lieves and avers that her said child is seriously suffering in health from the want of due attention and nourishment, and that its life will be endangered if it is not delivered up to her without delay." That was a rash and unwarranted statement, and it is clear that the child would be well left where it is. The case here was put entirely upon the legal right of the mother to the custody of her child, which springs from her natural right, and I have come to the conclusion that when the mother says that she desires to have the custody of the child she has a right to get it. But I would wish to qualify that statement by saying that I think that the putative father would have a right to come to the Court and say that he ought to get the custody of the child, if he could show that the child was suffering in its health or was in danger of its life, because I think that the paramount consideration must always be the interest of the child.

Lord Adam—It is not disputed that the right of the mother to the custody of her infant illegitimate child is absolute, and if the custody is in the mother, there is nothing averred here against the petitioner's character to make it improper for her to exercise that custody. The question is, whether this arrangement between the mother and the putative father as to the custody and maintenance of the child interferes with her right? Now, I do not know how the case might have been if the mother had absolutely bound herself to give up the custody of the child for all future time. Perhaps it would not have been good in that case either, but I think it is clear that the mother is entitled to set aside this temporary arrangement.

The child was delivered up to the petitioner, and the Court thereafter dismissed the petition.

Counsel for Petitioner — Graham Murray. Agents — Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for Respondent — M'Kechnie—MacWatt. Agent—William B. Glen, S.S.C.

Wednesday, June 7.

SECOND DIVISION.

[Sheriff of Caithness.

REID *v.* REID BROTHERS.

Proof — Parole — Competency — Anomalous and Unusual Contract between Consigner and Consignee.

In an action against the consigners of fish, at the instance of the consignee, to recover the amount of his advances upon the consignment, the defenders averred that by verbal agreement the pursuer had contracted to pay them certain fixed rates whatever prices the fish fetched in the market.

Question—Whether the alleged agreement could be proved otherwise than by writ or oath.

Opinions negative per Lord Justice-Clerk and Lord Young; *affirmative per* Lord Craighill and Lord Rutherfurd Clark.

William Reid, who was a herring-merchant at Stettin, and was in the habit of advancing cash to fish-curers in Scotland against consignments of herrings to be sold by him on commission, sued Messrs Reid Brothers, fish-curers, Keiss, Caithness, for the sum of £147, 12s. 4d. This sum he averred was the balance due to him in respect of certain advances to them on a consignment of 99 barrels crown branded herrings, and 718 barrels of other sorts, which had realised a sum of £368, 7s. 6d., which he had credited to account of the advances, under deduction of freight and the usual consignment charges. The defenders disputed liability, and averred that the pursuer had agreed to give at least a full price of 26s. per barrel of crown branded full herrings, and 12s. per barrel of other sorts. Under this agreement they averred that the pursuer was bound to credit them in account with £559, 10s. instead of the £368, 7s. 6d. with which he had credited them, and that the difference between these sums was more than the sum sued for. After a proof, in which the defenders adduced parole evidence in support of the agreement, the Sheriff-Substitute (Erskine Harper) assoilzied the defenders.

On appeal the Sheriff (Thoms) recalled the interlocutor and gave decree for the sum sued for.

The defenders appealed. On the question as to the competency of the parole evidence, the defenders relied on the following authorities:—Dickson on Evidence, sec. 599; Bell's Prins., sec. 286; *Stein's Assignees*, Nov. 21, 1828, 7 S. 47; *ex parte White in re Nevill*, Jan. 14, 1871, L.R. 6 Ch. App. 397; *Moscrip* v. *O'Hara, Spence, & Co.*, Oct. 23, 1880, 8 R. 36.

In reply, the pursuer, in support of his contention that proof by writ or oath was necessary in order to set up an agreement so unusual and anomalous as the present, cited Ersk. Inst. iv. 2, sec. 20; and *Edmonston* v. *Bruce & Edmonston*, June 7, 1861, 23 D. 995.

At advising—

Lord Justice-Clerk—The agreement alleged here is one of a somewhat eccentric and unusual kind, and one can only account for the pursuer's having entered into it, if he did so, by his desire to keep the fishing connection which the defenders could bring him from going to some one else in the market. The defenders attempt to prove it by parole evidence—[*His Lordship then proceeded to consider the evidence, and came to the conclusion that the parole evidence did not prove the alleged agreement. His Lordship then proceeded*]—But the question has arisen and has been argued to us, whether such an agreement can be proved by parole evidence? I have an impression that it cannot. I think the bargain was all on one side, and so repugnant to the nature of the original contract that it cannot be proved by parole. It falls therefore, I think, under the category of unusual and anomalous engagements which can only be proved by writ or oath. We must, I think, dismiss the appeal, and affirm the judgment of the Sheriff.

Lord Young—I am of the same opinion. The action is raised for a balance which the pursuer alleges is due to him on transactions between him and the defenders, by whom he was employed as agent to sell on commission herrings

consigned for the purpose. The defence is that he by a special bargain, which Mr Murray represents as one made for this occasion only, and in order to serve a particular purpose, agreed to make good to his principals 26s. and 12s. per barrel on different qualities of herrings respectively, whatever price he realised, and that as the transactions have not produced 26s. and 12s. he must make good the deficit. These are the exact terms of this exceptional bargain which is said to have been made for a particular purpose. I agree with your Lordship in thinking that such a bargain, looking to its nature and to what is said of it, is unusual and anomalous, and, according to our law, cannot be sustained unless it is supported by the writ or oath of the party disputing it. But I should desire, if it can be avoided, to refrain from deciding the question here, as I think the circumstances of this case are not favourable for doing so. I am of opinion, however, even if it is assumed that the agreement can be proved by parole evidence, that it has not been proved here. Therefore I agree in thinking that the pursuer ought to get decree for the balance of the amount sued for, which is, I think, due.

Lord Craighill.—I agree with your Lordships in the result, but if it were necessary in order to come to a decision in the case to give a final opinion on the competency of parole evidence here, I should be obliged to come to a different conclusion from your Lordships. The pursuer undertook to dispose of the defenders' herrings as their agent, and we have here a dispute regarding one of the terms of that contract. The proof, therefore, relates to the proof of these terms, and is incidental to the proof of the contract itself. It may be called an out-of-the-way contract, or an extraordinary contract, but if you are entitled to inquire by parole evidence whether the contract exists or not, and it is not disputed that you are, then by parole evidence also you may find out whether any of the conditions which are represented to have formed part of the contract really did so. I do not give that as my final opinion. I only say if it had been necessary for me to express an opinion, it would have been that just stated. I, however, agree with your Lordships in thinking that the parole evidence fails to show that the bargain alleged by the defenders was that which the parties truly entered into. [*His Lordship then considered the evidence.*]

Lord Rutherfurd Clark—If this question were to be decided entirely by parole evidence, and on the footing that written evidence was not requisite to establish the agreement founded on, I should incline to the opinion that the defence had been established. I think the defenders' evidence is so clear as to establish it, and we have no rebutting evidence on the other side.

There remains the further question, whether the defenders are entitled to proceed on parole evidence alone, or if they must prove this agreement *scripto*, on account of its being of an exceptional nature. As I have no voice in the decision of the case, I shall abstain from giving an opinion on this interesting question, only contenting myself with saying that I have an impression rather in favour of admitting parole proof of the agreement here alleged, if the evidence is satisfactory to the Court.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Appellant — Graham Murray — M'Lennan. Agent—William Gunn, S.S.C.

Counsel for Respondent—Comrie Thomson—Watt. Agents—H. & H. Tod, W.S.

Tuesday, June 7.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BRADY AND OTHERS *v.* PARKER.

Reparation — Unfenced Hatchway — Injury to Stranger legitimately on Premises.

Upon the premises of a soap manufacturer there was a hatch, consisting of a moveable platform, which when closed was flush with the ground. There were short stone pillars at each of the four corners of the hatchway, and it was fenced by chains attached to these. Over the hatchway there was a lamp. A dealer in firewood visited the premises on a dark evening for the purpose of buying tar barrels for firewood, and was referred by one of the workmen to a clerk, who informed him that they did not sell tar barrels. On his way out the firewood dealer fell down the open hatchway and died of the injuries thus sustained. In an action of damages at the instance of his representatives it was proved that though the hatchway was not in use, it had been left open; that one of the chains was not attached to the pillars; and that the lamp was not lighted. *Held* that the deceased was legitimately upon the premises, and that the defender was liable in respect the hatchway was unfenced and unlighted.

This was an action of damages in the Sheriff Court at Glasgow at the instance of the widow and children of the deceased Francis Brady against John Parker for fatal injuries which the deceased had sustained through the alleged negligence of the defender and his servants. The facts of the case were these :—

On 3d December 1885, about five o'clock in the evening, the deceased, who was a dealer in coals and firewood at Milton Lane, Glasgow, went into the premises of the defender, a soap manufacturer and oil merchant, 117 Port Dundas Road, Glasgow, for the purpose of buying empty barrels to be broken up for firewood. There were two entrances to these premises, one at Port Dundas Road, which was the usual entrance, and the other at Stirling Road, which was the entrance for carts. The defender had no sale or purchase transactions in the works, these transactions taking place in the office in Frederick Street. On the road leading from the entrance gate at Port Dundas Road there was a hatch for raising goods from the cellar underneath the warehouse to the ground above. This hatch was in the form of a platform which moved up and down, worked either by steam or hydraulic pres-