

lands carrying by its very force the right to the immediate possession, and thus determining the occupation of the vendor. From the conveyance the £9499, 18s. 3d. seems to have been apportioned by the jury as compensation for loss of business. But how was that loss occasioned? The answer must necessarily be by the determination on the conveyance of the vendor's right to the possession and occupation of the lands. The conveyance then appropriately goes on to say, "said three sums amounting in all to the sum of £52,658, 6s. 7d." That sum—no matter how you may subdivide it, no matter how you deal with it—is the price to be paid by the railway company in one shape or other for the right to the lands and the immediate occupation, and in my judgment forms the consideration for the sale.

LORD MACNAGHTEN—My Lords, I entirely agree. The Glasgow and South-Western Railway Company required to purchase and take for the purpose of their undertaking certain lands belonging to Messrs Sommerville & Company, who were saw-millers and timber merchants. They were in the occupation of those lands for the purposes of their trade. The railway company gave notice to treat under the Lands Clauses Consolidation Act in the usual form. In answer to that notice to treat Messrs Sommerville & Company sent in their claim; it was a claim in respect of those lands. That was the only claim they could make in answer to the notice to treat. They divided their claim into three heads. That, my Lords, was a convenient mode for enabling the jury to ascertain what was the sum proper to be paid under the circumstances, but still it was purchase money or compensation for the lands, and it was awarded as such—in fact, the jury had no power to award Messrs Sommerville & Company a single farthing except as compensation in respect of the lands.

Now, the Lands Clauses Act prohibits a railway company from entering upon any lands except after payment into the bank, or to the person who claims the compensation, of the purchase money agreed or awarded to be paid. After that it seems to me impossible to contend that this money was not consideration for the sale of the lands.

Judgment appealed from reversed; determination of the Commissioners of Inland Revenue affirmed; respondents to pay to appellants the costs of the appeal to this House and the costs below.

Counsel for Inland Revenue—Att.-Gen. Webster—Lord Adv. Macdonald—Sol.-Gen. Robertson—Young. Agents—W. H. Melville and D. Crole, Solicitors of Inland Revenue.

Counsel for Respondents—Balfour, Q.C.—R. S. Wright. Agents—W. A. Loch, for John Clerk Brodie & Sons, W.S.

COURT OF SESSION.

Wednesday, June 1.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

WESTLANDS v. PIRIE.

Parent and Child—Illegitimate Child—Aliment—Mora—Taciturnity.

In 1886 an action for the recovery of in-lying expenses, and aliment for thirteen years, was raised by the mother of an illegitimate male child born in 1863. The defender admitted the paternity, but alleged that he had paid in-lying expenses at the time of the birth, and, for four years thereafter, had paid aliment, to the pursuer's father, in whose house the child was maintained; that in 1867 he had made an offer to the grandfather to take the child to live with him, which was refused; and that subsequently he had *ex gratia* sent from time to time to the grandfather money for the child's aliment. The child lived with the grandfather until he was seventeen, when he went to live with his mother, who was then married. No claim was made against the defender until just before the action was raised. The Court (*rev.* Lord M'Laren) *assolized* the defender.

This was an action raised in 1886 at the instance of John Westland, carter, residing at 4 B Block, Holyrood Square, Edinburgh, and Elizabeth M'Arthur or Westland, his wife, against George Pirie, carrier and contractor, 63 Loch Street, Aberdeen, concluding for (1) the sum of £2, 2s., being the defender's proportion of in-lying expenses attendant on the birth of an illegitimate male child on or about 12th June 1863, of whom the female pursuer was the mother, and the defender the father; and (2) aliment for the said child at the rate of £10 per annum from 12th June 1863 until the child attained the age of 13 years complete.

The facts of the case were these—The defender admitted the paternity. At the time the defender had connection with the female pursuer she was a domestic servant at Old Deer, Aberdeenshire, and the defender was a farm-servant in the neighbourhood. Immediately after the birth of the child—which took place in the house of James M'Arthur, Mrs Westland's father—the defender paid to M'Arthur £3 for in-lying expenses and aliment, and during the next four years he from time to time paid him further sums of aliment. During these years the female pursuer had two other illegitimate children by other men. The child was maintained by the female pursuer's father, and continued to live in his house until he was seventeen, when he went to live with the pursuers. The defender wrote in 1867, after he was married, to M'Arthur, offering to take the child to live with him, and to provide for it free of expense to its mother or grandfather. This offer was declined, and the defender stated that though he considered that he had thus discharged any legal obligation incumbent on him, he yet con-

tinued *ex gratia* to send money to James M'Arthur from time to time for the boy's aliment.

The present claim was first intimated to the pursuer in 1886.

The pursuers pleaded—“(1) The defender being admittedly the father of the female pursuer's illegitimate son, was bound to contribute to his support till he was fourteen years of age. (2) Never having contributed anything, the defender is due to the female pursuer the sums sued for, which are moderate and reasonable, with interest as concluded for.”

The defender pleaded—“(2) The said child not having been maintained by the female pursuer or her husband during the period when he was unable to support himself, the pursuers have no title to sue, and *separatim* they have no title to sue for future aliment. (3) The action is barred by *mora*, taciturnity, and abandonment. (4) In respect of the offer to provide for the said child, and the other circumstances libelled on, the defender is entitled to absolvitor.”

After a proof, the import of which is stated above, and in the opinions of the Judges *infra*, the Lord Ordinary pronounced this interlocutor—“Finds that the defender, as the father of the illegitimate child, is liable for his aliment; and finds that after making allowance for some payments made to account thereof there remains a balance still due of £50, for which sum decerns against the defender, with interest thereon from the date of citation till paid: Finds the defender liable in expenses,” &c.

“*Opinion.*—In this case I am inclined to give a good deal of weight to the statements made by the parties in their record—the record being always before the judge where the case is investigated by a proof without a jury. The defender admits the paternity of the child for whom aliment is claimed, and he says that immediately after the child was born he paid James M'Arthur, the pursuer's father, £3 for inlying expenses and aliment. During the next four years he from time to time paid him further sums for aliment. Then he explains that in 1867—that is, at the end of the four years, he wrote to James M'Arthur offering to take the child to live with him, and to provide for it free of expense to its mother or grandfather; and, passing over the next sentence, he says that, while he considered that he had thus discharged any legal obligation incumbent on him, nevertheless, he continued *ex gratia* to send money to James M'Arthur from time to time for the boy's aliment. ‘The defender and James M'Arthur were throughout on friendly terms, and the latter never asked the defender for more money.’ Then the defender says it was well understood that M'Arthur was to maintain the boy gratuitously as one of his family, and that he had no claim against the defender in respect of such maintenance. I read these statements as averring that during the first four years of the boy's life the defender had fulfilled his legal obligation to maintain the child, but that thereafter he considered that had come to an end. Any sums he had given *ex gratia* I conclude must have been small, because he says it was well understood on both sides that M'Arthur was to maintain the boy gratuitously, and that statement is quite inconsistent with the idea that the defender continued to aliment him on the footing of a legal obligation.

“Now, the statement on record is not inconsistent with the evidence which the defender has given in Court; because, while he speaks positively as to his contribution during the infancy of the child, his statements of what he did after the first three or four years are very vague. He cannot mention any sums, except payments which he made by arrangement with his father and the pursuer's father; he sent what he thought right—what he could spare—through his father to the pursuer's father, which he understood went to the aliment of the boy. All that is extremely vague. If he had regularly, during the period of fourteen years, or whatever the period is, paid a fixed sum at periodical times, I should have given great weight to the argument that the mother's claim was satisfied; because when a claim like this is made so many years after the event, if any precise statement is made about it being discharged, I should be inclined to receive such a statement with great favour, there being no explanation of the cause of delay in making the claim. But taking the defender's evidence as amounting merely to evidence of casual payments, the amount of which he is unable to state, and the only corroboration being by his brother, whose evidence has reference to one payment during all that time, I have to set against it the positive evidence of the pursuer Mrs Westland and her sister and son, who all say that they know nothing of any such payments having been made by the defender. Their belief was that the boy was maintained by his maternal grandfather. Therefore I cannot hold that the defender has either averred or proved such payments in discharge of his legal obligation as would entitle him to be absolved from this action.

“With regard to the sum for which I have to give decree, that must be dealt with on the footing of approximation. Looking to the statements that have been made as to the rate of aliment allowed in the Sheriff Court, which has varied from £4 to £8, according to the place and the time, I am inclined to hold that aliment is due at the rate of £6, 10s. a year, which is a fair intermediate rate. And then as to the reduction to be made from it, I think that I shall allow no aliment for the first four years. The aliment for the remaining nine years would be, I think, about £58, 10s. Then I really cannot take off much for the gratuities which the defender is said to have given to the pursuer's father. I think, in all the circumstances, the claim may be fairly met by a payment of £50, and I shall give decree for that sum, but without interest.”

The defender reclaimed, and argued—The pursuers had no title to sue. The female pursuer did not sue as executor of the grandfather, who alone maintained the child. She herself expended nothing on the child's upbringing. If she made this claim as for a debt due to her as her father's representative, then her claim was barred by the triennial prescription—*Ligertwood v. Brown*, June 21, 1872, 10 Macph. 832. The pursuer's claim was barred by taciturnity, as she had acquiesced in the arrangement made in 1867, and had not made any further claim on the defender as the father of the child—*Arbuthnot v. Symon*, May 15, 1834, 12 S. 590. The defender

had offered to take the child in 1867 and support it at his own cost. That proposal extinguished all future claim for aliment—*Corrie v. Adair*, February 24, 1860, 22 D. 897; *Shearer v. Robertson*, November 29, 1877, 5 R. 263; *Weepers v. Heritors and Kirk Session of Kennoway*, June 20, 1844, 6 D. 1166.

The respondent argued—The pursuers had a title to sue. The mother kept the child in her father's house, but she either gave her services in the house or sent money when she was in service elsewhere as her contribution to the support of the child, while the father had not provided his share. The custody of the child remained in the mother. *Grant v. Yuill*, February 29, 1872, 10 Macph. 511. The claim for aliment of an illegitimate child could not be affected by the triennial prescription—*Thomson v. Westwood*, February 26, 1842, 4 D. 833. It could not be barred by *mora* or *taciturnity*, as the claim always existed against the defender. Here the female pursuer had never acquiesced in any arrangement with him—*Moncrieff v. Waugh*, January 11, 1859, 21 D. 216. The offer by the father could not be held as a bar to the claim, as the child was only four years old when it was made, and it was settled law that no offer by the father of an illegitimate child to take and support the child in his own home could be held to be a bar to claims for future aliment, unless the child was seven years old—*Corrie v. Adair*, *supra cit.*

At advising—

LORD JUSTICE-CLERK—This is rather a peculiar case. The Lord Ordinary has decided in favour of the pursuers, and held that their claim for aliment should be allowed.

The facts as they come out are these. The child for whom aliment is claimed was born in 1863. He was taken by his maternal grandfather, and brought up by him until he was seventeen years of age. Two daughters of the grandfather lived in the same house, one of whom was the female pursuer, the mother of the child, and the evidence is that they worked as servants in their father's house, unless they were engaged in service elsewhere, and apparently for six or seven years they were at home on alternate years. The boy was brought up by his grandfather. He is now twenty-four years of age, and a claim for aliment for him is brought against the defender.

The defender does not deny the paternity of the child, but says that he was brought up by his maternal grandfather, and farther, that he had paid his share of the expenses. There seems no doubt that he did contribute to the support of the child for a few years, and that then he made an offer to take the boy and bring him up himself, and that that offer was rejected when the boy was between four and five years of age. After that offer had been made and rejected no farther claim for aliment was made. Now, a case of this sort is not entitled to much favour when the facts are left so obscure as the pursuers have chosen to leave them. No claim was made until after the grandfather had been dead for some years. It is said that the mother did contribute to the support of the child by her service in her father's house. I do not think that her presence there was as a servant entitled to wages, although the evidence is not quite clear as to what was her footing in the house. But there is evidence that after the

defender had made payments for the child's aliment for three or four years he made an offer to take the child and provide for him, that that offer was rejected, and that afterwards no farther claim was made upon him. If the mother had been living in her own house, supporting herself by her own industry, and perhaps been of a more reputable character, that offer might not have been judged sufficient to bar all future claims of the mother against the father for aliment of the child, but looking to her character and the whole circumstances of the case, I am of opinion that the offer was a good one, and that it does not fall under the category of offers which, if made, do not bar a future claim for aliment on the ground that the child is too young to be taken away from the mother at the time when the offer is made. I think that in the circumstances the fact that the defender made the offer he did is sufficient to relieve him of all claims for aliment.

LORD YOUNG—I am of the same opinion. If the case had stood on this ground only that the defender had paid aliment for the child for four or five years, and then had offered to take and provide for it himself, I should have arrived at the same conclusion. But there is more in the case than that; the child was born in the grandfather's house, and was brought up there until he was seventeen years of age. It was admitted at the bar that the case must now be taken on the footing that the defender paid aliment for the first four years to the grandfather, and aliment is claimed for the child until he was thirteen years of age. The defender was a farm-servant. I do not know whether either the defender or the grandfather could write, but when a farm-servant gives sums such as one pound or even smaller, as aliment for his bastard child, to the person with whom that child is living, it is not usual for him to take receipts in writing for the sums so paid, and file them and docquet them for forty years, in case actions of aliment may be raised against him for the money already paid. Therefore unless payment could be proved otherwise, innumerable actions for aliment might be brought at any time within forty years from the birth of the child, and would be unanswerable. The defender says that he paid almost £100 in aliment; probably that is an exaggeration and he really paid a good deal less; but that he paid sufficient to satisfy the grandfather I conclude, and I think it is a proper judicial conclusion to reach, from the fact that he lived for twenty years without any further demand for aliment being made by the grandfather upon him, and that this action was not brought until the grandfather was dead. Therefore I do not think that the pursuer's statement of claim is established.

The pursuer Mrs Westland says that she wrote in 1865 to the defender, and that she got a letter from him offering to take the child and keep him himself. She says—"I had written to the defender before leaving my father's house, and he wrote me a letter in 1865, when the child was two years old, saying that he would take him. I never answered his letter offering to take the child." And then—"I never asked aliment from the defender till I put the matter into the hands of a law-agent. I instructed Mr Barclay to write him for aliment in February 1886. That was

the first claim I made on the defender since I wrote him in 1865." So that for twenty-one years she was silent and indicated no claim against the defender.

In these circumstances I am of opinion that the grounds of action are not proved, and that the evidence here does not satisfy me either that any debt was due to the grandfather who brought up the child, and who has been dead for some years, or to the mother, who does not seem to have paid anything for its maintenance. I think, therefore, we should find that the averments of the pursuers have not been established, and assoilzie the defender.

LORD CRAIGHILL CONCURTED.

LORD RUTHERFURD CLARK—I have found some difficulty in regard to this case. I think that in the ordinary sense of the word the child was throughout maintained by the mother. No doubt he lived in the grandfather's house, but he was placed there by the mother, who thought that in that way she was fulfilling her duty to the child. Now the defender has not contributed much, if anything, to the support of the child since he was four years old, and his first defence to this action for aliment is that he offered to take and maintain the child at his own home. If I thought that was a legal offer then there would be an end of the case. I think no doubt it would have been a legal offer if the child had been seven years of age. I think that is the principle to be deduced from the cases quoted to us. But I doubt if a father can denude himself of his liability to pay aliment for his illegitimate child by offering to take it away from the mother and maintain it himself if it is only one, two, or three years of age, or indeed of any age under seven. But then it is said that the child was not living with the mother. It is true that the mother was not constantly living in the same house, but the child was in her custody, and it is not clear whether the father is entitled to take a young child out of the custody of its mother, and if she refuses to give it up then to hold that he is free from all liability for aliment. I do not think that the offer was a good one, but I have some hesitation, because the conduct of the parties seems to show that when the offer was made and refused the mother preferred to keep the child and give up her claim for aliment. I am disposed to think that the only safe ground on which we can dispose of this case is that the pursuer abandoned her claim against the defender, as she was not content to act on the offer made to take the child and maintain him when he was four years of age, and made no further claim for aliment. As that seems to be the opinion of your Lordships I am not disposed to differ.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender, with expenses.

Counsel for Defender (Reclaimer)—Kennedy.
Agent—J. D. Macaulay, S.S.C.

Counsel for Pursuers (Respondents)—Rhind
—A. S. Paterson. Agent—Abraham Nivison,
Solicitor.

Wednesday, June 1.

FIRST DIVISION.

[Lord President, with a jury.

BONNAR v. RODEN.

Expenses—Jury Trial—Nominal Damages—Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 40.

In an action of damages for slander the damages were laid at £1000. The jury returned a verdict for the pursuer, and assessed the damages at one farthing. The presiding Judge granted a certificate in terms of section 40 of the Court of Session Act 1868, "that the action was brought for the vindication of character, and was, in his opinion, fit to be tried in the Court of Session." *Held* that the pursuer was entitled to his expenses.

This was an action of damages for slander at the instance of Hugh Bonnar, butter merchant, Tullagan and Sligo, Ireland, against John F. Roden, medical student in the University of Edinburgh.

The case was tried before the Lord President and a jury on the following issue—Whether on or about the 14th day of October 1886, the defender, John F. Roden, wrote or caused to be written and sent, or caused to be sent to the Inspector of the butter market in Sligo, Ireland, the letter in the terms set forth in schedule annexed; and whether the said letter, or any part thereof, is of and concerning the pursuer, and calumniously represents the pursuer as having been guilty of fraud or dishonesty in the transactions therein referred to, or makes similar false and calumnious representations of and concerning the pursuer to his loss, injury, and damage?" Damages were laid at £1000. The letter was as follows—"Dear Sir—Will you be able to recollect if Mr Hugh Bonnar bought in your market on Tuesday, August 17th last, a large number of firkins qualified by you as firsts? There is a lawsuit pending between him and us about twelve firkins—a part of the large consignment he bought that day—he sold us, which he described as being the finest Sligo firsts qualified by you. When we received the butter we found it was not equal to thirds, as it was oily and greasy. We returned the butter to him. You will oblige me very much by giving what information you can on the subject, as it is my conviction that this butter never passed through your hands as firsts, and even perhaps never entered your market. It is, Sir, a gross injustice to your market to have men coming here selling an inferior butter as Irish firsts. It is such misrepresentation that has caused our Irish butter to lose its hold on this and other markets, and the sooner Irishmen both at home and here put their foot on it, the better it will be for our Irish butter trade."

At the trial it was proved that the letter was written by the defender and sent to the inspector, and that the inspector, without showing the letter to anyone, sent it to the pursuer of the present action. The jury found for the pursuer, and assessed the damages at one farthing.

The presiding Judge certified in terms of the Court of Session Act 1868, sec. 40, "that the