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Friday, November 26.

## SECOND DIVISION.

[Sheriff of Forfar

SAMSON v. DAVIE.

*Parent and Child—Bastard—Indigent Mother.*

*Held (diss. Lord Young)* that an illegitimate son is bound to support his indigent mother.

Elizabeth Lindsay or Fairweather, who was aged sixty-six, and had become unable to earn her own maintenance, applied to Charles Samson, inspector of poor, Kirriemuir, and received from him up to 29th June 1885 parochial relief to the amount of £4, 3s. He raised this action against Robert Davie, whom he alleged to be her illegitimate son, for this sum, and to have him ordained to relieve the board of all such alimony as they might find it necessary in fulfilment of their duties to afford the pauper subsequent to 29th June 1885.

The defender denied liability as not being truly the pauper's son, and also pleaded that the action was irrelevant.

The Sheriff-Substitute (CAMPBELL SMITH) dismissed the action as irrelevant.

*Note.*— . . . The question whether a bastard is bound to support his pauper mother is, so far as I am aware, not settled by any clear or direct authority. It has remained a subject of interesting speculation and fascinating doubt for generations, and I am sorry to be compelled to take a step towards putting an end to its indeterminate character, and still more to decide it in a way which I think not in accordance with natural right. But for the fettering considerations of settled civil law, I should have felt inclined to hold that the obligations of parent and child to give support against want ought to be reciprocal and coextensive—that as the mother or father was bound to support the child when helpless, so the child ought to be bound to support either parent in case of ill-health, or old age or poverty, as is indeed, I believe, the usual custom in Scotland when human affections assert themselves independently of legal regulations and of civil law; but passing from natural right to civil law, I am met with the insuperable obstacle that except to one effect the civil law does not recognise the relation of parent and child as existing between illegitimate children and the persons who have produced them. A bastard is pronounced by a host of authorities to be *filius nullius*, that is, being interpreted, not a child at all, but a mere physiological product having no rights of any kind except the right to live and remain in the world at the expense of the temporary pair who have irregularly and improperly introduced it to life. So soon as a bastard is able to support itself, it is an alien to legal relationship—without legal father or legal mother. The

bastard inherits nothing from his father whatever fortune that father may leave. The bastard may make a fortune and die unmarried and childless. His fortune will go to the Crown as *ultima hæres*, and if the father get any part of his deceased bastard's estate, it will only be through the generosity of the Crown. The same thing would happen with the mother of a wealthy bastard. And here I touch the principle that separates the bastard from all legal ties, except those, by marrying and otherwise, he or she may form for himself or herself. In law the defender here is nobody's son. He has no mother at all, and therefore no mother for whom he is bound to bear the burden of giving her bread when she is old and destitute. I may have doubts of the real humanity of such a bastard son, but he has at least as much humanity as the law ascribes to him, which is physiological humanity, with the right to escape from starvation in infancy and until he becomes self-supporting."

On appeal the Sheriff (COMBIE THOMSON) recalled the interlocutor, repelled the plea of irrelevancy, and remitted the case to the Sheriff-Substitute for further procedure.

*Note.*—I am of opinion that an illegitimate son is legally bound to maintain his indigent mother."

A proof was then allowed. From the proof it appeared that the defender was truly the illegitimate son of the pauper. He was born in 1839, so that he was forty-seven years of age at the date of this action. In his youth she had neglected him. He had only seen her twice in his life; he was supported till he was able to support himself by his mother's mother, and had when she became old and feeble contributed to her support. He had risen to the position of farm overseer which he now occupied solely by his own efforts.

The Sheriff-Substitute gave decree for the £4, 3s. sued for, and reserved the pursuer's claims for future relief.

The defender appealed, and argued—There were two questions here—1st, Was an illegitimate son bound to support his indigent mother? 2d, Assuming the affirmative, were there not exceptional circumstances in this case which render it expedient that the obligation be not enforced? *On the first question*—It had arisen for the first time in the Court of Session, and must be answered in the negative. There was no authority for answering in the affirmative, and no *dicta* in the text-writers to that effect. Baron Hume says that "there is no obligation in a natural child to alimant his reputed father—at least it is an extremely doubtful question"—Hume's MSS. Lectures, i. 97; and the Lord President Inglis had expressed the same opinion in *Corrie v. Adair*, February 24, 1860, 22 D. 897. A bastard was in the eye of the law *filius nullius*, and there was no reciprocity of obligation between the father and the child. The French law was the same, M. D'Aguesseau le Chancelier in his Dissertations on the Roman law stating it thus—"Ces mêmes lois ne prouvoient pas qu'il y eût une liaison assez étroite entre un père et son fils bastard pour obliger ce dernier à le nourrir s'il était en nécessité."—Ulpian's Digest, xxv. 3, 4, 4. Before the days of Constantine neither the putative father nor mother could succeed the bastard. The English law also did not recognise the obligation. The bastard could neither be heir to any-

one nor have an heir, except one who was the issue of his body, because being *filiius nullius* he had no ancestor from whom inheritable blood could be derived, and no collateral relations—Stephen's Comm. on Laws of England, ii., 301. In fine, in England as in America, the common law enforced no obligation on the bastard, though provision was made for its welfare by statute, which had no force in Scotland. The principle of the law was to discourage illicit connection—*Horner v. Horner*, May 24, 1799, 1 Hag. Rep. 351, and 357. Parents were not allowed to have for their own wrong those rights which they would have where lawful children were procreated. The burdens of parentage were laid on them, but none of its privileges. The only privilege given to a bastard was one of bare maintenance—*Anderson v. Heritors and Kirk-Session of Lauder*, March 11, 1848, 10 D. 960. On the second question—It was proved that the defender's mother had always neglected him since his birth, and in these circumstances, and considering that the claim was only made when he was forty-seven years old and had risen in the world through his own efforts, and had discharged the duty of a son to the woman who had acted as a mother to him, it was quite unreasonable to call upon him to pay the sum sued for.

The pursuer replied—It was quite true that Baron Hume in his lectures said that the obligation of the bastard to aliment was doubtful, but he added that the obligation existed as regarded the mother. The obligation was one *ex jure naturali*.—Stair, i. 5, secs. 8 and 9; Bankton i. 6, sec. 20; Digest ii. 4, 4; and Institutes of Justinian, i. 10, 12. The practice under the Poor-Law Act had always been to enforce it.—*Wilson v. Todds*, February 1867, 3 Scot. Law Rep. 192; *Inspector of Poor of Inveravon v. Raeburn* (Sheriff Court of Aberdeen), 1856, 1 Sheriff Court Decisions, 192; *Taylor v. Spottiswoode*, *ibidem*, ii., 31 (Sheriff Logan); *Robertson v. Robertson*. November 21, 1865, 8 Poor-Law Mag. 244; *Watson v. Robertson*, 1868, 1 Poor-Law Mag., New Series, 172. The doctrine of *filiius nullius* applied to the father only. It had been even held that the husband of a bastard was liable to support the indigent parents of his wife during the subsistence of the marriage—*Reid v. Moir*, July 13, 1866, 4 Macph. 1060.

At advising—

LORD CRAIGHILL—The appellant is the illegitimate son of Mrs Elizabeth Lindsay or Fairweather, who resides in Kirriemuir. He was born in 1839, so that he is now forty-seven years of age. In infancy and early childhood he was nurtured and cared for by his mother's mother, or by relatives of hers who took upon themselves the duty which she ought to have discharged. When fit for work he did what he could for himself. He always found employment, and has always been steady, and the consequence is that for his position in life, which is that of a farm-overseer, he is in easy circumstances. In 1835 his mother became unable from failure of health to do anything for her living, and as she had no one to look to for support, the defender refusing to assist her, she applied to the parish, by whom she has since been maintained. The Parochial Board think that what they are doing for her ought to be done by the defender, for he has plenty of means, and these, as they

say, to the extent required, ought, in fulfilment of a legal as well as of a natural obligation, to be used for his mother's support. The defender accordingly was called upon to relieve the Parochial Board. But the defender refused to comply with this application. The present action therefore was instituted.

The defender's ability is not disputed. What is put in issue is the legal liability of the defender. The Sheriff-Substitute dismissed the action on the ground, as is explained in the note to his interlocutor, that "the defender being a bastard, he is nobody's son. He has no mother at all, and therefore no mother for whom he is bound to bear the burden of giving her bread when she is old and destitute." The Sheriff was of a different opinion, and the result in the end was that decree was given in terms of the conclusions of the summons. Hence the present appeal.

Were it the case that a woman who has borne a bastard is in the eye of the law not the mother of the child, there would be much to urge for the conclusion at which the Sheriff-Substitute has arrived. But such a view is repugnant to common sense, and there is nothing in the way of authority by which this paradox can be supported.

The Sheriff-Substitute apparently rests his opinion on the description which has often been used that a bastard is *nullius filius*. But these words only import that in the eye of the law a bastard is without a father. This is the substance of many texts and many *dicta* in the civil law and in our own law. The result is, according to the authorities, that there is in law no father to a bastard, but it is nowhere said that in law a bastard is without a mother. Upon this point there never has, so far as I know, been any controversy. The contrary is indeed implied in all the passages in the Corpus Juris Civilis and in our own institutional writers, where it is said that a bastard is without a father. Of these the following are examples—Inst. i. 10, 12, and iii. 5, 4; Dig. i. 5, 23, and ii. 4, 5. Out of our own institutional writers, Stair, iii. 3, 44, and iv. 12, 1, may be referred to. What is implied in these passages is expressed in the Institutes of Gaius, book i., sec. 64, where it is said—"Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere videtur neque liberos: itaque hi qui ex eo coitu nascuntur matrem quidem habere videntur, patrem vero non utique; nec ob id in potestate ejus sunt [sed tales sunt], quales sunt hi quos mater vulgo concepit: nam et hi patrem habere non intelleguntur, cum is etiam incertus sit; unde solent spurii filii appellari, vel a Græca voce quasi *σποραδῆν* concepti, vel quasi sine patre filii."

Mrs Lindsay or Fairweather and the defender are therefore in law, as well as in fact, mother and son, though all the rights and obligations of this relationship which result from the birth of a child in wedlock do not exist in the present case, where the defender is a bastard. And the question which now awaits decision is, whether the burden of his mother's support, now that she is destitute, affects the defender as a legal obligation. She was bound to support him in infancy—this being an obediencial obligation based on the law of nature—*Vide* the case of *Marjoribanks*, Nov. 30, 1831, and the opinion of Lord Justice-Clerk Inglis in *Reid v. Moir*, July 13, 1880, 4 Macph.

1060, as well as the opinions of Lord Fullerton and Lord Balgray, which are cited by his Lordship. Is the defender in like manner not bound to support her, seeing he is able so to do, now that from age and infirmity she can do nothing for her livelihood? I think he is. The obligation arises *ex jure naturali*, and is one of those natural obligations to which it is decent as well as reasonable and expedient that our municipal law should give legal effect on account of the natural justice on which it is founded. This is the ground on which the liability of the putative father to contribute to the aliment of his bastard child has been made a rule of our law—*Vide* opinion of Lord Justice-Clerk Inglis in *Corrie v. Adair*, February 24, 1860, 22 D. 900—and the reason for this rule is certainly not stronger than can be urged for the recognition of the reciprocal rule that a bastard able to support his mother when she is in destitution is subject to this obligation. Such also was the rule of the Roman law expressed in so many words—*Vide* book 25, tit. iii., “De agnoscendis et alendis liberis, vel parentibus, vel patronis, vel libertis.” There it is said (title iii., sec. 4, sub-secs. 3 and 4)—“3. Idem in liberis quoque exhibendis a parentibus dicendum est. 4. Ergo et matrem cogemus præsertim vulgo quæsitos liberos alere; nec non ipsos eam.”

There is no contradiction to this in any other part of the *Corpus Juris*, nor in any of the works of any of the commentators. The question has been decided again and again in conformity with this text of the Roman law in many Sheriff Courts in the country, nor is any adverse opinion expressed on the subject by any of our own institutional writers, or by any of our Judges, while there is this passage in the lectures of Baron Hume. He says that “there is no obligation on a natural child to aliment his reputed father—at least it is an extremely doubtful question. The contrary holds with respect to the mother however, whom the child is always bound to support if she be in indigent circumstances.”—*Vide* Fraser on Parent and Child, p. 127, for this quotation. This opinion is of great consideration, and I take it into account, though I do not rest my opinion upon its authority alone. I come to the conclusion that there is legal liability upon the ground already explained, which is supported by the rule of the civil law, and by the opinion of Baron Hume, and it nowhere meets with any contradiction or application whatever. The Lord Justice-General and Lord Cunningham, as was pointed out at the debate, have expressed an opinion that a putative father in destitution has not a legal claim for support against his bastard child. What was said on this subject in the cases referred to—*Corrie v. Adair*, 22 D. 900; and *Anderson v. Kirk-Session of Lauder*, 10 D. 961, was altogether *obiter*, and there does not appear to have been any argument on the subject addressed to the Court. But even assuming that the views of those Judges were to be applied, were the question to be submitted for judgment, my opinion with reference to the right of the mother to be supported would not be in any way affected. In the eye of the law the woman bearing the child, and the child to which she gives birth, are mother and son, whereas the child that is born and the man who is made liable for a contribution of aliment

as putative father are in law in no way related. The ground of liability in the one case therefore does not exist in the other. Lord Cowan in his opinion in the case of *Reid v. Motr* makes this distinction between the two cases.

On the whole matter my opinion is that the defender's appeal ought to be dismissed.

LORD YOUNG—This is an interesting question but I cannot say that I regard it as one of first-class importance. It has never occurred before for decision in the Supreme Court, and just as likely as not it may never occur again. The inclination of my opinion is with the Sheriff-Substitute. I have not gone to the Roman law for guidance in this matter. The Roman law regarding the family relations has not very much in common with ours. Its leading idea is the *patria potestas*, to which we have nothing analogous. Legitimate children were under the power of the father to such an extent that he could put them to death. Even the property which the son acquired he did not acquire for himself but for his father. He could not sue an action or be defender in one. In short, their rules were altogether different in conception from ours. If I wanted light to aid me, I confess I should prefer the more modern, the nearer, and the brighter light of the practice of our fellow-subjects on the other side of the Tweed, where the law of the family relations is akin to our own, and is conceived in the same spirit. When we were ourselves in a state of comparative darkness we resorted to the Roman law, and got from it some useful and profitable enough maxims, and if any considerations or principles which seem to us to be reasonable or expedient are to be derived from that source now, we will make use of them just as we should make use of reasonable or expedient considerations which may present themselves from any other source. But the question here, now before us for the first time, must, I think, be determined by reference to considerations to which, so far as I know, the Roman law had nothing analogous. We have a poor law of our own, and a law of succession of our own. *Jus naturale*—It is difficult to say what that exactly means. The poor law is natural I suppose in one sense at least, because it is simply this—That human beings shall not be allowed to beg or to starve, but that those who can afford to pay taxes shall be taxed for the benefit of those who would otherwise be obliged to beg or starve. Unfortunately even in this advanced state of civilisation there are bastards, but our law does not permit even bastards to starve, and I am not aware that we borrowed that from the Roman law. I rather think that by the Roman law bastards were left to starve, but by our law, although people are not encouraged to commit fornication, yet if they do, the fruits of the fornication are protected from starvation, though if those whose illicit amours have brought the fruits into existence are able to support them, and so prevent the tax being laid on the public, our law is that they shall support their own offspring. That is the plain sense of the whole matter. If the parents cannot be found, or if they are unable to support the offspring, the humanity of modern times does not permit the offspring to starve. The poor law will support them. It

might have been a tax imposed on the whole country as a single area, but the smaller areas make up the whole country, so that it comes to be just a public tax, and by means of this public tax illegitimate children are protected against starvation, but the father is bound to support the children if he can afford it, and so is the mother. Is that the *jus naturale*? It is quite natural at least in one sense—just as it is natural to pay one's debts. But then the converse proposition is, that whereas fornicators are by law bound to protect the public against having to support the fruits of their illicit amours, the fruits are on their part bound to protect the public against having to support the fornicators. I do not think that that follows—the one proposition appears to me reasonable and the other not, and accordingly if I go to the other side of the Tweed I find that they adopt the one proposition but reject the other. It was conceded that they did so. I do not think that there is any question of sentiment here, or any matter of good feeling which we can take account of. I do not for a moment mean to say that there may not be the warmest mutual feelings of attachment between a mother and her bastard child. We have all heard of instances of distinguished persons being bound together by the utmost affection although the relation was an illegitimate one, and such an affection will always be found to exist, I believe, where it is merited. The present case is that of a woman who has had several bastard children,\* and who at an advanced age becomes a pauper. The poor law authorities, after she becomes chargeable, discover that about thirty years ago she gave birth to a bastard son, who became a gardener in a gentleman's family. She had seen him only twice during that long period, but unfortunately the poor law authorities discover that she and he are mother and son. He was ignorant of the fact himself, and in consequence this action was brought to have it proved against him that he is the son of his mother. Now, I cannot think that it is expedient or for edification to have this man called into Court to discuss such a matter relating to his own history. For, observe, it is not a question of feeling or want of feeling on his part towards his mother—it is the public taxpayer, who having discovered a relation which neither of the parties to it knew about or cared to perpetuate, says to the son "You are bound to give us relief of the sums which we are contributing to your mother's support." I think that here a consideration arises to which there is nothing analogous in the Roman law, but a great deal that is analogous in the law which prevails on the other side of the Tweed. How do the public, who are seeking here to be relieved of the burden of supporting this woman, deal with bastard children? Here the considerations to which the Sheriff-Substitute adverts commend themselves very strongly to me, as they have done to our neighbours on the other side of the Tweed who act on them. Does the public treat the son as the child of its natural parents? In one sense certainly. If the father and mother can support the child in infancy, the public compels them to do so. But in no other sense will the public recognise the relation. If the father die a millionaire, or if the mother die

\*Note.—It appeared from the proof that the pauper had had at least one other illegitimate child.

a millionaire—if they die intestate I mean—not one shilling of their fortunes would their bastard son be entitled to. Nay, more, if the father or the mother died leaving any fortune you choose to mention, in the event of the failure of blood relatives the public itself would take the fortune—it would go to the Crown as *ultima hæres*—and it is this bastard child to whom they would give no benefit that the public are asking to protect them against the burden of supporting this old woman—a child who in this particular instance had no notice that she was his mother until the raising of the action. Now, how would the Roman law deal with such a case—the case of the father or the mother of a bastard dying and leaving a fortune but no blood relatives to take it? I do not know. Considerations of Roman law therefore I put aside. In this country I know that the child is not treated as a child at all. We have a maxim taken from the Roman law, indeed, but which we should, I suppose, have had if that law had never existed, *Cujus est commodum ejus debet esse periculum*—"He who has the benefit should bear the risk." But here, if there is any *commodum* to be taken from the mother, the public takes it in preference to the bastard child. So true is this that even if she leaves it to her child by will he is taxed for it at ten per cent. as a stranger. There is no single circumstance in which the public consents to treat a bastard child as the child of its father or mother except this, that they must take from the public and upon themselves the burden of supporting their child if they are able, and the child requires it. In that respect, and in that respect alone, will the public recognise the relation.

As I have said, I am moved by the considerations which have determined the law of England in this matter, considerations which are of equal cogency here. The Roman law, I must confess, I have difficulty in understanding. Lord Craig-hill was good enough to give me the reference to two texts, to which he has also himself referred. One of them, Dig. book 25, tit. iii., sec. 5, sub-sec. 4, is in these terms—"Ergo et matrem cogemus liberos, præsertim vulgo quæsitos alere, nec non ipsos eam." Now, I put in parenthesis the words "præsertim vulgo quæsitos," and the text will then run—"Ergo et matrem cogemus liberos alere, nec non ipsos eam"—"a mother, if able, must support her children, and her children must support her." Then what is the force of "præsertim vulgo quæsitos?" Does it mean that there is a special duty of supporting his mother laid on the bastard, just as there is a special duty of supporting him laid on her, so that if she has legitimate children as well as the bastard, the "præsertim" applies to him, and he must support her in preference to her legitimate children? That does not commend itself to my mind as good sense. It appears from the proof that the father of this gardener of forty-five is also alive, and I suppose therefore that the unfortunate man will have to support his father as well as his mother—just as they were both liable to keep him off the rates if they could, so must he keep them if he can, and they need it. Then, again, in one of the cases mentioned, I think, by Lord Craig-hill, it was held that if a man marries the mother of a bastard child, he must support the child though not his own—he takes the mother with

all her burdens, and cannot get rid of them. Now, I suppose this obligation is reciprocal, so that if he is liable to support the child, the child when it grows up becomes liable to support him as well as the mother. I cannot go that length, nor do I see, once you begin, what limit is to be placed to this obligation which it is sought to impose upon bastards of supporting their parents, and so of relieving the public, which refuses to allow to the bastard a single advantage through its relation to its father and mother. My judgment, therefore, after the most attentive consideration I have been able to give to the matter, would be in accordance with that of the Sheriff-Substitute.

**LORD RUTHERFURD CLARK**—This case is one of novelty, but after the most careful consideration I have been able to give to it I have come to agree with Lord Craighill. I think we have a considerable body of authority—both text writers and decisions—for the proposition that a bastard son is liable to support his mother, and I am not disposed to pronounce a decision contrary to so much authority, especially as the obligation of support has been recognised in the civil law. I confess I do not share the difficulty of Lord Young in understanding the text on which he commented. It seems to me capable of a very simple rendering—“*Ergo et matrem cogemus præsertim vulgo quæsitos liberos alere, nec non ipsos eam,*” which means, I think, “We will compel the mother to support her children, especially her bastard children, and her children we will compel to support her.” Probably the “*præsertim vulgo quæsitos*” was added because of the difficulty which there might be of discovering the father in the case of bastards—the word “*vulgo*” seems especially to point to that. I do not think that the words “*præsertim vulgo quæsitos*” are to be brought into the second member of the clause. I think that the “*ipsos*” refers to “*liberos*” simply.

**LORD JUSTICE-CLERK**—In this case I concur with Lord Craighill. I have looked into the authorities with some attention, as the question is one of considerable general importance, though the particular application is not likely to be of frequent occurrence.

I should be very sorry if the slightest doubt were thrown on the foundations of our law in this matter, and with all respect to the law of England I should be very sorry if it were supposed that the foundations of our law on this point were identical with those of that system of jurisprudence, because it denies natural obligation altogether not merely in the case of bastards, but, as I understand it, it denies all place to natural obligation between parents and their legitimate children, although of course in speaking of the law of England we are dealing with what we have no proper knowledge of. But as far as I understand it, it is statutory only—the poor law statute, and nothing else. Now, whatever may be the virtue of that principle of the law of England, I believe it to be the only country in Europe which denies a place to natural obligation; and in the case of our own country, I can only say this, that it is certain that, from the days of Lord Stair to the present time, there is not a word in the authorities—whether insti-

tutional writers or judicial decisions—in which the slightest doubt is suggested as to the principle on which our law proceeds, or which makes any reference to the law of England as at all resembling our own; and I think we should bear this clearly in mind now, for I own that I regard the principle of natural obligation as a very valuable one. We have only to look at Stair under the head of aliment, where he discusses the whole matter, to see that he refers to the civil law, but places the subject entirely on the ground of *debitum naturale*, and the numerous cases in the Dictionary will be found to turn on that principle alone. I have made these observations, but except to assert the admission of the principle of natural obligation in the law of Scotland they have nothing to do with the case here in my opinion.

The other question presents some novelty for our consideration. It is not a question of public municipal law. It relates to the mutual rights and obligations of two parties—an illegitimate child and its parent. In regard to the civil law, I thought it was well understood that the law of *patria potestas* and of succession in the civil law formed no part of our system. They were early rejected, but, on the other hand—on the other relations of parents and children—are not indeed authorities but illustrations, and very important illustrations. Lord Young has found some difficulty in giving a fitting sense to the text from the Digest which he has quoted. I think the best way of solving such a difficulty is to consult the commentators, and on referring to Voet I find that he amplifies the text very satisfactorily, and lays it down clearly that the two obligations of parent to child and child to parent are reciprocal, whether the children be legitimate or illegitimate. I do not say that we must follow that here, but I arrive at the same conclusion. The natural obligation between mother and child is as strong whether the child be legitimate or illegitimate, and therefore as a legitimate child is under an obligation to support its mother, so also must an illegitimate child be under the same obligation. It is true that there is a paucity of authority in this matter. But there are some cases and *dicta*. The opinions of the Lord President and Lord Cowan in *Reid v. Moir*, July 13, 1866, are important, and are among the latest. The Lord President can think of no other category of law to which the bastard's claim to aliment can be referred except that of “the obdiential obligations based upon the law of nature;” and Lord Cowan, while reserving his opinion on the abstract question, says that he cannot see any difference in this respect between legitimate and illegitimate children. This case was referred to in *Wilson v. Todd*, which was an Outer House decision by Lord Jerviswoode, whose judgment was acquiesced in. The rubric of the report in vol. iii. of the Scottish Law Reporter, p. 192, is—“*Held* that an illegitimate daughter and her husband were bound during the subsistence of their marriage to aliment the indigent mother of the former.”

On these grounds I think we should dismiss the appeal and affirm the judgment.

The Court pronounced this interlocutor:—

“Find in fact (1) that Elizabeth Lindsay or Fairweather is a proper object of parochial

relief, and that she has received such relief from the pursuer to the amount of £4, 3s. ; (2) that the defender is her illegitimate son : Find in law that the defender is liable to the pursuer in relief of the said sum : Therefore dismisses the appeal : Affirm the judgment of the Sheriff-Substitute appealed against : Of new ordain the defender to make payment to the pursuer of the said sum of £4, 3s."

Counsel for Pursuer—Pearson—Hay. Agent—  
Counsel for Defender—Kennedy. Agent—  
John Macpherson, W.S.

Saturday, November 27.

OUTER HOUSE.

[Lord Trayner.

GILLON FERGUSON, PETITIONER.

*Entail—Charging Improvement Expenditure—  
Expenses of Application—Entail Act 1875 (38  
and 39 Vict. c. 1), secs. 7 and 8.*

In a petition to charge an entailed estate by bond and disposition in security with improvement expenditure to the extent of three-fourths of such expenditure, held that not the whole expenses of the application and of obtaining the loan, but only three-fourths thereof, could competently be included in the bond and disposition in security.

This was a petition to charge the entailed estate of Isle with improvement expenditure. The petitioner, Joseph Gillon Fergusson of Isle, was heir of entail in possession under a disposition and deed of entail dated in 1768, and recorded in the Register of Tailzies in 1769.

The petitioner was of full age and not subject to any legal incapacity. He had three children, all pupils, and entitled in their order to succeed after him—Robert Don Gillon Fergusson, J. S. E. Gillon Fergusson, and I. M. Gillon Fergusson.

He stated that he had, between 1881 and 1886, expended on the entailed estate, in additions and improvements on the mansion-house and offices and farm buildings, and other permanent improvements, a sum amounting to £2140, and was under 38 and 39 Vict. c. 61, secs. 7 and 8, and 45 and 46 Vict. c. 53, sec. 6 (Entail Acts 1875 and 1882), entitled to borrow money to defray the cost of those improvements, "together with the actual or estimated cost of this application, and of the proceedings therein, and of obtaining the loan, and granting security therefor." He accordingly craved authority to borrow the same, and to charge the fee of the entailed estate other than the mansion-house &c., with a bond of annual-rent binding himself and his heirs of tailzie to pay an annual-rent on said sum for twenty-five years from the authority of the Court being obtained ; or alternatively, to borrow three-fourths of the sum expended on improvements, together with the costs of the application as aforesaid, and to charge the fee of the estate with a bond and disposition in security therefor.

A *curator ad litem*, Mr C. G. Rankine Simson, W.S., was appointed to the petitioner's children, and the Lord Ordinary remitted the petition to a man of business, Mr H. B. Dewar, S.S.C.

The petitioner proposed to adopt the alternative of granting a bond and disposition in security.

The *curator ad litem* lodged a minute, in which he contended that in place of the whole expenses being included in the bond and disposition in security, only three-fourths of the expenses should be so included.

He stated—"The curator's view is that the meaning of sec. 7 (6) of the Entail Act 1875 is that the expenses should be added to and put on the same footing as the amount of improvement expenditure which may have been approved of by the Court as chargeable on the estate, the petitioner being entitled to choose whether to charge the whole accumulated sum of improvement expenditure and expenses by way of a bond of annual-rent, or only three-fourths of such accumulated sum by way of bond and disposition in security. The Act referred to first prescribes the manner in which the amount to be charged on the estate, made up partly of improvement expenditure and partly of expenses of the application to the Court, &c., is to be fixed, and then by sec. 8 goes on to provide alternative methods in which the amount so fixed may be charged on the estate ; the accumulation of the expenditure and the expenses thus preceding the striking of the three-fourths proportion if the method of granting a bond and disposition in security over the estate is to be adopted."

Mr Dewar in his report to the Lord Ordinary reported that there was diversity of practice on the point, but in a majority of instances the whole expenses seemed to have been allowed. He referred more particularly to sub-sec. (6) of sec. 7 of the Entail Act 1875—"In every case the Court shall in fixing the amount to be borrowed under their authority, add to the actual or estimated amount of the cost of the improvements the actual or estimated amount of the cost of the application, and the proceedings therein, and of obtaining the loan, and granting security therefor ;" and also to sec. 8 of the Act of 1875. He stated that in his opinion the *curator ad litem* was right, and that three-fourths, and not the whole, of the legal expenses ought to be allowed.

The Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Finds that the procedure has been regular and proper, and in conformity with the provisions of the statutes and relative Acts of Sederunt : Interpones authority : Finds that the petitioner has, prior to the date of application and within the last twenty years, *bona fide* expended on improvements on the said entailed estates the sum of £2081, 12s. 11d. : Disallows the sum of £58, 10s. 3d. mentioned in the abstract appended to Mr Johnston's report : Grants warrant to and authorises the petitioner to borrow and charge the fee and rents of the foresaid entailed lands and estates so far as situated in the shire of Dumfries, other than the mansion-house, offices, and policies thereof, with the sum of £1561, 4s. 9d., being three-fourths of the foresaid sum of £2081, 12s. 11d. expended by the petitioner on improvements as aforesaid, together with the sum of £74, 17s. 9d., being three-fourths of the estimated cost of this application and the proceedings therein, and of obtaining the loan and granting security therefor, amounting together to the sum of £1636, 2s. 6d., with corresponding interest and penalties, and decerns :