

able to work in the shop. But I think I must take the pursuer's own statement, as if not necessarily the more reliable one, at least the one by which she is bound, and it is that he had superseded his wife in the charge of the shop, and that in consequence of that she left him. Well, it may be that she was not entitled to leave him on that ground, but certainly it is a ground that one must have a very considerable sympathy with, and I can hardly look upon her leaving in such circumstances as a deliberate act of desertion. Well, then, according to the law of divorce the desertion must be continued notwithstanding the remonstrances of the other spouse, and in opposition to his or her wishes, but I have no sufficient evidence that Mrs Gould's absence from her husband's house was continued in opposition to his wishes. One witness says that he had taken a message from the husband to the wife asking her to return. She denies the statement, and gives a different version of that matter. But there were other ways that might have been tried. The pursuer might have seen his wife or written to her, and expressed regret for anything he had done that had contributed to the separation, and offered a reconciliation. Letters of that kind have often been put in evidence in cases of divorce for desertion, and where they appear to be written in good faith great weight is always allowed to them. In the present case the result of my consideration of the evidence is, that in the first place Mrs Gould left her husband, not from any purpose of wilful desertion, but from natural feelings of resentment caused by his conduct towards her, and that the pursuer has not since then done what was incumbent upon him to induce her to repent and to resume conjugal cohabitation.

“With regard to the other cases which have been cited, while of course it is always very useful to know the views that are taken by the Court of Appeal upon any legal question, I cannot look upon a decision in one case of fact as a precedent or authority for the decision of another question of fact, and in the view I take there is no question of law here, and I must give my opinion upon the facts as I find them. I shall therefore dismiss the action.”

The pursuer reclaimed, and argued—That if the husband was not satisfied with his wife's conduct as manager of the shop he was entitled to get another assistant, and that did not entitle the defender to leave him. She had never offered to go back to him—*Willey v. Willey*, May 17, 1884, 11 R. 815.

No appearance was made for the defender.

The Court ordered additional proof as to whether the pursuer had ever asked the defender to return to him as his wife.

At the proof before Lord Rutherford Clark the pursuer deponed—“I remember sending a message to my wife shortly after she left me in 1875, by Mr James Drummond, who was in the habit of coming about my house. I told him to go to my wife and tell her I was anxious for her to return. He went to see my wife with the view of inducing her to return to me. I thought he could do that better than if I went myself. He reported the result to me, saying that she said she would never return, and that when she left me she did not mean to come back.”

James Drummond deponed—“I remember the pursuer asking me to convey a message to his wife. He said I was to make sure and try to get her back to him if possible. I called on the defender accordingly. My interview with her lasted about half-an-hour. I asked her on her husband's behalf to return to him, but she said she would not return. I told her her husband was anxious she should come, but she said she would not come.”

At advising—

LORD CRAIGHILL—[*After narrating the facts*]—The only matters to which I should advert are, First, the cause of the defender leaving her husband's home. The pursuer thinks that the cause was that she was superseded in the management of the baker's shop belonging to him. The Lord Ordinary gives that also as his view in his note, and states that he thinks when she left it was not wilful desertion. I have no sympathy with that view. The husband was master in his own house, and if it seemed good to him to appoint another than his wife to conduct his business he was quite entitled to do so, and it was no excuse for the wife leaving her husband's house that he did so appoint someone to conduct the business.

Then with regard to the other matters in regard to which the additional proof was allowed, I do not know that I would have thought it necessary to have ordered additional proof, because I could not have held that the pursuer's right of divorce had been ousted because he did not send after his wife when she left the house, but the Lord Ordinary thought that that raised a difficulty. The Court therefore thought that additional evidence might clear up the point, and it was accordingly ordered. The pursuer appeared and stated that he had sent James Drummond to his wife to induce her to return, and James Drummond also appeared, and repeated the evidence he had given before, to the effect that he had by the husband's desire requested her to return. This being the position of affairs, it appears to me that the Lord Ordinary's grounds of judgment have been displaced, and we are left free to come to our own judgment. On the whole matter I think that there was no excuse for the wife leaving her home, and that the pursuer is entitled to decree.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court recalled the Lord Ordinary's interlocutor and granted decree as craved.

Counsel for the Pursuer—Forsyth. Agents—Watt & Anderson, S.S.C.

Thursday, December 22.

FIRST DIVISION.

SUTHERLAND v. TAYLOR.

Parent and Child—Custody of Illegitimate Child.

The mother of an illegitimate child entered into an agreement, with the approval of its father, to hand over the child,

then two months old, to the custody of a person who undertook to adopt the child permanently. In the following year the mother presented a petition to the Court praying for the custody of the child. The respondent opposed the petition, on the ground that the mother was bound by the agreement, and that she had not sufficient means for the proper maintenance of the child, who was in a delicate state of health. *Held* that the legal title of the petitioner to the custody of the child was overcome by the fact that she was unable to provide the support which was essential for the preservation of its health and life.

This was a petition presented by Ann Sutherland, No. 77 Rose Street, Edinburgh, in which the Court was asked to find that she was entitled to the custody of her illegitimate child Ethel Kate Sutherland, who was born on 21st March 1886, and to ordain Jonathan Taylor, commercial traveller, residing at No. 78 Easter Road, Leith, with whom it was living, to deliver the child to her.

Taylor lodged answers, in which he stated that he was married, but childless, and that at a meeting between the petitioner and himself and his wife in May 1886 "it was agreed that the respondent should take the immediate custody of the child and adopt it permanently as his own. The petitioner distinctly and expressly agreed with the respondent that the child should remain permanently with him. The respondent took the custody of the child accordingly, and on 18th May 1886 he granted to the petitioner a written acknowledgment that he would maintain and bring it up respectably as his own, and at his own expense 'in all time coming.' The respondent and his wife have maintained and nursed the child ever since, and have become deeply attached to it. The arrangement thus come to was made with the entire approval of the child's father. On 9th June 1886 the respondent had the child baptised by the Rev. Dr Mitchell, minister of South Leith, of whose congregation the respondent and his wife are members. At the baptism the usual baptismal vows were undertaken for the future upbringing of the child. The child has been and is now extremely delicate in bodily health. In consequence it has not been able yet to be vaccinated. The doctor who has attended the child, on 8th November 1887 granted a certificate in the following terms:—'18 Easter Road, Leith, November 8, 1887.—I have attended Ethel Kate Sutherland since July 22nd 1886 up to the present date. When I saw her at first she was in poor condition, and had a rash in some parts of her body. I have treated her all along for congenital syphilis, and she has much improved under the treatment adopted. The child has been frequently under my observation, and I have always noticed that she has been well fed, well and warmly clothed, and has had all the care and attention that could be given to a child. She is at present suffering from bronchial catarrh, and could not be safely removed from her present home yet for two weeks.—GEORGE GUTHRIE, M.B., C.M.'

Since the respondent got the custody of the child, the petitioner has not had anything

to do with it, and has not manifested the slightest interest in it. The respondent has ascertained, and now avers, that the petitioner is living in an attic in Rose Street; she has no visible means of supporting herself, and has no means to support the child, far less to provide it with the clothing, medicine, and other things essential for the preservation of its life and health in its present extremely delicate condition. It is believed and averred that it would be against the child's moral well-being if the petitioner had the custody of it. The father of the child has remonstrated with the petitioner against her seeking the child's custody, and has expressed his desire that the respondent should retain the custody, as he is satisfied that the respondent and his wife have been and are still giving it every possible attention and care. The petitioner has no affection for the child; she has no honest desire to have it with her; her only wish on the matter is to cause pain to the respondent and his wife."

After hearing counsel the First Division appointed the petitioner to lodge a minute stating the facts as to her places of residence since the birth of the child, her present abode, and her means of maintaining the child if it should be delivered to her. The import of the minute lodged, and of the answers thereto for the respondent, appears from the opinion of the Lord President.

Argued for the petitioner—Such an agreement between the mother of an illegitimate child and a stranger only subsisted at the will of the mother—*Macpherson v. Leishman*, June 4, 1887, 14 R. 780. This was a stronger case than that cited, which was between the mother of an illegitimate child and the father. Even if the agreement in this case was permanent it was beyond the power of the petitioner. But it was not clear that it was permanent—[**LORD PRESIDENT**—The averment of danger to the health and morals of the child is an element which was not in the case of *Macpherson*]. The petitioner was ready to take the child, and she was promised a home in her father's house—*Queen v. Nash*, 10 Q.B.D. 454; *Nicolson v. Nicolson*, July 20, 1869, 7 Macph. 1118; *Buie v. Stephen*, December 5, 1863, 2 Macph. 208.

Argued for the respondent—There were two points of distinction between this case and that of *Macpherson*—(1) There was here a permanent arrangement, and (2) there were allegations that the mother was not a proper custodian, and that she was destitute and unable to provide for the child. In the case of legitimate children this allegation was given effect to—*Gulland v. Henderson*, March 16, 1885, 5 R. 768; *Muir v. Milligan*, July 18, 1878, 6 Macph. 1125; *Denny v. Macnishi*, January 16, 1863, 1 Macph. 268. The same principles applied to the case of illegitimate children. The statements in the minute showed seven changes of residence in two years. It did not set forth that the petitioner had any proper means of subsistence. The true question was what was for the benefit of the child.

At advising—

LORD PRESIDENT—This is an application by a mother for the custody of her illegitimate child, and no one can doubt that the petitioner pos-

esses the only legal title to the custody of her child. The putative father has no right over it at all. The child is very young; it was born so lately as the 21st of March 1886, and therefore in addition to her legal title to its custody the petitioner is also the natural custodian of a child at such an early age. There is therefore a *prima facie* case in favour of the petitioner. But as regards the question of custody there are other considerations to be taken into account besides the legal title, and the Court has always considered as of importance the interest of the child itself, and its position as regards the possibilities of life, health, and support.

The present case is unusual in its circumstances. We naturally inquire how the mother came to part with her child, and that leads to the disclosure of a peculiar history. The petitioner, with the approval of the father of the child, delivered the child at the age of three months, and before it was baptised, into the custody of the respondent and his wife. This was done on an arrangement that the respondent and his wife should adopt the child—they being childless—and that the child should remain permanently with them. The petitioner was obviously not able to maintain the child, and was quite willing to be quit of it. The child is very delicate from causes of a painful kind, and it is not disputed that since it has been in the custody of the respondent the child has been carefully tended. The question comes to be therefore, whether it would be inconsistent with the welfare of the child, especially in regard to its health and its chances of life, to restore it to its natural and legal custodian. We had presented to us with the answers a medical certificate of a gentleman who attended professionally in the respondent's family, and who in particular attended this child. On the 3rd of November 1886 he wrote as follows—[*His Lordship read the medical certificate quoted above*].

Now, this information, and other circumstances which came out on the first hearing of this petition, induced the Court to order the petitioner to lodge a minute stating her present place of abode, where she had been in the interval between the birth of the child and the present time, and what means and ability she possessed of maintaining the child if it should be delivered into her custody. The minute lodged in obedience to this order discloses a wandering and restless life, and exhibits no apparent means sufficient to enable the petitioner to maintain or take charge of such a delicate child, with the exception of a statement to the effect that the petitioner has succeeded to money by the death of an aunt. Her place of abode, and the general circumstances of her life, show that she is not in a condition to secure to the child the necessary safety and comfort. Since the minute was lodged it has been explained in correspondence between the agents of the parties that the statement as to succession to an aunt is a mistake, and it was said that the petitioner has succeeded to money by the death of two uncles. But when asked to explain what that money was, or who her uncles were, and when asked to exhibit any deed by which the money was left to her, all further explanation has ceased. Therefore we are compelled to conclude that the supposed source of means thus claimed for the petitioner is an entire

delusion, and that the petitioner is in the most straightened circumstances, and is not in a position to sustain any additional burden.

It is fortunate, as bearing out the necessity for careful charge of this child, that we have a further certificate from the same medical gentleman, bringing down his opinion to the 24th of November, and it is enough to say that, although the condition of the child is fairly good, he mentions the presence in it of some unpleasant and dangerous symptoms, and he concludes thus—“The manifestation of further symptoms depends much upon the health of the child, and it is very essential that she should have (as she has at present) generous diet, warm clothing, and careful nursing, otherwise her bodily condition would certainly deteriorate, and her health and life be seriously endangered.” Now, I think we have enough before us to conclude that if the child were delivered to the petitioner she could not provide for it the generous diet, warm clothing, and careful nursing which are here said to be essential, and therefore it follows that to deliver the child to the petitioner would be to imperil not only its comfort, but its health and its life. In these circumstances I think we have here a case to overcome the legal title of the petitioner, for it is apparent that the highest interests of the child—its health and life—would be endangered by such a course, and I am therefore for refusing this petition.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent from illness.

The Court refused the petition.

Counsel for the Petitioner—Craigie. Agent—William Gunn, S.S.O.

Counsel for the Respondent—Salvesen. Agent—D. Howard Smith, Solicitor.

Thursday, December 22.

SECOND DIVISION.

MURRAY'S TRUSTEES v. BLOXSOM'S TRUSTEES.

Marriage-Contract—Vesting of Provisions to Children.

In an antenuptial marriage-contract the husband bound himself to pay a sum of money to the child or children of the marriage at the first term of Whitsunday or Martinmas after his death if he should survive, or after the death of the widow if she should survive. There was a power of appointment reserved to the husband, and failing appointment the money was to be divided equally, the issue of children predeceasing succeeding to their parents' shares. In the event of there being no children of the marriage, or of the child or children predeceasing the last survivor of the spouses without issue, then the sum was to be held by the trustees for behoof of the heirs and assignees of the husband. No appointment was made. The husband predeceased his wife, survived by three