

The actions were conjoined and proof was allowed and led. After both parties had closed their respective proofs, but before the hearing on evidence, A B moved the Lord Ordinary to open up the proof in order to allow X to be examined as a witness. It was stated at the bar that X, who had absconded, had been arrested in South Africa and was about to be brought to this country for trial.

This motion was opposed by counsel for C D, who referred to the following authorities—*Allan v. Stott*, June 14, 1893, 20 R. 804, 30 S.L.R. 728; *Glengarnock Iron and Steel Company v. Cooper & Company*, June 12, 1895, 22 R. 672, 32 S.L.R. 546; *Coul v. Northern District Committee of the County Council of Ayr*, 1909 S.C. 422, 46 S.L.R. 338.

The Lord Ordinary (ORMIDALE) opened up the proof to allow X to be examined as a witness for A B, reserving to the parties right to move that the proof be closed in the event of protracted delay in procuring his examination.

Counsel for A B—Cooper, K.C.—M. P. Fraser—Armit. Agents—Clark & Macdonald, S.S.C.

Counsel for C D—Maclennan, K.C.—Mercer. Agent—Frank J. Trotter, Solicitor.

Friday, October 27.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

BROWN v. FERGUSON.

Parent and Child—Aliment—Bastard—Claim against Putative Father by Grandmother who has Taken into Custody Bastard, aged Four, on Death of Mother.

The mother of an illegitimate child, born in 1900, died in 1904. Thereupon the alleged father, who had always denied paternity but had paid aliment, offered to take the child. The child's maternal grandmother, who had taken charge of it, refused this offer, and in 1909 raised an action against the alleged father to recover aliment for the period subsequent to the mother's death in 1904. *Held (distinguishing Keay v. Watson*, February 19, 1825, F.C., 3 S. 561) that the defender's offer, notwithstanding his denial of paternity and the age of the child at the time, was a complete answer to the claim of the pursuer, who, being in law a stranger to the child, was under no obligation to maintain it.

Mrs Margaret Taylor or Brown raised an action in the Sheriff Court at Glasgow against David Ferguson craving the Court to find that the defender was the father of an illegitimate male child, of which the pursuer's daughter the deceased Elizabeth Brown was delivered on 29th June 1900, and to decern against the defender for payment to the pursuer of the sum of £8

yearly as aliment for the child from 29th June 1900 till he should attain the age of fourteen or be able to support himself.

The pursuer averred that the defender was the father of the child, and further—“(Cond. 8) Prior to and since the death of pursuer's daughter, the said Elizabeth Brown, pursuer maintained and is still maintaining the said child in family with her, and has disbursed the sums concluded for.”

The defender averred, *inter alia*—“(Stat. 2) Defender has throughout denied the paternity of the child to which the said Elizabeth Brown gave birth on 27th June 1900, but subsequently, to avoid the heavy cost of litigation and without admission of paternity, he offered to take charge of the child, and he went to Aberdeen for the purpose. His offer was refused, and ultimately, upon the same conditions, he agreed to pay half aliment. (Stat. 3) On hearing that Elizabeth Brown was in South Africa and that the child was not in her custody he again offered in October 1903 to take the child. On receiving assurance that the child was still in custody of the mother (contrary to the fact implied by article 8 of pursuer's condescendence that the child was in custody of pursuer in Aberdeen) he continued payment of the aliment. (Stat. 4) After the death of the said Elizabeth Brown, which occurred on 8th June 1904, defender renewed in August 1904 his offer to take charge of the child but pursuer refused the offer. Pursuer is called upon to produce defender's letter to her agents of August 1904.”

Statements 3 and 4 were admitted by the pursuer.

The defender also tendered the sum of £12, 10s., being the aliment due at the date of his offer in August 1904, and renewed his offer to take charge of the child.

The defender pleaded, *inter alia*—“(3) Defender having made a *bona fide* offer to take charge of said child as from and after 8th June 1904, and said offer having been refused, pursuer is not entitled to decree for aliment after the date of said offer.”

On 16th March 1910 the Sheriff-Substitute (DAVIDSON) sustained the third plea-in-law for the defender, decerned against him for £12, 10s., the sum tendered, and found him entitled to expenses.

On 6th July 1910 the Sheriff (MILLAR) on appeal adhered.

The pursuer appealed, and argued—(1) It was conceded that the pursuer was not entitled to a decree for future aliment, but she was entitled to recover the sums expended by her in name of aliment down to the date of the action, for which she had undoubtedly a title to sue—*Macdowall v. MacLurg*, 1807, M. voce Prescription, App. No. 6; *Butchart v. Dunlop*, June 28, 1839, 1 D. 1128. An offer by a defender in an action of affiliation and aliment to take the child was no answer to the pursuer's claim so long as he denied the paternity—*Keay v. Watson*, February 19, 1825, 3 S. 561; *Caldwell v. Stewart*, 1773, 5 Br. Sup. 390. The same rule applied in the present case, for though

the mother of the child was dead and the grandmother was the pursuer, she had been given the custody by the child's mother, whose wishes were entitled to be considered—*Brand v. Shaws*, December 22, 1888, 16 R. 315, 26 S.L.R. 199. (2) In any event the pursuer was entitled to recover aliment down to June 1907, when the child reached the age of seven, for even the admitted father of an illegitimate child could not escape the payment of aliment for it by an offer to take the custody before the child was seven years old—*Westlands v. Pirie*, June 1, 1887, 14 R. 763, 24 S.L.R. 536, per Lord Rutherford Clark, at p. 767, p. 539; *Corrie v. Adair*, February 24, 1860, 22 D. 897; *Ligertwood v. Brown*, June 21, 1872, 10 Macph. 832, 9 S.L.R. 539, at p. 833, p. 540. The mother's death made no difference, for the same considerations operated in favour of leaving so young a child with the pursuer, who had been given the custody by the mother. The pursuer was therefore entitled in either view to a proof of paternity.

Argued for the pursuer (respondent)—The claim for future aliment was bad—*Den v. Lumsden*, November 10, 1891, 19 R. 77, 29 S.L.R. 76. Nor was the pursuer entitled to recover any aliment for the period subsequent to 1904. As a general rule a father was entitled to take the custody of an illegitimate child in lieu of paying aliment, for he was entitled to discharge his liability in the way least burdensome to himself—per L.J.C. Inglis in *Corrie v. Adair*, *cit.*, at p. 900. There might be an exception where the defender in an action of affiliation and aliment denied paternity, but that exception was limited to the case where the claim for aliment was at the instance of the mother of the child, and was based on her inalienable right to its custody—*Brand v. Shaws*, February 24, 1888, 15 R. 449, 25 S.L.R. 332—and not on unfitness of the father to have the child, which did not involve his being denied the custody—*Grant v. Yuill*, February 29, 1872, 10 Macph. 511, 9 S.L.R. 299. The defender's offer might quite well be a good answer to the pursuer, though it would not have been good against the mother of the child—*Buie v. Stiven*, December 5, 1863, 2 Macph. 208. Further, the pursuer was under no obligation to support the child, and was in law a stranger to it, against whom an offer to take the child was good—*Mathieson v. Kirk Session of Fodderty*, December 22, 1831, 10 S. 183. In any event the pursuer's delay in bringing the action defeated her claim. If she had brought her action in 1904 and proved paternity, the defender's offer would, on such proof, have become good, and the pursuer could not thereafter have kept the child and recovered aliment, while if she had failed to prove paternity she could not have recovered from the defender. In neither case therefore could she have recovered any aliment subsequent to 1904, and she could not be allowed to profit by her delay in bringing the action. (2) The fact that the child was only four years old at the date of the defender's offer made no difference, for the father could

always discharge his obligation by such an offer so long as the child was not in the mother's care—*Westlands v. Pirie*, *cit.* The rule that a defender in an action of affiliation and aliment could not discharge his obligation by taking the child before it reached the age of seven, if such rule there was, proceeded on the view that the mother was the best person to have the custody until that time.

At advising—

LORD DUNDAS—The pursuer is the mother of Elizabeth Brown, who was delivered of a male illegitimate child in June 1900, and died in June 1904. The action is directed against the defender, on the allegation that he is the child's father, for aliment at the rate of £8 per annum from the date of its birth till it attains the age of fourteen, but at our Bar the claim was restricted to one for aliment down to the date when the action was raised. The defender denies paternity, but he explains on record that, for reasons specified, he offered to take charge of the child, and, on this offer being refused, agreed to pay the father's proportion of its aliment; and that in August 1904 (the mother having died in June, as already stated) he renewed his offer to take the child, which the pursuer refused, and he tenders the arrears of aliment down to August 1904, and repeats his offer to take the custody of the child. The Sheriff-Substitute and the Sheriff have upheld the defender's plea as a sufficient answer to the action. The pursuer appeals, and asks that the case should be sent back to the Sheriff Court in order that she may establish by proof, if she can, that the defender is in fact the child's father. She maintains that his offer is not a *bona fide* one; that he must pay the aliment sued for, unless it is judicially found that he is not the father; and that he is not entitled to avoid proof upon this matter by accepting the custody of the child.

I think the Sheriffs are right. The pursuer's case resolves itself into a dilemma. If the defender is not in fact the father, it is clear that the pursuer's demand must fail. But if he is the father, I can see no reason why he should not be allowed to implement his obligation as such by taking the child and putting it in the charge of his mother, against whose ability and fitness to attend to its suitable upbringing there is admittedly nothing to be said. The pursuer's counsel, however, contended that, as the defender does not admit paternity, he is not entitled to offer custody in lieu of aliment. I think the argument is fallacious, and is not supported by any of the authorities cited to us. Much reliance was placed by the pursuer's counsel on the case of *Keay v. Watson* (3 S. 561, reported also 19th February 1825, F.C.). As I read the reports, which are not very full or satisfactory, all that was there decided was that the mother of an illegitimate female child of seven was not bound to accept, as in full of her legal demand for its aliment, an offer to accept its custody made by the defender, who denied paternity but "ad-

mitted that he had agreed to become liable for the aliment on the part of the father." One can understand that when the mother in that case sought to establish against the defender by legal process his paternity of the infant and consequent liability at law to contribute to its aliment, a mere offer by him "to take the child into his own house and support it" was rejected by the Court as inadequate "while he denied the paternity." The mother had a clear interest (which the present pursuer has not) to establish, if she could, the fact of paternity while evidence of it was available, as this was the only means she had of relieving herself from the obligation of maintenance which was otherwise legally incumbent upon her. It is also to be observed that in *Keay v. Watson* the child, a female, was only seven years of age, which may well explain why (as Shaw's report bears) "one of their Lordships expressed an opinion that even the true father of a bastard child has no right of custody." Now in the present case we are not considering the demand of a mother, but a claim for aliment put forward by a third party, who stands in no legal relationship to the infant, and is under no legal obligation to support it. In a question with her, the defender's offer appears to me to be a sufficient and conclusive answer. I cannot see why, in the admitted circumstances of this case, the defender should be put to his defence in a proof upon the question of actual paternity.

A subordinate argument was advanced for the pursuer as regards the period between the mother's death in 1904 and the date (in 1907) when the child (a boy) reached the age of seven. But this contention, in my opinion, clearly fails, because a mother's right to the custody (even in a question with the father) of her bastard child of tender years is based upon natural considerations, and is purely personal to herself.

For these reasons I am for affirming the interlocutors appealed against.

THE LORD JUSTICE-CLERK and LORD SKERRINGTON concurred.

LORD ARDWALL was absent.

LORD SALVESEN was sitting in the Justiciary Court at Glasgow.

The Court affirmed.

Counsel for the Pursuer (Appellant)—M'Lennan, K.C. — Maclaren. Agents — Oliphant & Murray, W.S.

Counsel for the Defender (Respondent)—Chree — Kirkland. Agent — Thomas J. Cochrane, S.S.C.

Friday, October 27.

SECOND DIVISION.

[Sheriff Court at Aberdeen.]

OLD MACHAR PARISH COUNCIL v.
ABERDEEN CITY PARISH COUNCIL.

Poor—Settlement—Deserted Children—Discovery of Father and Acquisition by Him of New Settlement—Liability for Maintenance of Children—Transference.

In 1905 four pupil children became chargeable, in respect of their father's failure to maintain them, to the parish of M., where they had a settlement derived from their father. The father, who had disappeared, was not traced till July 1909, when he was found to have acquired a settlement in the parish of A. He was in 1905 and continued to be able-bodied. On 14th July 1909 the parish of M. intimated to the parish of A. a claim of relief of liability for the maintenance of the children after that date.

Held that by the definite location of the father as an able-bodied man with a settlement in the parish of A., the parish of M. was freed, as from the date of their intimation, from liability for the maintenance of the children, and that they were entitled to recover from A. the sums expended in maintenance since that date.

Parish Council of Paisley v. Parish Councils of Row and Glasgow, 1908 S.C. 731, 45 S.L.R. 556, and *Leith Parish Council v. Aberdeen Parish Council*, 1910 S.C. 404, 47 S.L.R. 263, considered and distinguished.

Poor—Settlement—"Able-bodied."

Circumstances in which held (*distinguishing Know v. Hewat*, January 12, 1870, 8 Macph. 397, 7 S.L.R. 230) that a man who did not earn enough to support his children as well as himself, was able-bodied within the meaning of the poor law.

Opinion (per Lord Dundas) that a man who cannot support his children, but is able to support himself, is "able-bodied" within the meaning of the poor law.

Per Lord Salvesen—"I think it would be dangerous to hold that in determining whether a man is able-bodied within the meaning of the poor law, regard should be had to anything but the physical (in which I include mental) condition of the man himself."

The Parish Council of Old Machar raised an action in the Sheriff Court at Aberdeen against the Parish Council of the City Parish of Aberdeen concluding for (1) repayment of certain sums expended by the pursuers on the maintenance of four pupil children of William Taylor, from and after 14th July 1910; and (2) relief of all future advances for the maintenance of the children.

The following narrative is taken from