case at all, because I think that the demand for the dues must be made at the time the cattle enter into the town. I quite agree that a party conveying any large number of sheep or cattle may well arrange with the Magistrates to pay periodically, but that is a private agreement, and if there is no agreement, and the cattle are allowed to pass, the remedy is gone. The English case was a totally different case from this. It was founded upon a privileged Act of Parliament, and the decision depended upon the construction of the words of that Act of Parliament. It did not deal with petty customs, but related solely to dues upon cargoes of coal, and although consignees were liable in a certain event, that was a statutory liability which could form no authority in this case. With reference to the demand upon the defenders to disclose the names of their customers, I think it is most preposterous. It would mean that all who assisted in introducing cattle into the burgh were to be liable jointly and severally for the dues.

LORD M'LAREN—We have not before us the terms of the Crown grant, but it is admitted that it is a grant of small customs in general terms to be levied upon goods brought into the burgh for sale. While we are not able to do anything further for the Magistrates, I think we may at least give our opinion as to the nature of their right, because they have a right under their charter. I think the only right they have is this—that as a condition of admitting cattle or bestial into the town for sale they may demand the dues which custom has authorised. It is not like a contract right where you pay for admission upon a contract made with the public. It is a right flowing from the grant of the Crown and within the powers of the Crown. Nor is this a lien, because that is a right of detaining a thing until some charge is paid. But this is only a right of refusing to admit cattle into the town until the dues are paid. Now, supposing that a port with a gatekeeper is established, and the cattleman or person in charge of the cattle is not in a position to pay, but he being duly authorised says "My employer is so-and-so, and if you will keep an account he will pay you," then a personal contract is set up upon which, I doubt not, the consignor of the cattle could be sued. But I will go further and say that the mere fact of the cattle being admitted after a demand for payment had been made would go a long way to enable the Court or a jury to infer that there was in fact an agreement to give credit, because in the case supposed the person charged with levying the dues waived his right of exclusion on the understanding that the dues would be paid. I agree with your Lordships that the liability attaches only to the person who is in possession of the beasts at the time when they enter the town, or it may be against anyone who, although not in possession, comes forward and voluntarily guarantees payment. As regards the present case I have great doubt whether any claim exists apart from the demand made at the time of the admission of the bestial into the burgh; but I think the Sheriff has exercised a proper discretion in allowing the limited proof that he has in order to raise this question. On the second part of the case—the conclusion for exhibition—it appears to me to be a new and alarming extension of the right of search for enemy's goods, and I need hardly say there is no authority for it. You must first find your debtor, and after you have brought an action against him you will get a diligence against his agents to recover excerpts from their books showing how many cattle passed through his hands. I also agree with your Lordships with regard to the *Harwich* case. It gives us no assistance, because a decision upon the construction of one royal or parliamentary grant can be of no authority on the question of the effect of a grant expressed in different terms on a different subject-matter. I agree that we should affirm the interlocutor.

LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the Sheriff-Substitute's interlocutor of 29th November 1899: Find that the pursuers moved for and that the defenders did not object to proof being allowed of the following averments in article 3 of the condescendence, viz.—"There have been brought for sale within the said burgh by the defenders the number of cattle, horses, sheep, pigs, or other bestials mentioned in the list herewith produced": Therefore allow to the pursuers a proof of the said averment and to the defenders a conjunct probation: *Quoad ultra* find that the pursuers' averments are not relevant or sufficient in law to support the conclusions of the summons, and decern: Find the appellants liable to the respondents in the expenses of the appeal," &c.

Counsel for the Pursuers — Solicitor-General (Dickson, Q.C.)—Reid. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders—Salvesen, Q.C. —M'Clure. Agents—Simpson & Marwick, W.S.

Thursday, February 15.

FIRST DIVISION.

[Sheriff Court of Aberdeen.

A B *v.* C D's TRUSTEE.

Parent and Child—Illegitimate Child—Right to Aliment—Contract with Third Party to Support Child.

In an action for aliment at the instance of an illegitimate child against the executor of her deceased father, the defender pleaded that the child was in the custody and under the care of a third party, who had entered into an

agreement with the father to adopt her, and had received from him certain sums of money in consideration thereof, and that the child was accordingly barred from suing for aliment. It was proved that the child, who was twelve years of age, was in delicate health, and was likely to continue so, and that the person with whom she was living was not in a position to continue supporting her without assistance.

The Court *held* that the child's claim to aliment from her father was not barred by an arrangement to which she had not been a party, and that she was entitled to aliment so long as she was unable to support herself, and in the circumstances proved fixed the amount at £20 per annum.

An action was raised in the Sheriff Court of Aberdeen by A B, an illegitimate child, and X Y, a widow, in whose care she was living, against the trustee and executor of C D, the father, who died in 1890, concluding for payment of £30 per annum by way of aliment. The paternity of the child was in the first instance denied by the defender, but at a later stage in the case it was admitted. She was born on March 21st 1886.

The pursuers averred that the pursuer X Y and her late husband, in virtue of an arrangement come to with the mother of the child, adopted her in May 1886 as their own child, and that the sum of £100 was paid to them at that time by the father towards her maintenance; that shortly thereafter the mother had applied to the Court for the custody of her child, but that her application had been refused, and that the child had since been brought up and cared for by X Y and her husband; that in 1889, owing to the ill-health of the child, and the consequent expense of maintaining her, the father was called upon to make a further contribution towards her maintenance, and that an action was raised against him for aliment, which was settled by payment of £70 and expenses.

The pursuers further averred that the husband of X Y had died two years previously without leaving her any means of support, and that she had no means of support but by keeping lodgers, and was only barely able to keep herself.

They averred — "(Cond. 5) The first-named pursuer has been in delicate health all her life, and her survivance is solely attributable to the exceptionally careful and kind treatment of her by her adopted mother, the second-named pursuer. Periodical and severe illnesses have befallen her during her whole life, which for lengthened periods disabled her from attendance at school. She is never likely to be able to earn her own livelihood, for her delicate constitution will prevent her from earning or acquiring any handicraft."

The defender averred that X Y and her husband, under the original arrangement had agreed to adopt the child and maintain her for all future time. He further averred that in respect of the payment made in 1889 above referred to, X Y and her husband granted a formal discharge in favour of the father, by which they jointly and severally accepted the said sum in full satisfaction of all claims for aliment past due and to become due for A B.

The pursuers maintained that the discharge founded on by the defenders was personal to X Y's husband, and that he could not bind his representatives to implement it; and further, that the minor pursuer, not having been a party to it was not bound thereby.

The defender pleaded—"(2) *Separatim*, the pursuer X Y having adopted the said A B as her own child, and having received from the said C D (1) a sum of £100, and (2) a sum of £150 in respect of her having done so, and having granted the discharge condescended on, is barred from suing the present action, and said action, so far as at her instance, should be dismissed with expenses. (3) The pursuer A B, in respect of her being at present in the custody and under the care of the said X Y, and in respect that she is at present being maintained by her, is barred from suing the present action, and the defender should be assoilzied with expenses."

The Sheriff-Substitute (DUNCAN ROBERTSON) appointed a curator *ad litem* to the minor pursuer.

On 13th December 1898 the Sheriff-Substitute pronounced an interlocutor whereby he sustained the defender's second plea, and held that the action was barred so far as at the instance of the pursuer X Y, and to that extent dismissed it, and *quoad ultra* allowed the parties a proof before answer. The evidence clearly established that A B had always been and still was in delicate health.

With reference to her ability to maintain the child, the pursuer X Y deponed—"I have no income whatever of my own beyond what I make by keeping lodgers, and they are not steady but are always coming and going. At present I have three lodgers. I get 15s. from them—5s. each. In addition to that they pay for coal and gas. My friends are always giving me. They paid my rent last six months. That is what I make now, but I have no certainty that the lodgers are to be with me for all time. What my friends give me is only voluntary on their part. To enable me to provide accommodation for three lodgers I require a larger house than I might otherwise have. My rent comes to 6s. 11d. per week, and deducting that from 15s. leaves 8s. 1d. But they are getting tired of it, and turn round and tell me they will not give me it any longer so long as I keep that child. I suppose they assist me for charity's sake, knowing the way I was left. My rent is in arrear just now, about the last quarter, I think. I am not in a position to go on maintaining the child at the extra expense I have been to unless I get into debt, and I do not choose to do that. If my friends did not assist me I am not able to do it. (Q) If they don't assist you what would be the alternative; you would have to give up the child to some-one that would keep it—(A) But I will not do that; I would go as a charwoman first." . . .

The Sheriff-Substitute on 10th April 1899 dismissed the action.

Both pursuers appealed to the Sheriff, who on 24th June 1899 dismissed the appeal.

The pursuer A B appealed to the First Division, and argued—The primary claim of a child was against his father or his father's representatives. It might be enough for the father to say that he was fulfilling his obligation in a particular way. But it was no answer to say that X Y was bound to relieve the trust-estate of a claim at the instance of the child. Even if the contract could apply beyond the joint lives of the parties to it, on a fair construction it came to an end when the ordinary period of maintenance ended. It was proved that X Y was no longer in a position to support the child, and it was admitted that the trust-estate could afford a proper sum. The case of *Pott* v. *Pott*, December 7, 1833, 12 S. 183, formed a precedent for the amount claimed.

Argued for respondent — The contract was clearly intended to subsist during the joint lives of the spouses. At any rate X Y had homologated it after her husband's death by continuing to maintain the child as a matter of duty. The obligation of the father to maintain his child was fully satisfied by this arrangement, under which it was intended to provide for the maintenance of the child, and in accordance with which she had in fact been maintained. The real question at issue was one of fact—Had the child been properly maintained in the past, and would she be so in the future? The evidence showed that the answer to both these questions was in the affirmative.

Lord President — This is certainly a case of some peculiarity, though I cannot say that it appears to me to present any serious difficulty. The action is at the instance of A B, an illegitimate child, now nearly fourteen years old, and X Y, a widow, who earns her livelihood by letting lodgings in Leith; but it was dismissed, in so far as X Y was concerned, by an interlocutor of the Sheriff-Substitute dated 13th December 1898, and on appeal that interlocutor was affirmed by the Sheriff on 24th June 1899. X Y has not appealed to this Court against these interlocutors, so that she has not been a party to the process since the latter date, and the case is no longer complicated by any question relating to her. There was an obvious difficulty in regard to her title to sue, as she could only have sued as a disburser, and an agreement which her husband, now deceased, and she had entered into with C D was pleaded in bar of her claim. It is unnecessary to express any opinion as to whether that plea was, or was not, well founded, as X Y is no longer a party to the process. The sole question has come to be, whether A B has a valid claim for aliment against the estate of C D in the hands of the defender, his sole surviving trustee and executor. I think there is no doubt that C D was the father of the pursuer A B. The paternity was denied down to a late stage in the proceedings, but it is now no longer disputed, and if it were disputed, I should have no difficulty in holding that it is sufficiently proved. What then is the obligation of a father in such a case? It is to provide a reasonable maintenance for his child, according to his rank and means, so long as the child is unable to maintain itself, and the obligation terminates only when the child can maintain itself—probably in most cases about, or shortly after, puberty. But if, owing to some physical or mental weakness or incapacity, the child continues after the ordinary age, to be unable to support itself, the obligation of the father remains, and may continue throughout the life of the child. Now it is clear that in the present case the child is, owing to the state of her health, unable to maintain herself, and although it is to be hoped that her health will improve, there is no immediate prospect of her becoming self-supporting.

How, then, is the obligation of the father said to have been satisfied or discharged? No one save the child herself could discharge her right to aliment; she has not done so in fact, and as till lately she was a pupil, and now is a *minor pubes* without curators, she could not grant a valid discharge. So far, therefore, as the present question arises between the child and her father's estate, her claim remains. But it is said that her father made an agreement with X Y and her husband, by which they undertook, in consideration of certain money payments, to adopt, educate, and maintain the child. It appears to me that we do not require to express any opinion as to whether the obligation undertaken by X Y is valid or invalid. It is said with great force that inasmuch as it was an obligation by a married woman practically for the payment of money it is null, and it is also said that upon a true construction of the agreement, it appears that it was not intended to last throughout the life of the child, but only during the period of childhood, so that it did not impose any obligation to maintain the child after puberty. But however these questions might be decided in an action between C D's trustee and X Y, it appears to me that, so far as the child is concerned, the agreement is *res inter alios acta*, and that it cannot affect her right to aliment from her father's estate. It may be that if C D or his trustee had established liability against X Y to support the child, and she was doing so in fact under that obligation, the child could not have sued, because she was on that hypothesis being alimented by her father through X Y, but no such liability has been established against X Y by C D or his trustee, and even if it had been established it does not appear that X Y is able to fulfil the obligation. It is true that she has been maintaining the child down to the present time, but only with the voluntary assistance of friends, and it does not appear that she can continue its maintenance. But even if she had been able and willing to do so, this would not in my judgment have disentitled the child to establish by action that C D was her father, and to constitute

her claim to maintenance from his estate.

It being thus, in my opinion, clear that the child is entitled to a decree for aliment, the next question is, for what period should aliment be awarded. The action concludes for payment of £30 per annum, and it appears to me that we should only award aliment from Martinmas last, as the child has in fact been maintained down to that date and since, although the question had been made contentious by the action.

The remaining question relates to the amount of aliment, and on that question we were referred to a case decided in 1831 (*Marjoribanks* v. *Amos*, 10 S. 79), when the expense of living was probably not so great as it is now, in which an award of £20 a-year was made, and I think we should be giving a moderate amount if we followed that case and allowed aliment at the rate of £20 a-year, carefully guarding the award by declaring that it should continue only so long as the child shall be unable to maintain herself. We shall make that clear in the interlocutor, and if at any time the child should become able to maintain herself or be otherwise provided for her claim to aliment from C D's estate will cease.

LORD M'LAREN—I think that the judgments of the Sheriff-Substitute and the Sheriff show a correct appreciation of the legal bearings of the case, but that they have come to a wrong conclusion from attaching too much weight to the element of the supposed contract to maintain the child, and too little to the natural claim of the child against her father's representatives. I am not prepared to say that it would be a good defence to an action of aliment to aver that the pursuer was being maintained on the footing of charity or hospitality by some-one who was under no obligation to give support. But neither do I think that in order to exclude the claim of aliment it is necessary to have a legal obligation, holograph or tested, by a person having capacity to grant an obligatory instrument. There are imperfect obligations recognised by law, and if a child be supported on the basis of a contract which the person giving such aliment recognises and acts upon, this may be a good defence to an action for aliment. The question may arise in many ways—thus, a lady may be maintained by her brother because he considers it a matter of social or moral obligation, and if she is well provided for it does not follow that she will also be entitled to aliment from her father's representatives. I only give the illustration for the purpose of reserving my opinion. It is impossible to decide such questions upon general rules.

In the present case I think it is clear from X Y's evidence that she recognised the existence of a duty to the child's father to do what she could to support it, but I am also satisfied that X Y is not in circumstances to give the requisite support. Considering that X Y may contribute to some extent, I think the allowance of aliment proposed is reasonable.

LORD ADAM and LORD KINNEAR concurred,

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff-Substitute dated 10th April and 19th July 1899, and the interlocutor of the Sheriff dated 24th June 1899: Find (1) that the late C D was the father of the pursuer A B; (2) that the said A B is not now in good health and has never been so, and that she is unable to maintain herself; (3) that the defender as trustee and executor of the said C D is, as such trustee and executor, liable to pay aliment to the said A B so long as she is, owing to the state of her health, unable to maintain herself; (4) that £20 per annum is *hoc statu* a reasonable amount to be allowed to the said A B in name of aliment: Therefore decern and ordain the said defender, as trustee and executor foresaid, to pay to the said A B the sum of £20 sterling per annum quarterly in advance so long as she is, owing to the state of her health, unable to maintain herself, commencing the first quarter's payment as at 11th November 1899, with interest at the rate of five per centum per annum on each quarterly payment till paid: Find the defender, as trustee and executor foresaid, liable to the said A B in expenses both in this Court and in the Sheriff Court, and remit the accounts thereof to the Auditor to tax and to report; and find no expenses due to or by the pursuer X Y, and decern."

Counsel for the Pursuer—Kennedy—W. Brown. Agents—Mackay & Young, W.S.

Counsel for the Defender—A. Jameson, Q.C.—Nicolson. Agents—Auld & Macdonald, W.S.

Friday, February 16.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ENSOR'S TRUSTEES *v.* RICHTER.

Succession—Conditio si sine liberis decesserit—Lapsed Share—Accretion.

A testator directed that the residue of his estate should, on the expiration of a liferent, be divided among his nephews and nieces *nominatim*, "equally among them, share and share alike." He declared that the bequest should not vest until the death of the liferenter or his own death, should the liferenter predecease him, and that in the event of any of the nephews or nieces predeceasing the period of vesting, their share should accresce to the survivors. A nephew predeceased the testator without issue, and a niece survived the testator but predeceased the liferenter, leaving a daughter. *Held* that in virtue of the *conditio si institutus sine liberis*