

we apply the principles stated in the case *Bryson's Trustees v. Clark*, 8 R. 142, to the circumstances of this case. The only right which is given to the pursuers under this will is a right to an equal division of the third part of the trust-estate after the death of Mrs Forbes. I think we must hold, after what was said by the Lord President in that case, that no right can vest in the pursuers until the condition has been fulfilled. I am therefore of opinion that we should refuse this appeal, and adhere to the Sheriff-Substitute's interlocutor.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

The Court adhered to the Sheriff-Substitute's interlocutor.

Counsel for the Appellants—Salvesen. Agent—John Rhind, S.S.C.

Counsel for the Respondents—M'Lennan. Agents—Auld & Macdonald, W.S.

Saturday, December 13.

FIRST DIVISION.

HUTCHISON v. HUTCHISON.

Parent and Child—Custody.

Terms of order pronounced by the Court on the petition of a father from whose custody a child had been abducted by the mother, who was living separate from him.

A woman who was living separate from her husband abducted a child from his custody. The father then presented a petition praying the Court to find him entitled to the custody of the child, and to ordain the mother to restore the child to him. The mother lodged answers, in which she asked the Court to give her the custody of the child, or at any rate to give her full and complete access to it. The child having been restored to its father, the Court held that the sole object of the petition had been fulfilled, and declined to consider the questions of custody or access.

This was a petition at the instance of John Paterson Hutchison, photographer in Penicuik.

The petitioner stated that he married Mrs Agnes Stevenson or Hutchison in 1883; that two children—a daughter and a son—had been born of the marriage, the daughter being six and the son about three years of age at the date of the petition; that his wife left him in January 1888, and had since lived separate from him; that she left her two children at the same time, and that they had since then resided with and been in the custody of the petitioner; that on 12th November the daughter, while on her way to school, which was at a little distance from her father's house, was abducted by a man and two women, and

that from inquiries made the petitioner had reason to believe that the child had been abducted by or on the instructions of his wife, and had been taken to Glasgow, and that his wife intended to take her out with the jurisdiction of the Court.

He therefore prayed the Court to appoint the petition to be intimated on the walls and in the minute-books, and to be served upon his wife Mrs Agnes Hutchison, her sister Mrs Gow, and her brothers William and James Stevenson, and to ordain them to lodge answers, if so advised, within four days; "and upon resuming consideration hereof, with or without answers, to find that the petitioner is entitled to the custody of his child, the said Margaret Forrest Hutchison, and to decern and ordain the said Agnes Forrest Stevenson or Hutchison, or Anne Stevenson or Gow, or William Stevenson or James Stevenson, or whatsoever person shall be found to be withholding said child from the custody of the petitioner, forthwith, and at such time and place as may be fixed by your Lordships, to deliver up the said child to the petitioner, or any other person having his authority; and meanwhile to grant warrant to messengers-at-arms and other officers of the law to take into their custody the person of the child, the said Margaret Forrest Hutchison, in the petition mentioned, wherever she may be found, and deliver her into the custody of the petitioner, and to authorise and require all judges ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of such warrant, and to recommend to all magistrates elsewhere to give their aid and concurrence in carrying such warrant into effect; and further, to prohibit and interdict the said Agnes Forrest Stevenson or Hutchison, or anyone acting on her behalf, and all others, from withdrawing or attempting to withdraw the said child Margaret Forrest Hutchison from Scotland or from the jurisdiction of your Lordships' Court; and to do further or otherwise in the premises as to your Lordships shall seem proper."

The Court on 15th November ordered intimation and service as craved, and answers in eight days, and granted warrant "to messengers-at-arms and other officers of the law to take into their custody the person of the child Margaret Forrest Hutchison, daughter of the said John Paterson Hutchison, and of the said Agnes Forrest Stevenson or Hutchison, wherever she may be found, and deliver her into the custody of the said John Paterson Hutchison; and authorise and require all judges ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of this warrant, and recommend to all magistrates elsewhere to give their aid and concurrence in carrying the same into effect: Further, prohibit and interdict the said Agnes Forrest Stevenson or Hutchison, or anyone acting on her behalf, and all others, from withdrawing or attempting to withdraw the said Margaret Forrest Hutchison from Scotland."

Mrs Agnes Hutchison lodged answers, in which she admitted that she had lived separate from her husband since January 1888, but explained that she had left her husband in consequence of being ill-treated by him. She further admitted that she had taken away her daughter, but denied that she ever intended to take her outwith the jurisdiction of the Court, and explained that the petitioner frequently refused her access to her children, even when she had travelled from Glasgow to Penicuik specially to see them, and that on the occasions when she was allowed to see them the petitioner or his sister always remained in the room, and frequently abused and maligned the respondent in the presence of her children; that the children were being taught to fear and dislike their mother; and that these were the reasons which had led her to take away her daughter. She further asked the Court to make such arrangements for the custody of the children as might seem best, and submitted that at all events while they were so young it would be for their interest to be in the custody of their mother. If the Court should decide that the petitioner should have the custody of the children, she requested that provision might be made for her having full and complete access to them outwith the house where her husband resided, and the presence of other parties, and also that the children should be allowed to stay with her during part of every year.

Thereafter the petitioner, having failed to discover the whereabouts of the child, presented a note to the Court to have the respondent ordained to inform him of its residence, and the Court having considered the note and heard counsel for the parties, ordained the respondent to give such information within twenty-four hours with certification. This order was followed by the restoration of the child to its father.

Counsel for the parties were subsequently heard on the petition and answers. At the discussion reference was made for the respondent to the Guardianship of Infants Act 1886 (49 and 50 Vict. c. 26), sec. 5, and to the following cases—*Beedie v. Beedie*, March 20, 1889, 16 R. 648; *Mackenzie v. Mackenzie*, March 5, 1881, 8 R. 574, and December 22, 1887, 25 S.L.R. 183.

At advising—

LORD PRESIDENT—The sole object of this petition was to obtain delivery to the father of a child which had been illegally carried away by its mother. That purpose has been accomplished, and the object of the application having thus been attained, it appears to me that the proceeding is at an end, and that we cannot do anything more in terms of the prayer of petition except find that it is unnecessary to grant any further order, because the petitioner has obtained delivery of the child, and when that was done there was nothing more before us.

It is sometimes convenient, especially with a view to save expense, to regulate matters relating to custody or access in a

process where such questions do not necessarily arise, but such cases as I am thinking of are different from the present, because the whole object of the process before us is to undo an illegal act. When the illegal act is undone we cannot take up any other question, and it would not save expense if we were to consider the right of the mother to access in this process, because we must have more papers before us before we can dispose of that question. The petitioner has had no opportunity of answering the statements in the answers bearing on that question, and therefore I think the safest course for us is simply to find it unnecessary to pronounce any other order, and to dismiss the petition, finding the petitioner entitled to expenses.

LORD ADAM—This petition is not, properly speaking, a petition for the custody of a child. If it were, it might make a difference in the result to be arrived at. It is quite true that the prayer begins by asking us to find the petitioner entitled to the custody of the child in question, but that only leads up to the true object of the petition, because the fact is that the child, who was living with its father, was surreptitiously and forcibly carried away. It was to remedy that wrong that the petition was brought, and for no other purpose, and accordingly the leading part of the prayer is that the mother, or whoever should be found to be withholding the child from the custody of its father, should be ordained to deliver it up. That is the true nature of the petition, and I agree with your Lordship that the object of the petition having been attained, the prayer of the petition is exhausted.

LORD M'LAREN—It is true that under the Guardianship of Infants Act it is provided that upon the application of the mother the Court is to make such order as may be fitting regarding the custody of the child and right of access to it. I agree with your Lordship in the view that this does not necessarily limit our jurisdiction to cases where the petition is in the name of the mother. On the contrary, wherever there is a process depending which truly raises the question of the regulation of the rights of the spouses with reference to the care and custody of the children, an order such as the statute contemplates may be made, and that may be, as in the case of *Beedie*, in a petition at the instance of the father for access, or, it may be, in disposing of an application for separation and alimony. But the present case does not raise any question of the regulation of the rights of the spouses; it is an application for the purpose of restoring the right of the husband against an attempt on the part of the wife to deprive him of it by taking the law into her own hands; and I think if we were to allow this process to be converted into an application for access we should be introducing a new form of jurisdiction founded on arrestment.

LORD KINNEAR concurred.

Counsel for the respondent then submitted that she should not be found liable in expenses. She was working to support herself, but had no separate estate in the ordinary sense of the word. It was unusual to give the husband in such cases expenses against the wife.

Counsel for the petitioner stated that his information was that the respondent was working at photography and was not in destitute circumstances.

The Court, in respect that the custody of the child had been recovered by the petitioner, found it unnecessary to pronounce any further order, dismissed the petition, finding the petitioner entitled to expenses.

Counsel for the Petitioner—Macfarlane. Agents—Shiell & Smith.

Counsel for the Respondent—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Saturday, December 13.

FIRST DIVISION.

SMITH AND OTHERS v. SUTHERLAND AND ANOTHER.

Custody of Pupil where no Tutor or Guardian.

Both the parents of a child being dead, and the child being left without any legal guardian, a petition was presented by the child's whole surviving relatives, with the exception of one aunt, praying the Court to find the child's grandmother entitled to his custody. It appeared that when his parents died the child was boarded with some friends, whose care of their child had given the parents the most complete satisfaction; that the trustees under the father's will had continued that arrangement; and that it was improbable that the nearest male agnate would ever be able to undertake the office of tutor.

Held that there was no reason to interfere with the existing arrangement for the education and upbringing of the child, and petition *refused*.

The Rev. William Smith, minister of the Church of Scotland, died in India on 21st October 1889. His wife died about six months before him. There was one child of the marriage, John M'Gregor Smith, born in 1881. Mr Smith left a testament, in which he appointed certain trustees to carry out his last wishes, and to them he left his whole estate, both real and personal, "for the benefit of my son John M'Gregor Smith, now residing with Mr James Wilson, Dunfillan House, Crieff." He appointed the trustees his executors, and expressed a desire that they should pay his mother £100 from his estate, and directed that she and his brother Alexander should have the life-rent of a little house property belonging to him in Catrine. The will contained no

appointment of a tutor, and gave no directions as to the guardianship or custody of the testator's child.

When Mr Smith died his son John M'Gregor Smith was with Mr James Wilson at Crieff, and the accepting trustees under the will—the Rev. William Summers Sutherland and the Rev. James Muir Hamilton, both ministers of the Church of Scotland—continued to keep the boy where he was.

In November 1889 the present petition was presented by Mrs Catherine Smith, the boy's paternal grandmother, and others, his uncles and aunts, being, with the exception of one aunt who did not join in the petition, the whole surviving relatives.

They stated—"The petitioners are very desirous that the custody of the said John M'Gregor Smith should be entrusted to his grandmother, the petitioner Mrs Catherine M'Master or Smith. They believe it would be for his benefit to be placed under the guardianship of his grandmother. They further believe and aver that the estate is not sufficient to bear the expense of his board and education at Crieff. The available income, it is believed, amounts to about £40. They are satisfied that if he were living with his grandmother, and educated in Glasgow, the expense of his upbringing and education could be provided out of the income of the estate, and that such an arrangement would be in every way conducive to his interests and welfare."

The petitioners therefore prayed the Court to find the petitioner Mrs Catherine Smith entitled to the custody of the boy John M'Gregor Smith, and to ordain Mr Wilson to deliver him up to her.

The trustees, Mr Sutherland and Mr Hamilton, lodged answers, in which they stated that "John M'Gregor Smith formerly resided for about a year with the petitioner Catherine M'Master or Smith, who then lived at Eaglesham. His father, however, the testator, sometime before his death thought it better to remove him from her care, and to place him under the care of the said Mr James Wilson, Dunfillan House, Crieff. The testator frequently expressed to the respondents after he did so his great satisfaction with the result of this arrangement. Mr Wilson and his wife were on intimate terms with the testator, and also with Mrs Smith, the boy's mother, and he has cared for the boy's benefit in every way. The boy is receiving a good education at the Crieff Academy. The cost of his board and education is about £53 a-year, and the respondents estimate that the income of his means, together with an annual sum of £14 which he will enjoy from the Ministers Widows' Fund till he reaches eighteen years of age, will be about £60. . . . It is explained with reference to the petitioner Alexander Smith, who is the boy's next male agnate, and his heir-at-law, and for whom the testator made the life-ent provision already mentioned, that he is unfortunately in very infirm health, and is unable to maintain himself or to be a proper guardian for the boy." They sub-