defender and desired her to get the money placed in her own name so as to secure herself. This the defender accordingly did; and on 18th April she obtained a new deposit-receipt for the amount, payable to herself alone. And she accordingly, with her aunt's sanction, retained the receipt in her own custody as her own property until and after her aunt's death, which took place on 29th April 1871, and she ultimately uplifted the money and applied it to her own use. The defender also stated that nothing was ever said by her aunt as to the gift being revocable, or as to the repayment of the money in the event of her recovery.

Now, it appears to me that the evidence of the defender — which is indeed substantially the whole evidence in the case—is not sufficient to establish an absolute gift of the money *inter vivos*. On the contrary, I think it clearly shews that the gift was made *intuitu mortis*, and I cannot doubt that had the deceased recovered and sought to retain the money the defender would have been compelled to restore it to her aunt. In short, the donation was a *mortis causa* gift and a legacy, and is therefore chargeable with the legacy duty claimed. In the circumstances of this case I do not think that expenses should be given against the defender."

The interlocutor was acquiesced in.

Counsel for Pursuer—Lord Advocate (Watson) — Solicitor-General (Macdonald) — Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Defender—Scott. Agent—W. P. Stuart, S.S.C.

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* *Saturday, November* 17.

OUTER HOUSE.

[Lord Craighill, Ordinary.

M'CARROLL *v.* KERR.

Parent and Child—Father's Objection to Aliment an Illegitimate Child, where he Offers to take it himself.

The father of an illegitimate child, against whom there was a decree standing for its aliment, offered when it reached the age of seven to take it into his own custody, and refused aliment accordingly. The mother, with whom the child had been brought up, declined to give it up, *inter alia*, because the father (a married man) and his family were Roman Catholics and she was a Protestant and desired the child to be brought up as such.—*Held* (by Lord Craighill, Ordinary), in a suspension by the father of a charge for aliment, that, looking to the circumstances of the case, the objection taken by the mother afforded good ground why the father's offer should be refused, and reasons of suspension repelled according.

M'Carroll was father of an illegitimate child born in 1868, of which Kerr was the mother. She in 1869 got decree against M'Carroll for aliment at the rate of £8 a-year; there was a restriction in the decree reserving the defender's right to apply for the custody of the child on its attaining the age of seven. The aliment was paid till the child was past eight years of age, when it was refused, and Kerr accordingly, on the 20th December 1876, gave M'Carroll a charge upon the decree for the sum of £2, being the one quarter's aliment due on 6th December preceding.

This was a note of suspension of that charge, and of interdict of a poinding which had followed upon it. The complainer stated, *inter alia*—"The complainer has since the said decree regularly paid aliment for the said child; but the said child having attained the age of seven years, the complainer is desirous and has offered to take the child into his own custody, and to aliment the child under his own care. He wishes to bring the boy up to his own business in his own house and shop. The boy in question is in good health, and his aliment and education can be best attended to by the complainer. The charger is the sole servant, employed from 8 A.M. to 11 P.M., in a small public-house in Ardrossan, and the boy goes about the said public-house, where he gets his meals in company with an elder son of the charger, also illegitimate. The boy sometimes sleeps in the charger's house or lodging and sometimes in that of her aunt; but he is practically houseless and under no sufficient control. The complainer is entitled, and now demands, to discharge his obligation of aliment by taking the boy into his own keeping."

The respondent answered—"Admitted that till recently the complainer has paid aliment for the child, which is now past eight years of age. Admitted also that the complainer has offered to aliment the child in his own house, but explained that since the birth of the child the complainer has been married to another woman, by whom he has had several children, and that it would be unsafe and injurious to the best interests of the complainer's natural child that it should be taken to his house and brought up along with his wife and lawful children. The complainer's wife has an antipathy to the child, both because of its being the child of her husband by another woman and because it has been trained as a Protestant, while she and her husband are Roman Catholics. On one occasion, when the child accidentally strayed into the complainer's shop, his wife struck and ill-used it in a most cruel manner." She further stated that the complainer's offer was not made *bona fide*, and that though living quite near he had never taken any interest in the child.

A proof was led, the purport of which appears from the note to the Lord Ordinary's interlocutor. His Lordship repelled the reasons of suspension and interdict, and found the charge orderly proceeded, and decerned. He added the following note:—

"The question is whether the complainer, who for eight years has been contributing to the aliment of a bastard child, now nearly nine years old, of which the respondent is the mother, is henceforth to be relieved of liability by an offer to take and support the boy? Whether the complainer really desired to have the child may be doubted. Affection indeed is not put forward as the motive, and the offer, were it to be accepted, would be pecuniarily unprofitable to the complainer. The Lord Ordinary is disposed to think that the complainer is speculating on the

* Decided 15th June

probability that the respondent will rather give up her claim for further aliment than part with her child. This consideration, however, does not furnish a ground for the decision of the controversy. The same thing has been or might have been said in most of the cases of this description which have come before the Court.

"The first consideration which is urged by the respondent as a reason why she should not be held bound to give up her claim on the complainer for aliment if she is to retain the custody of her child, is that he is now a married man, living with his wife and the children of their marriage. The introduction into the family of such a stranger as this bastard child, must, it is said, be a cause of misery to all, though the principal sufferer would of course be the bastard. This is a view which in all likelihood would be realised. Any arrangement more undesirable than what is proposed could scarcely be imagined; but nevertheless it has never been sustained as a ground upon which such an offer as the complainer's may be rejected without releasing him from liability for future aliment. The contrary indeed is proved by several decisions of the Court. The respondent, to strengthen this part of her case, alleges that illwill and violence have already been exhibited towards the child by the wife of the complainer. But the Lord Ordinary is of opinion that this has not been satisfactorily established; and, therefore, the allegation has been thrown out of account in repelling the reasons of suspension.

"What the Lord Ordinary has proceeded upon is this—The respondent is a Protestant, and as she desires that her child should be brought up as a Protestant, she refuses to give it up to the complainer, who is a Roman Catholic, and whose wife is a Roman Catholic, because it would be brought up by them as a Roman Catholic. The point thus raised for decision is new, and there is no authority touching it to be found in any of the books. This, of course, renders the decision of the present case all the more difficult. If a bastard is to regarded merely as an animal, for whose upbringing all that has to be provided is so much daily food, this objection must be overruled; but it cannot be so regarded exclusively. It is a human being. The child in question is already intelligent, and will soon be responsible for its conduct. There are thus other things to be supplied besides food and raiment, and of these religious training is the most important. This is a consideration which cannot be ignored. And who is to determine the creed which the child is to be taught? Not the complainer surely, for he has none of the rights of a father, and indeed is not held in full legal acceptance to be the father. The mother of a bastard is the only parent that, as such, is recognised. Her will, therefore, on this subject must be paramount. She has not only the relative right, but is under a relative obligation. The law is interested in the exercise of the one and in the fulfilment of the other, and neither, as the Lord Ordinary thinks, may be frustrated by forcing upon her such a temptation to sacrifice her duty as that presented in the offer of the complainer. He, indeed, has explained that, should the Court so direct, he, in place of bringing up the respondent's child as a Roman Catholic in his own house, will board it out in a respectable family that it may be brought up as a Protestant. The Court, it is thought, will not assume the responsibility of giving any such direction. Nor is there any need for its interference. The willingness of the complainer to transfer the custody shows plainly enough that there is no legitimate interest or end which is to be served by taking the child out of the custody of the respondent.

"Two other things may properly be explained. The first is, that the Lord Ordinary's judgment has nothing to do with the comparative merits of Protestantism and Roman Catholicism. The respondent happens to be a Protestant, but had she been a Roman Catholic and the complainer a Protestant, the same decision would have been pronounced. The other is, that though it has been suggested on the part of the complainer that the child in question has not been well cared for by the mother, the appearance and intelligence of the boy point to the opposite conclusion. This can have little influence upon the decision; but nevertheless it is only fair that the impression produced upon the mind of the Lord Ordinary in the course of the boy's examination as a witness should be communicated."

The interlocutor was acquiesced in.

Counsel for the Complainer—Vary Campbell. Agent—A. Kirk Mackie, S.S.C.

Counsel for the Respondent—Burnet. Agent—J. Scott Hampton, S.S.C.

Saturday, November 17.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

YEATMAN *v.* PROCTOR AND OTHERS.

Error—Issues—Averments founding an Issue of Essential Error.

Held in an action of reduction of a probative deed on grounds of fraud, facility, and circumvention, that in order to obtain an issue also of essential error the record must contain a specific statement of what the error was, and of what the intention of the granter of the deed had been, and that merely negative averments were insufficient.

Process—Review—Statute 48 *Geo. III. cap.* 151, *sec.* 15—*Leave to Appeal to House of Lords.*

Circumstances where leave to appeal to the House of Lords against an interlocutory judgment disallowing an issue of essential error in an action of reduction of a probative deed was *refused*, with £3, 3s. of expenses.

This was an action raised by Mrs Yeatman, wife of Harry Yeatman, retired commander R.N., against James Proctor and others, some of the next-of-kin and the heir-at-law of Miss Macpherson Grant of Aberlour, Banffshire, concluding for reduction of a pretended deed of revocation bearing to be executed by her on 2d November 1876, and which bore that she thereby revoked all testamentary settlements theretofore executed by her, and