

tions, called as defenders hereto as aforesaid, in the way and in the manner prescribed by the said trust-disposition and settlement; or otherwise as may be considered just and expedient by our said Lords, and that said sum of £600 sterling having been advanced and paid to her by her said husband's trustees, and she having deposited the same in the said pursuer's branch bank established at Kirkcudbright, the pursuers are only liable in once and single payment thereof, with bank interest due thereon from the date of said deposit until payment, or until consignment in this process, and that to the person or persons who may have best right thereto; for determining which, the said several persons, creditors, or pretended creditors foresaid, and the said Mrs Margaret M'Neillie or Comrie, common debtor for her interest, and all others pretending right to said sum of £600 sterling, ought to produce their respective rights, claims, and titles, or other interests in said sum, and dispute their preferences thereto."

The raisers pleaded—"The defenders and other beneficiaries, if any, exclusively interested in said legacy of £600 sterling, with interest due thereon as aforesaid, the fund *in medio*, and in the division and distribution thereof, are entitled *de plano*, to have the same divided and distributed amongst themselves as libelled, or at all events, to have it adequately secured and rendered safe in the meantime, by consignment in bank in their names or otherwise, and kept ready for final division and distribution when the proper time arrives for that purpose."

Mrs Comrie appeared and claimed the whole fund *in medio*, and to hold the same in terms of her late husband's trust-deed. She pleaded—" (1) The sum of money forming the fund *in medio* having been left directly to the claimant for the purpose specified in the trust-deed, she ought to be ranked and preferred *primo loco* thereto, in terms of her claim, with expenses. (2) The claimant cannot be compelled by legal proceedings to exercise the faculty committed to her by her deceased husband, in regard to the said fund. (3) In no view are the claimant's brothers and sisters-german entitled to have the fund divided equally among them, they being not her only relations.

The Lord Ordinary (ORMIDALE) pronounced the following interlocutors in the case:—

"19th May 1870.—The Lord Ordinary having heard parties' procurators, repels the objections to the multiplepounding; finds the real raisers entitled to their expenses, including the expenses of this discussion; remits the accounts thereof when lodged to the auditor to tax and report; finds the nominal raisers liable only in once and single payment; holds the summons as a condescendence of the fund *in medio*, and appoints the claimants to lodge their condescendences and claims within ten days.

"19th November 1870.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, sustains the claim for Mrs Margaret M'Neillie or Comrie, No. 20 of process, and accordingly ranks and prefers her to the fund *in medio*; repels the competing claims, and decerns; finds the claimant Mrs Comrie entitled to expenses as against the other claimants; allows her to lodge an account thereof, and remits the same when lodged to the auditor to tax and report."

Against this latter interlocutor the real raisers reclaimed.

PATISON, for them, referred to *Williamson v.*

Gardiner, 17 Nov. 1865, 4 Macph. 66, and *Scott v. Scott*, 2 Macq. 281.

MACLEAN for Mrs Comrie, the common debtor.

At advising—

LORD PRESIDENT—This is the most extraordinary proceeding, or rather one of a series of the most extraordinary proceedings, which ever came before this Court. I am not going to construe farther than is necessary the clause in the trust-settlement of the late Mr Comrie, which has given rise to this process. To do so would be to involve ourselves in questions of some difficulty, and which are quite beside the disposal of this case. I can conceive that hereafter, and as soon as Mrs Comrie exercises the discretionary power of division committed to her, those questions may arise, but at present it does not seem to me that there is any room for entertaining them. Mr Comrie directs his trustees to pay over to his widow "the sum of £600 sterling, to be by her at any time divided among her relations, as she shall think fit." Now it is quite clear that it is left entirely to the discretion of Mrs Comrie, at what time and in what manner this division shall be made, and the fund disposed of. The words are "to be divided as she shall think fit." She has not, it appears, yet thought "fit" to make a division, and, so far as I can see, no Court can compel her to do so. I therefore think that any attempt to compel Mrs Comrie to proceed with a division must be absolutely inept, never mind in what form it is made. While, as regards this particular form of a multiplepounding, it is most manifestly and absurdly incompetent. The way in which it has been attempted to raise double distress is for the brothers and sisters of Mrs Comrie, who are claiming to have the fund divided among them, to raise action against her, and then arrest upon the dependence of these actions; and then, in virtue of these arrestments, they say they have created double distress. But there is no more room for a competition for this fund in the hands of the bank, between these relatives, and Mrs Comrie, than between them and the trustees under Mr Comrie's settlement. Without going farther, I may simply state that I am of opinion that the objections to the multiplepounding ought to have been sustained *in initio litis*. But the interlocutor of the Lord Ordinary of May 19th repels the objection, and appoints the claimants to lodge their condescendences and claims. I am therefore of opinion that that interlocutor should be recalled—and of course all subsequent ones fall with it—and that we should simply sustain the objection, and dismiss the action as incompetent.

The other Judges concurred.

The Court accordingly recalled the interlocutor of the Lord Ordinary, and dismissed the action.

Agent for the Real Raiser and Reclaimers—William Mackersy, W.S.

Agent for the Common Debtor and Respondent—Hugh Milroy, S.S.C.

Saturday, March 11.

SECOND DIVISION.

KETCHEN *v.* KETCHEN.

Aliment—Parent and Child—Divorce. Circumstances in which held that £25 per annum was a sufficient sum to be paid by a captain in the army for the support of a daughter, four years

of age, in the custody of her mother, from whom he had been divorced; and action concluding for payment of £60 per annum dismissed accordingly.

James Ketchen, a lieutenant in the Bombay Native Infantry, the defender in this action, married Julia Matilda Grant on July 5th 1862, went with her to India, and was thereafter promoted to the rank of captain. Four children were born of the marriage, of whom Ethel Julia Grant, the pursuer in this action, alone survived. In October 1868 they returned to Great Britain, and went to reside at Kingillie House, near Nairn; but in May 1870 Mrs Ketchen obtained a decree of divorce against her husband on the ground of adultery. In June 1870 the Second Division of the Court refused the prayer of a petition by the defender for the custody of his child, and gave the custody to the mother. In July 1870 defender offered to pay £25 per annum as aliment for his daughter, but that offer was declined as unsuitable. On November 23d, 1871, pursuer raised the present action, concluding for aliment at the rate of £60 per annum. It appeared that defender was proprietor of Kingillie House, the rental of which was entered on the Valuation Roll as £65, but that the property was burdened with heritable debts to the extent of £1000. Defender's pay as captain in the Indian army amounted to nearly £500, but from September 1868 to September 1870 he had been in receipt of half-pay only, while, subsequently to the latter date, he was allowed 10s. 6d. per diem only.

Pursuer pleaded that "The defender, being the pursuer's father, is bound to aliment the pursuer, and is therefore liable as concluded for."

Defender pleaded, *inter alia*—“(1) The pursuer, being a pupil, has no title to sue, and the action ought therefore to be dismissed. (4) The action is barred by the statements and pleadings of the pursuer's mother (the *vera domina litis*) in the petition for custody.” (This plea referred to a statement by the mother, in objection to that petition, that “she was quite able to support and educate the child in a manner befitting her position in life.”) “(6) The offer made by the defender to pay £25 a-year was, in the circumstances, a reasonable one, and this action was unnecessary.”

The Lord Ordinary (JERVISWOODE) pronounced an interlocutor “ordaining the defender to make payment to the pursuer of the sum of forty pounds sterling (£40) yearly, in name of aliment, payable at the terms, in manner, and with interest, as concluded for in the summons, and that during the pupilarity of the pursuer, without prejudice to such claim for aliment thereafter as she may be advised to insist in.

“*Note*.—It was here earnestly argued, on behalf of the defender, that having regard to the principles of law applicable to the class of cases within which the present may be held to come, and of which the case of *Maule v. Maule*, as decided in the House of Lords is a prominent instance, the aliment which the defender should here be found liable to pay should be fixed at a sum sufficient merely to preserve the pursuer from absolute want. But the Lord Ordinary holds, and in his present judgment has proceeded on the footing, that the case of *Maule* does not rule, or seriously affect, the principle which is to be applied.

“Here the foundation of the claim, at the instance of the pursuer, is the misconduct of the defender himself. That this is so is rendered clear by the terms of the judgment, and of the opinion

of the Court, as delivered in the case of *Ketchen v. Ketchen* (the defender), reported under date July 2d, 1870; and it appears to the Lord Ordinary that it would be contrary to principle to find first that the defender is disqualified by his personal conduct to act as the custodian of his child, and to follow such a finding by fixing the aliment which is, in consequence, to be paid to another, who is to act *in loco parentis*, at the lowest possible rate consistent with the actual subsistence of the child.”

The defender reclaimed.

BURNET for him.

LANCASTER for respondent.

At advising—

The LORD JUSTICE-CLERK—I am of opinion that the offer made by the defender for the aliment of his child is sufficient in the circumstances, and that the action should therefore be dismissed. When the defender presented a petition to us, praying for the custody of the child, we debarred him from separating it from its mother; but her statement, that she was in a position to support and educate it, formed an element in the considerations which induced us to give her the custody. Now, this is really an application by the mother for the aliment of the child. Keeping in view, therefore, her former statement, and the circumstance that the child is to live with the mother, I think the defender has made a sufficient offer of aliment, and it is not necessary to touch on the general principles by which such aliment is to be determined. The amount offered is enough in the meantime, but if a change in the circumstances of the defender takes place, an increased aliment may perhaps reasonably be demanded.

LORD BENEHOLME—I hold that the action should be dismissed, on the ground that the offer made by the defender is sufficient, although circumstances may so far change as to justify the pursuer in asking for an increase. The case of *Maule* is the ruling authority in all these cases, and cannot be regarded as otherwise than binding. The Lord Ordinary, however, appears to me to have allowed himself to be a little affected by the previous misconduct of the father, and to have granted a higher aliment than that offered, as a kind of penalty; but I consider £25 per annum as an allowance for a child living with its mother to be sufficient in the circumstances, while the misconduct of the father has no bearing on the matter.

LORD COWAN and LORD NEAVES concurred.

The Court accordingly pronounced an interlocutor dismissing the action, “in respect of the offer made by the defender to pay £25 per annum as aliment.”

Agents for Pursuer—H. & A. Inglis, W.S.

Agent for Defender—N. M. Campbell, S.S.C.

Tuesday, March 14.

FIRST DIVISION.

MACKENZIE, PETITIONER.

Petition—Entail—Montgomery Act—Improvements—Enclosing. Circumstances in which wire fences were sanctioned as permanent improvements under the Montgomery Act.

This was a petition to charge the entailed estate of Seaforth with expenditure for Improvements, under the Montgomery Act, 10 Geo. III, c. 51, part of which expenditure was incurred in the erection