The Court pronounced the following interlocutor:—

"Recal the judgment of the Sheriff: Sustain the first plea for the defender Wright, and assoilzie him from the conclusions of the action."

Counsel for Appellant—Guthrie Smith—Shaw. Agent—John Gill, S.S.C.

Counsel for Respondent—Lang—Ure. Agent—Thomas Carmichael, S.S.C.

Wednesday, May 20.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MURRAY *v.* STEEL & SONS.

Process—Appeal—Removal to Court of Session—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 6.

The pursuer brought an action in the Sheriff Court against the defenders, his employers, concluding for £1000 in respect of bodily injury sustained, as he alleged, owing to their fault. On the record being closed he appealed for jury trial. The verdict was for pursuer, damages £150. On motion to apply the verdict with expenses, the defenders moved that only Sheriff Court expenses be allowed, on the ground that pursuer had (as was admitted) been successful on the grounds introduced by the Employers Liability Act, and the Legislature by providing that all actions under that Act should be brought in the Sheriff Court, contemplated their decision by that tribunal. The Court overruled the defenders' motion, and *applied the verdict* with the usual expenses applicable to an appeal for jury trial.

Counsel for Pursuer—Rhind—Gunn. Agent—R. Stewart, S.S.C.

Counsel for Defender—Jameson—Ure. Agents—Cuthbert & Marchbank, S.S.C.

Wednesday, May 20.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DOIG AND ANOTHER *v.* BUCHAN.

Parent and Child—Bastard—Aliment.

A woman gave birth in 1851 to a bastard child. The alleged father, while paying a share of her inlying expenses, refused to acknowledge the paternity of the child, and she supported it entirely herself till 1857, when they entered into an agreement, by which she renounced all claims on him for past aliment of the child, and he acknowledged the paternity, and promised in future to support the child, so far as he was able, till it could support itself. He entirely failed to implement this agreement, and in 1884 she raised an action against him for his share of the child's aliment at the rate of £8 per annum from the date of its birth. The Court *awarded* £40 as the amount due in the circumstances by him to her from the date of the agreement till 1865, when the child attained minority.

Father's Offer to Provide Suitable Home for Bastard Child—Aliment.

Observations (*per* Lord Young) as to the effect which the rejection of the father's offer to provide a suitable home for his bastard child has in extinguishing the mother's claim on him for the child's aliment.

Margaret Law, who was formerly a domestic servant, on the 19th May 1851 gave birth to an illegitimate male child, of which she alleged that Walter Buchan, market gardener at Muirhouses, Linlithgow, was the father. The latter refused at the time to acknowledge the paternity, and she alone continued to support the child herself till 1857. In August of that year, however, they executed a deed of agreement and discharge, in which she renounced and discharged all claims against him for bygone aliment of the child, or for repayment of any money disbursed by her for the maintenance, clothing, and upbringing of the child; in consideration of which, and, on the other part, he thereby acknowledged the child as his son, and engaged and promised thenceforth to aliment and support the child, so far as he might thereafter be able to do so, while the child was unable to earn his own subsistence. He did not after the agreement pay anything for the child's aliment. He paid 30s. for inlying expenses. The child attained minority on 19th May 1865. The mother in November 1873 married John Doig, surgeon at Bathgate, and with consent of her husband, in 1884, raised this action against Buchan to have him ordained to pay the sum of £152, 18s. 5d., as the balance of inlying expenses attending the birth of the child, and aliment at the rate of £8 per annum from the date of the birth until the child arrived at minority on 19th May 1865.

In defence the defender stated that he had never admitted that he was actually the father of the child, and he made no such admission now. As to aliment prior to the agreement, he founded on the discharge. He stated that in 1857 he had been rendered incapable of regular work through his hand being shattered by the bursting of a gun, and was unable till the winter of 1859 to resume his employment; that in 1880 he became, for the first time after his injury, able to contribute towards the aliment of the child; that in and about that year he made offer to the pursuer to take custody of and maintain the child, which was then about nine years of age, and to aliment him in family with himself, and also offered to have the child bound as an apprentice to any trade which the pursuer might choose; that these offers were declined by the pursuer, who absolutely declined to part with the boy. "In respect of said offers and refusal, the defender's liability to contribute anything towards the support of the child ceased and determined; and this was well understood and acquiesced in by the pursuer."

He also stated that for nearly a year before he offered to take the child the boy was working in the pottery works at Bo'ness, and earning about a shilling a-day; that he was always a strong, healthy lad, and was able to earn his own subsistence from an early age; that he (defender)

had, moreover, as occasion required, assisted him with various sums of money, and since he grew up had helped to start him in business.

"(Stat. 7) The defender's liability is thus entirely excluded by said discharge and agreement, the defender's offer to undertake the custody and alimenting of the boy, and the boy's ability to earn his own subsistence. Moreover, this result has been understood and acquiesced in by the pursuer, who, since the defender's said offer in 1860, has not, until within the last few months, made any claim for aliment against the defender. Her demands are thus absolutely barred by *mora* and taciturnity."

The defender, however, under reservation of his pleas, judicially tendered £20 in full of the pursuer's claim.

Proof was led, the import of which sufficiently appears in the Lord Ordinary's note and the opinion of Lord Young.

The Lord Ordinary (KINNEAR) decerned against the defender for the sum of £20.

"*Opinion.*—The pursuer has failed to establish any ground for setting aside the discharge of bygone aliment. The case for reduction would be a very unfavourable one if the evidence of deceit were much stronger than it is, for the discharge is dated in 1857, and no claim for the aliment then past due appears to have been made till shortly before the action was raised; and then it would appear from the evidence that the claim was brought forward for the purpose of compelling the defender to contribute towards payment of a debt for which he is no way liable. But upon the evidence I am satisfied that the discharge expresses fairly the terms to which the pursuer agreed, viz., that if the defender would acknowledge the paternity of her child, and his liability for future aliment, she would make no claim for bygones. The discharge does not bar the claim for the period subsequent to its date. But I have some doubt whether the defender has not sufficiently established his defence that he is relieved of liability by an offer, which the pursuer refused, to take the child into his family, and bring him up with his legitimate children. On the whole, however, I have come to be of opinion that the pursuer may still be entitled to insist upon her claim for the period between the discharge and the time when the boy was able to work for himself. But the sum of £20 tendered by the defender is sufficient, in my opinion, to satisfy that claim. The pursuer is equally liable with the defender for the support of her child, and her claim against him is for a rateable contribution only. But her statement is that during the period in question she paid £4 a year for the child's maintenance. Assuming that the defender is liable to contribute his share for her relief, and keeping in view the evidence as to the time when the boy began to work for himself, I think the sum tendered sufficient."

The pursuer reclaimed, and argued—The sum awarded by the Lord Ordinary was in every aspect of the case inadequate, for even if the agreement were to be founded on (and it was little better than a compromise of certain rights between the parties) it was proved that the defender had only paid 30s. in fulfilment of his obligation. The pursuer had supported the child entirely for the first six years. The time up to which aliment was held legally due to a bastard child by the father was stated by Erskine and Bell to be till he attained the age of puberty—*Clarkson* v. *Fleming*, July 7th 1858, 20 D. 1224. The cases of *Lamb* v. *Patterson*, Dec. 6th 1842, 5 D. 248; and *Patrick* v. *Gordon*, 26th Nov. 1845, 8 D. 138, were cases in which the Court awarded the aliment on a higher scale than that adopted by the Lord Ordinary. The pursuer was fairly entitled to £8 for six years from the date of the agreement. The plea of *mora* could not be sustained. In the case of *Moncrieff* v. *Waugh*, Jan. 11th 1859, 21 D. 216, the child was born in 1817, and the action for aliment not raised till 1856.

The defender replied—The main purpose of the agreement was that he should acknowledge the child. He was unable, owing to an accident to his thumb, to support it, and he only bound himself to do what he could for it in the future. But the pursuer's claim was barred by the offer which he made to provide a suitable home for the child. This was proved most clearly. It was a serious and deliberate offer to take the child and it was refused by the pursuer in such circumstances as extinguished her claim—*Grant* v. *Yuill*, Feb. 29th 1872, 10 Macph. 571; *Dunnet* v. *Campbell*, Dec. 11th 1883, 11 R. 208. The earlier cases fix 7 years, up to which a boy is entitled to be alimented. Lastly, it was proved that at the time in question the sum usually given was £4 per annum from each of the parents, so that according to the county practice the sum awarded by the Lord Ordinary was ample.

At advising—

LORD YOUNG—This is an ordinary action of filiation and aliment, notwithstanding that it is brought at so unusually long a period after the birth of the child, and the first question which presents itself in the case is, whether the paternity has been proved? It is denied on record, but it has beyond all question been proved and is not contested in the argument submitted to us. The child was born in May 1851, and it has been proved, and is not now disputed, that the defender is the father. Now, the only other question is, what is the pecuniary measure of his liability to the mother as such? He paid 30s. of inlying expenses at the time the child was born, but he has paid nothing since, for I take no account of his own statement in evidence that he gave to the grandmother some coals, and on several times when he met her 1s. The fact is that his contribution to the maintenance of his bastard child has been 30s., and only that. There is some explanation made as to why he entirely failed to do his duty to the mother. It is said he met with an accident to his thumb, and we may take this as some explanation why he left the whole burden to the mother till 1857. But in 1857 she made an agreement with him, and he with her, whereby she renounced all claims against him for the burden which she had previously borne alone, he undertaking to bear his part in the future. I do not think it is necessary to enter into the question whether he only agreed to contribute a share only, or which would be the more fair reading, that as the mother had borne the burden before, he should altogether undertake it for the future. The fact is, he made the agreement and under it he did nothing, and altogether failed to implement it. But he says in evidence,

and there is something to support it, that he offered to take the child home when he was 7 or 8 years old. I do not think that was a serious offer at all. Very likely he spoke of it, as indeed he says he did, and when the mother objected he went away saying no more about it. Now, neither on principle nor on authority do I consider myself at liberty to hold that such an offer relieved him of his obligation and placed it entirely on the mother. I do not enter on the question of law, for I do not think it arises. The cases in which the Court will or will not sanction an offer by the father of an illegitimate child to provide it a suitable home are each a rule for themselves. A father may say, "I cannot afford a money contribution, but my mother or sister (it may be) will take care of the child till it is of an age to support itself, and I discharge my duty by making this offer." Well, there are no doubt circumstances in which the Court will sanction such an offer. In one of the cases cited to us—*Grant* v. *Yuill*—the girl was ten years of age, and the father, who was unable to contribute money, offered to provide a suitable home for her in the house of his sister, who lived in a farm-house, and of whose willingness and fitness to do so the Court were satisfied. There the Court sanctioned the offer and refused decree for money against the father. But no question of the kind arises here, and I repeat in passing that in my judgment all such questions are questions always of circumstances.

But we have to determine the pecuniary obligation of the father, who has only contributed up to this time 30s. Now, from 1857 he is certainly liable, for according to all the evidence before us the burden was on the mother till he attained the age of fourteen, when he first began to earn money for himself. But it is not necessary to pitch on any particular period. I think his pecuniary obligation, taking it from 1857, when the child was six, is not measured by £20. I think it is too small a sum. With the permission of your Lordships I asked Mr Scott if he would be content with £40. He replied in the affirmative, and I think too large a pecuniary obligation will not be placed on him by fixing the sum at £40. I therefore propose that we should find the paternity proved by holding that he is father of the child, and that in the circumstances of the case we should decern against him in favour of the pursuer for £40.

Lord Craighill—I concur in every word which has been said by your Lordship and in the judgment proposed.

Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"The Lords . . . find that the defender is the father of the female pursuer's child libelled; ordain him to make payment to the pursuers of the sum of £40 sterling: Find the pursuers entitled to expenses: Remit the same to the Auditor to tax and report, and decern."

Counsel for Reclaimers — Scott — Gardner. Agent—Thomas M'Naught, S.S.C.

Counsel for Respondent—Jameson—M'Lennan. Agents—J. & A. Peddie & Ivory, W.S.

Wednesday, May 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

COLVIN (BRENNAN'S EXECUTOR) *v.* TURNER AND OTHERS.

Succession — Testament — Holograph Writing headed "Will of," and Subscribed by Maker.

In the repositories of a person deceased was found a pencil writing consisting of a list of names and figures, and having written at one side of it the words "Will of John Brennan." These figures and words were not in themselves intelligible without extrinsic evidence of their meaning. *Held*, after a proof, that while it is not necessary that a document relied on as a will take the form of a proposition or completed sentence, the document in question was by its own appearance, and also by the parole proof, shown to be only a memorandum, and not to have been intended as a completed will.

John Brennan, grocer, Dumfries, died on 31st January 1884. There was found after his death among his papers the following writing written in blue pencil:—

"3-500

'1000 Fr. Turner.
300 Altar.
500 Sisters.
100 Masses.
100 Do.
100 Nephew.
100 Infirmary.
100 Poor.
100 Fr. Macmanus.
100 Lord Douglas.
50 Matthew.
100 Hutchison and Books.
50 Blind.
20 Grave, &., &.
Watch, Chain, and Body-Clothing, and 50 St Vincent de Paul.'

Will of 'John Brennan.'

£1 per week to father."

This was an action of multiplepoinding in which John Colvin, executor-dative *qua* tutor and administrator-in-law of his pupil son John Colvin, the next-of-kin of the deceased John Brennan, was the pursuer and nominal raiser, and the various persons who might allege an interest under the said settlement were defenders, Joan Hutchison being the real raiser.

The averments in the condescendence were as follows:—"The first defender called is the Reverend William Turner, Dean of St Andrew's Roman Catholic Church, Dumfries. The deceased John Brennan was a Roman Catholic, a member of St Andrew's Roman Catholic Church, and on very intimate terms with the Dean thereof. He is therefore presumed to be the 'Fr. Turner' to whom the £1000 is bequeathed. The immediately succeeding bequest, or apparent bequest, viz., '300 Altar,' is presumed to be a legacy or offering of £300 to the altar of St Andrew's Roman Catholic Church, or some other church. The two bequests, or apparent bequests, viz., '100 Masses' and '100 do.,' are presumed