeal the Sheriff (MACDONALD) adhered.

The pursuer appealed, and argued—In a case of filiation and aliment decided in the Second Division October 24, 1883, but unreported (*Milne* v. *Thomson*), the defender, while admitting connection four months before the birth of the child, adduced a witness who admitted connection nine months previous to birth; the Court notwithstanding gave decree for the pursuer. In the present case the defence was much weaker; the defender admitted connection though within four months of the birth of the child. He had had the same opportunity of it both before and after the date of conception, and the admission, coupled with the oath of the pursuer, were sufficient to prove the case.

Argued for the defender—The pursuer had failed to prove her case. The admission of the defender of intercourse at a time which could not have been that at which the child was begotten was in his favour. It was not an admission extorted in examination by the pursuer, but one voluntarily made, though he was not bound to make it. The case was one such as was pointed out by Lord Neaves in *Ross* v. *Fraser*, May 13, 1863, 1 Macph. 783, where a pursuer, after she knew herself to be pregnant, desired for reasons of her own to establish terms of intimacy with a man in the defender's position whom it would seem easy and natural to charge with the paternity.

At advising—

LORD JUSTICE-CLERK—I have no doubt whatever about this case. The Sheriff-Substitute calls attention to the fact, and it is not immaterial, that the admission on which so much is founded was not on record. The defender denies there entirely any connection with the pursuer, and there is no qualification of it. When examined he not only admits the connection, but founds on a long conversation as to the period when the connection took place.

Now, where a man admits connection, even though it is during the period of pregnancy, and when he has had the same opportunity of connection before as after it, that, coupled with the evidence of the girl, may be sufficient to lead the Court to a conclusion of the paternity adverse to the defender. What Lord Neaves said in the case of *Ross* is not applicable in circumstances other than those which he suggests in the passage from his judgment which was referred to. The circumstances he there supposes do not exist here. Here the defender never set up that defence when first charged, and the conversation between him and the mother is entirely inconsistent with that view. It is true the mother may be speaking falsely, but it is difficult to believe she could have forgotten what had been said so recently.

On the whole, I am satisfied on the proof that the Sheriffs' judgments are wrong.

LORD YOUNG—I am of the same opinion, and so clearly that I should not feel it necessary to add a single word were it not that we are altering the judgments of the Sheriffs; but I agree that the evidence here does not in any reasonable view support the conclusions at which they have arrived. The pursuer gives distinct evidence that the defender and none other had had connection with her, and that he was the father of her child. That statement is now admitted to evidence by the law of Scotland, and we consider what it is worth according to the credit which we give to the witnesses. She was a servant in the defender's father's house, and only seventeen years of age when he paid his addresses to her, and she felt with child and gave birth to it in November 1882. Now, what is the defence? He says that he did take up with her, but he confines it to this, that a month or so before she told him, in August, that she was with child, he had had connection with her. Now, credit is taken, and perhaps reasonably, for his being a truthful witness in admitting what could not otherwise be proved; this, however, is not evident to me. But the Sheriff-Substitute says in his note—"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." However, we next take it as proved that he had had intercourse with her in his father's house, and though he says it was in July she says it was in February. Which are we to believe? I am inclined to believe the girl. Again, the Sheriff-Substitute further on in his note says—"There is an obvious distinction between an admission of conception anterior and one posterior to the time of conception. Where there was the same opportunity of continued intercourse subsequent to the date of the 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." Now, I take the liberty of saying that there may be such a distinction, but it is not always necessarily so. Where you have connection anterior to the date of conception admitted or proved, it is so likely to have been continued, that if the woman swears to it, and the child is born at a period conform to it, it disposes me to believe her story. But that is all that can be said. But where you have connection posterior to it, it may have exactly the same effect, for if it is not likely that the anterior connection was the end of

it, it is as little likely that the posterior connection was the beginning of it. In either case it gives credit to the woman's story, and disposes one to believe her. I hope it will be understood that my observations are of a general nature, for there undoubtedly may be cases the circumstances of which show the importance of the distinction between connection anterior and connection posterior to the date of conception, when such connection is admitted or proved. But it is of no moment here; if he was in the habit of having connection with the girl either before or after the date of conception, the admission of either fact disposes me to believe that he had connection at the period averred by the girl.

These remarks are entirely in harmony with your Lordship's opinion, and have been only prompted by what I look upon as an erroneous statement by the Sheriff-Substitute in his note.

Lords Craighill and Rutherfurd Clark concurred.

The Court sustained the appeal, and found it proved that the defender was the father of the pursuer's child.

Counsel for Appellant (Pursuer)—Lord Advocate (Balfour, Q.C.)—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for Respondent (Defender)—Trayner—Rhind. Agents—Begg & Murray, Solicitors.

Wednesday, October 31.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

STEWART *v.* THE GLASGOW TRAMWAY AND OMNIBUS COMPANY (LIMITED).

Reparation—Carriage—Passenger thrown from Tramway Car.

A passenger directed the conductor of the tramway car on which he was travelling to stop the car. The conductor rang the bell for that purpose, and the car slackened speed, but the passenger, finding that he was being carried past his destination, himself pulled the bell, and then descended on to the step, and thence to the street. While he was doing so the driver, thinking the second ring was the signal to proceed, took off his brake, and the car went on, with the result that the passenger was thrown from the step of the car and injured. In an action by him against the company owning the car, the Court *assoilzied* the defenders, holding that the cause of the accident was not the fault of their servant, but that of the pursuer himself.

This was an action at the instance of John Stewart, a clerk in Glasgow, against the Glasgow Tramway and Omnibus Company (Limited), concluding for £250 as damages for injuries caused to pursuer by the alleged fault of the defenders.

On Friday the 19th January 1883 the pursuer, along with a friend (named David Gray), entered a car belonging to the defenders in New City Road. The pursuer was lame in his right leg, and walked with a limp. When the car arrived at Bath Street they told the conductor to stop the car, which was at the time descending a considerable incline. The conductor pulled the bell, and Gray left the car while it was slowing. The car did not stop immediately, and the pursuer rang the bell and descended to the step. The driver of the car, who had never stopped it altogether, thought the ring of the pursuer was the signal to go on, and took off his brake and went on. The pursuer, who was at that moment descending to the street, in consequence fell heavily on to the street, and sustained a compound dislocation of the thumb and severe shock. More than one witness spoke to the pursuer's appearance as indicating that he had been drinking, but a medical man, to whose house in the same street he immediately went for treatment, deponed that he was perfectly sober, and this evidence was corroborated by his companion, and other friends with whom he had passed the earlier part of the evening.

After a proof on the 22d May 1883 the Sheriff-Substitute (Lees) pronounced the following interlocutor:—"Finds that on 19th January last the pursuer was a passenger by one of the defenders' cars, which arrived at Bath Street shortly before 11 p.m.: Finds that the pursuer, being lame, requested the conductor to give the signal to the driver for the car to be stopped in order that he might get out: Finds that the conductor accordingly rang the bell, and that the driver slackened his pace, but did not stop the car, and that the pursuer being afraid to get out whilst the car was descending the hill, and at the same time agitated at being carried past his destination, again rang the bell two or three times: Finds that the driver, without ever having brought his car to a stop, took off the brake, and let the car go forward: Finds that the pursuer, either through his lameness, or through the impetus given to the car, or through both, fell off the car on to the street, and sustained a compound fracture of his right thumb, whereby he has suffered much pain, and has incurred heavy medical expenses, and been incapacitated for his work, and has been to some extent permanently disabled therefor: Finds that in these circumstances the defenders are liable to him in compensation for the loss and injury he has sustained; assesses the sum to be paid to the pursuer at £50; decerns against the defenders for payment of said sum to the pursuer, with the legal interest thereon from the date hereof till payment: Finds them liable to the pursuer in his expenses," &c.

"*Note.*—The pursuer is forty-two years of age, and has been for the past ten years in the service of the Caledonian Railway Company as a clerk; and the fact that during the period he was disabled from working they paid him his wages regularly testifies alike to their opinion of the pursuer and to their generous treatment of him.

"As it seems to me, the vital point in this case is, Was the driver of the car seeking to bring it to a stop when the accident occurred? I am unhesitatingly of opinion that he was not. Not unnaturally there is some conflict of evidence on the point. But it is not disputed that till the accident occurred he had never stopped the car, and he himself admits—and it is proved by other witnesses—that, looking round and seeing the pursuer standing on the rear platform of the car, he took off his brake, and let the car go forward. This fact and his lameness are the causes that the pursuer assigns for his fall off the car. The