

to go to her sister the appellant; others desire that she assured them that her brother James was to get a share. She seems to have intentionally played upon their hopes and fears, and possibly did not know her own mind. In these circumstances I do not think there is sufficient evidence to sustain the present claim.

LORD JUSTICE-CLERK—The view which your Lordships have taken I take also. While the case of *Crosbie's Trustees* must be followed in similar circumstances, I do not think that it is an authority which should rule except in practically similar circumstances. The present is a different case altogether. If the doctrine laid down in *Crosbie's Trustees* is to be followed, the circumstances of the case must prove the intention of the donor absolutely and conclusively. But here the evidence comes to this, that on different occasions this old lady expressed diverse intentions to different people, so that no-one can find out the decision which she arrived at, or whether she definitely intended to dispose of her funds in a particular way. I think it is impossible to say that there is no doubt as to the intention of the alleged donor. I am therefore of opinion that the conclusion which the Sheriff has arrived at is right.

LORD YOUNG was absent.

The Court refused the appeal.

Counsel for Pursuer—Guthrie, Q.C.—T. B. Morison. Agents—Mackay & Young, W.S.

Counsel for Defender—Younger. Agents—Curren, Cowper, & Buchanan, W.S.

Saturday, June 30.

SECOND DIVISION.

[Sheriff of Forfarshire.

MONCRIEFF v. LANGLANDS.

Parent and Child—Illegitimate Child—Aliment—Offer by Father to Place Male Child of Seven Years in Care of a Stranger.

An offer made by the father of an illegitimate male child seven years of age, to place it in the care of a stranger, is a good defence to a claim by the mother for future aliment, provided that the Court is satisfied as to the suitability of the person in whose custody the father proposes to place the child.

This was an action at the instance of Mrs Alison Moncrieff, with consent of her husband Alexander Moncrieff, yarn dresser, Dundee, against Charles Langlands, overseer, Dundee, for the aliment of her illegitimate male child born on 19th August 1892, of which the defender was admitted to be the father.

The petition concluded (1) for certain

arrears which the pursuer alleged to be due for the period prior to 19th August 1899, when the child reached the age of seven; and (2) for a sum of £7, 16s. yearly thereafter as aliment for the said child.

The defender stated that he had paid aliment up to 24th August 1899, on which date he offered to take the custody of the child, and that his offer was refused by the pursuer, and he therefore refused to pay any further aliment. He stated further, that being temporarily absent from this country in pursuit of his calling he had arranged to place the child either under the care of one Mrs Macdonald, residing near Dundee, or with his brother.

He pleaded (2) "The defender is entitled to make his own arrangements for the upbringing and education of the child, in respect the child is over seven years of age, and pursuer has been married since its birth."

On 22nd December 1899 the Sheriff-Substitute (CAMPBELL SMITH) decerned in terms of the prayer of the petition.

The defender appealed to the Sheriff (JOHNSTON), who on 9th March 1899 pronounced an interlocutor in these terms—(After dealing with the claim for arrears), "Finds that the defender not being in this country his offer to board the child with strangers, or even his brother, is no sufficient answer to the claim for aliment: Therefore decerns him to pay aliment at the rate of 3s. per week from said 24th August 1899 until the date hereof, and thereafter quarterly in advance, with interest as craved: Finds the defender liable to the pursuer in three-fourths of her taxed expenses. Allows an account," &c.

Note.—"I think the law is that unless there is something exceptional in the case, a father of an illegitimate child is entitled at the age of seven years to say, in answer to a claim to contribute further aliment, that he is willing to receive the child into his own house, but I do not think that this extends to entitling him to say that he will provide for its support in someone else's house. I have not given decree for future aliment down to any definite date, because the defender may return home and then make a legitimate offer to receive the child into his house."

The defender appealed to the Court of Session. It was stated by his counsel at the bar that he now proposed to entrust the child to the care of Mrs Macdonald.

Argued for the defender and appellant—The father of an illegitimate child was entitled when it reached the age of seven to provide for its support and upbringing as he thought best, subject to the condition that his offer must be made in *bona fide*, and that the proposed arrangement was suitable—*Grant v. Yule*, February 29, 1872, 10 Macph. 511; *Shaver v. Robertson*, November 29, 1877, 5 R. 263; *Westland v. Pirie*, June 1, 1887, 14 R. 763. The Sheriff's view that the father was not entitled to provide for the child's upbringing elsewhere than in his own house was unsound. It was not said here that the person with whom the defender proposed

to place the child was in any respect unsuitable. It must therefore be held that the proposed arrangement was reasonable, and the defender was consequently absolved from liability for further aliment.

Argued for the pursuer and respondent—The offer made by the defender was not reasonable. He was not in this country, and it was not proposed to place the child in the care even of a relative. The Court had never sanctioned an offer to entrust the child to the care of a stranger. The pursuer had no information about Mrs Macdonald, and it did not appear that she had agreed to take the child. The respondent cited *Brown v. Halbert*, May 19, 1896, 23 R. 733.

The Court remitted to a reporter to make inquiry regarding the circumstances and character of the person to whom the defender proposed to entrust the child. The result of that inquiry sufficiently appears from the opinions of the Judges.

At advising—

LORD JUSTICE-CLERK—This child has reached the age of seven years, and when an illegitimate male child has reached that age it is as a rule the right of the putative father to decline to pay any further aliment on the footing of taking the maintenance and upbringing of the child into his own hands. During the child's earlier years, when a mother's care is of the highest importance, the father has no such right. Where a father, when the child is seven years old, proposes to take charge of it himself, it is in the ordinary case to one of his relatives that he entrusts the custody of the child, but I am not prepared to say that the mere fact that the father does not propose to take the child into his own personal custody, and proposes to hand it over to a stranger, is conclusive against the father's proposal if that proposal is otherwise satisfactory in the opinion of the Court. I can imagine many cases in which it would be out of the question for the father to take the child into his own house. I know of no authority for the doctrine that the father must have a house of his own in which to receive the child. I think that he sufficiently fulfils his obligation if he provides a place for the child in a suitable house. I think that the defender's proposal here is of that nature. I am therefore of opinion that we should recall the Sheriff's interlocutor, and give the mother decree for aliment up to the present date, but no longer.

LORD TRAYNER—I have come to the same conclusion. The rule is now well established that, unless in exceptional circumstances, such as the weakness of the child, the father of an illegitimate child which has reached the age of seven years is entitled to say, in answer to an action by the mother for payment of future aliment, "I will no longer pay aliment, for I intend to provide for the child by taking it into my own charge." If that offer is made in *bona fide*, the mother is not entitled to insist in her action against the father. The

father may take the child into his own house if he wishes; but he may be a bachelor, and other circumstances may easily be figured which would make it undesirable for him to take the child to live in his own house or lodgings, and the cases which have been decided show that it is not a reason for refusing to give effect to the father's offer that he does not propose personally to undertake the custody of the child. The offer generally made by the putative father is to place the child with his brother, his sister, or other relative, and the difference in the present case is simply this, that the defender here proposes to place the child with a stranger, but if the person is respectable and the Court is satisfied that the child will be well cared for in such custody, I think that the father's offer is just as good and effectual as an offer to take the child to his own home. I am satisfied that the person with whom the defender proposes to place the custody of this child is a suitable person, and I am therefore of opinion that the Sheriff's interlocutor in so far as it is an interlocutor decerning for payment of continuing aliment in the future, ought to be recalled. I think that the pursuer is entitled to decree for aliment at the rate of 3s. a-week from the date of the last payment to the present date, but to no more. The defender's offer terminates his obligation to pay aliment to the pursuer. She may reject the offer and keep the child if she pleases, but if she does, that frees the defender from any obligation to provide aliment in the future.

LORD MONCREIFF—I am of the same opinion. I confess to feeling some sympathy with the pursuer, but the case of course cannot be decided upon considerations of sympathy. The defender's right to meet the action by an offer to take the child into his own hands is undoubted. Notwithstanding the offer, the mother is entitled to keep the child if she pleases; but if the offer is a good offer, she is not entitled to keep the child and also to decree for future aliment against the defender. Therefore the only question here is, whether the offer which the defender has made is to be regarded as a good offer. It is said that the offer is bad, because the defender, being absent from the country, does not propose to take the child into his own house or that of a near relative, but proposes to board the child with a stranger. It is true that the cases in the books with which we are familiar were cases in which the child was boarded with a relative of the father, but it does not follow that an offer by the father to send the child to a person who, although in other respects suitable, is a stranger, is an offer which must necessarily be rejected as insufficient. The Court must be satisfied that the person, whoever it is, to whom it is proposed to send the child is a suitable person, who is likely to look well after the child, and I think that the only effect of the person proposed being a stranger is to lay on the Court the duty of seeing that he or she is entirely unexcept-

tionable. We have a report here which gives a very satisfactory account of Mrs Macdonald, to whom the defender proposes that the child should be sent. Mr Gunn does not dispute that. Therefore whatever views one may entertain as to the motives of this defence, I think that we have no alternative but to sustain the defender's proposal.

LORD YOUNG was absent.

The Court sustained the appeal, recalled the interlocutors appealed against, found "that the defender has intimated that he is prepared to provide for the child's future maintenance, and that the provision he has made for doing so is satisfactory;" decreed for alimont from 24th August 1899 to 3rd July 1900, and *quoad ultra* assoilzied the defender.

Counsel for the Pursuer—Gunn—Adamson. Agents—Mackay & Young, W.S.

Counsel for the Defender—Blair. Agent—L. McIntosh, S.S.C.

Saturday, June 30.

SECOND DIVISION.

BRODIE'S JUDICIAL FACTOR v. BRODIE.

Succession — Marriage - Contract — Provisions to Children—Reserved Power of Apportionment — Implied Exercise of Power by General Settlement.

A husband in his marriage-contract bound himself to provide a certain fund, to be held by the trustees for his wife in life-rent and the children of the marriage and their issue in fee. It was declared that the issue of children predeceasing the period of payment should be entitled to their parents' share. Power was reserved to the husband to divide and proportion the said provision among the children, and in the event of his death without making such division, the wife, if she survived him, was to have the same power. The husband predeceased his wife, leaving a settlement whereby he directed his trustees to set aside the fund provided by the marriage-contract to be invested for behoof of his wife and children in the terms and for the purposes therein specified. By the last purpose of his settlement he directed his trustees to "divide, pay, and make over the whole residue and remainder of my said means and estate, after satisfying the purposes hereinbefore written, equally among my said children and the survivors of them, on their respectively attaining twenty-one years of age." The wife, after her husband's death, executed a deed of apportionment, whereby she directed the trustees to divide the fund among her then surviving daughters equally.

Held that the husband had not by his settlement validly exercised the power of apportionment reserved to him, and that the deed of apportionment executed by the wife must receive effect.

By antenuptial contract of marriage dated 3rd and 4th February 1852 the late Kenneth Sutherland Brodie bound and obliged himself, within the period of four years from and after the solemnisation of his then intended marriage, and at the sight and to the satisfaction of the trustees nominated and appointed by the said contract of marriage, to lay out and secure the sum of £6000 sterling upon good and sufficient bonds or mortgages either in Scotland or in India, in his own option, or in the other securities and investments mentioned in the said contract, and to take the rights and securities thereof to him the said Kenneth Sutherland Brodie and the said Isabella Waters Smith (his wife) and the survivor of them, in conjunct fee and life-rent, but for her the said Isabella Waters Smith's life-rent use only, and to the child or children of the said intended marriage, and the issue of the bodies of such child or children as representing their parent in manner after mentioned, whom failing to the said Kenneth Sutherland Brodie's own heirs and assignees whomsoever in fee.

The marriage-contract further provided—"And it is further hereby declared that if there shall be more than one child of the said intended marriage it shall be lawful to and in the power of the said Kenneth Sutherland Brodie at any time of his life, and even on deathbed, to divide and proportion as he shall think proper amongst the said children the aforesaid provision in their favour; and in the case of his death without making such division, the said Isabella Waters Smith, if she shall survive, shall have the same power, and failing of such division the said principal sum shall belong to and be divided amongst the said children equally and share and share alike: Declaring always that if any child or children of the said marriage shall die before the said sum provided to him, her, or them under these presents and the exercise of the said power of division shall be paid and become payable, leaving lawful issue of his, her, or their bodies, the said issue shall have right to the share of such deceased child or children in the same manner as if such parent had received payment, or the same had become payable during the parent's lifetime."

By his trust-disposition and settlement dated 4th May 1863 Mr Brodie directed his trustees therein named, after payment of all his just and lawful debts, sickbed, and funeral expenses—"In the second place, to set aside the sum of £6000 provided by the contract of marriage between me and Isabella Waters Smith or Brodie, my wife, to be invested for behoof of her and the children of our marriage, and to invest the same in the terms and for the purposes specified in the said contract of marriage, and whatever sum shall be necessary in addition to the interest or produce of the