Robert Hunter Bell, the eldest son of the marriage, and sole surviving trustee under the marriage-contract (*first party*), and Mr Bell, his father (*second party*), did not raise any question in regard to the apportionments up to Martinmas 1884, as the whole revenue from the trust-estate had been paid to the second party, and he had, on the other hand, expended on the education and maintenance of the children of the marriage, including the first party, sums considerably in excess of what would have been available therefor under the interpretation of the fourth purpose now contended for by the first party. As regarded the division of the rental of Lunna estate subsequent to Martinmas 1884, however, the first party maintained that the mode of apportionment hitherto adopted was erroneous and not warranted by the fourth purpose of the marriage-contract and that in ascertaining the amount of the second party's annuity there should be deducted from the gross rents of Lunna, as reduced by the deduction of 4 per cent. interest on capital expenditure, not only public and parochial burdens, but also arrears of rents not actually received, and the cost of repairs and current expenses. The second party maintained that in fixing the amount of his annuity under the fourth purpose there fell to be deducted from the gross rents receivable from the estate of Lunna, reduced as aforesaid, only public and parochial burdens.

At advising—

Lord President—The question raised by this Special Case depends upon the construction which is to be put upon certain clauses in a contract of marriage entered into in June 1846, and the difficulty has arisen from the ambiguity of the language there used.

Miss Hunter was heiress of entail of the estate of Lunna, and she was also possessed of considerable personalty. She by this deed conveyed all her estate, both heritable and moveable, to trustees for the purposes of the marriage, while Mr Bell, as an equivalent, came under various personal obligations which are fully narrated in the deed.

The purposes of the trust included in the first place a payment to the spouses of a sum of £1000, and then the deed goes on to provide as follows:—"For payment during the subsistence of the intended marriage of the free yearly proceeds of the residue of the trust-estate, after deduction of all public and parochial burdens and existing annuities, to the said Robert Bell, for the use of the spouses."

Now, this clause is quite clear, and raises no difficulties whatever, for it only provides for the nett proceeds of Mrs Bell's estate being paid over to the spouses for their maintenance during the subsistence of the marriage. If Mr Bell predeceased his wife, then payment was to be made to Mrs Bell of the said free yearly proceeds, but if Mrs Bell was the predeceaser then a different provision was to take effect, and it is the way in which this purpose of the trust-deed is expressed that has given rise to the present question. The words are—"In the event of the predecease of the said Robina Hunter the said trustees shall pay to the said Robert Bell an annuity equal in amount to one-half of the estate of Lunna after deduction of all public and parochial burdens."

Now, the meaning of this is said to be that Mr Bell is to get an annuity out of the trust-estate, the measure of which is to be the rents payable under the existing leases out of the estate of Lunna, limited, however, to the extent of one-half.

If these words had stood alone I confess I should have had considerable difficulty in rejecting this theory, because an annuity in many respects resembles a legacy, and it is paid out of the entire estate of the testator. An annuity may, and sometimes does, exhaust the entire interest of a trust-estate. We have had cases in which it has—and even made encroachments upon capital. But the deed here goes on to say—"And it is hereby declared that the remaining half of the said rental, and the free proceeds of the residue of the trust-estate, or so much thereof as in the discretion of the said trustees may from time to time appear to be necessary, shall be applied in maintaining and educating the children of the marriage." And then the whole residue goes to the heir of the marriage, burdened with certain provisions in favour of younger children.

Now, when it is said that "the remaining half of the said rental" is to go otherwise than to Mr Bell, what is there meant is I think this—that Mr Bell and the others are to share equally, not the rents payable by the tenants of this estate, but the free rents. I think, therefore, not without some hesitation, that what it was intended to be expressed by this deed was, that Mr Bell in the event of his survivance was to be entitled to one-half of the free rents of Lunna.

Lords Mure, Shand, and Adam concurred.

The Court pronounced the following interlocutor:—

> "Find and declare that the annuity payable to the second party consists of one-half of the free yearly rents of the estate of Lunna, and decern; and appoint the expenses of both parties to be paid out of the trust-funds in the hands of the first party."

Counsel for First Party—Cheyne—Wilson. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for Second Party—Moncreiff. Agent—R. C. Bell, W.S.

Tuesday, July 20.

FIRST DIVISION.

LEYS *v* LEYS.

Parent and Child—Custody of Child—Father's Right to Custody.

A father placed his two children under the care of their paternal grandfather, a Protestant clergyman, and for six years they remained in his house, and were in great part maintained and educated by him. Thereafter the father desired to resume their custody; the grandfather opposed this, on the ground that the father, who had become a Roman Catholic, was in poverty and unable to maintain them, and

that it would be dangerous to their health if they were restored to him. It appeared, however, that the father had provided for the future board and education of the children. The Court *ordered* the children to be delivered up to their father in respect that he was acting within his legal right as father in resuming their custody.

Process—Contempt of Court.

A person ordered by the Court to deliver up to their father children for whose custody he had ceased to have the father's authority, removed them out of the jurisdiction, and refused to state where they had been placed. The Court in respect of this refusal found him guilty of contempt of Court, and *granted* warrant for his apprehension and imprisonment.

This was a petition by John Kirkwood Leys, barrister-at-law, for the custody of his two sons, aged respectively eleven and nine years. The pursuer stated that he was a widower, and that his children had, with his consent, been residing with their paternal grandfather, the Rev. Peter Leys, United Presbyterian clergyman, Glasgow, since 1880, and that he now wished to resume their custody, and had made an arrangement to have them received and educated at a college in England, and that the application was rendered necessary through the refusal of the Rev Mr Leys to give up the custody of the children.

Answers to the petition were lodged by the Rev. Mr Leys, in which he stated that the petitioner was not in circumstances to support his children, that he had neither the means nor the prospect of providing a home for them, that they were sent to him at a time the petitioner was in a state of poverty, that he had remained so, that they were in delicate health, and their care had been devolved on him and his daughter for six years, and that the change of residence proposed would seriously endanger their health. The respondent also averred that the petitioner had lately become a Roman Catholic, and he alleged that the object of the present application was to have the children transferred from their present home to a Roman Catholic charity.

The petitioner obtained leave to lodge a minute with reference to the answers. In this minute he denied that his circumstances were such that he was unable to educate and maintain his children, or had been in poverty when they were sent to Scotland in 1880, which he alleged to have been a temporary arrangement. He alleged that during the period in question he had contributed towards their maintenance, and that the school to which he proposed to send his children was not a charity but a school for the education of the sons of Roman Catholic gentlemen. He also alleged that he had made arrangements for the education and maintenance of the children for a fixed period, which was subsequently stated at the bar to be two years, and that his own income for the past year had been £174. He denied that the children were delicate, and stated that when he saw them very shortly before the petition was presented they were in excellent health.

In answer to this minute put in by the respondent it was stated that the petitioner was deeply in debt, certain particulars of which were given, and it was stated that in 1880 he had been unable to provide medical treatment for the children during a serious illness, and that his circumstances were now even worse.

Argued for the petitioner—To entitle the Court to interfere with the father in his right to claim custody of his children there must be a relevant averment of injury to morals or physical health. A father was not bound to take his children into his own house; he could provide for their board and education elsewhere; and if there was no disqualification his discretion would not be interfered with—*Pagan* v. *Pagan*, July 3, 1883, 10 R. 1072; *Beattie* v. *Beattie*, November 10, 1883, 11 R. 85. The petitioner was only claiming his legal right, and no relevant or sufficient reason had been shown why his application should be refused. A letter was read by the petitioner's counsel setting forth the terms at which the children were to be provided for at the college he had selected.

Replied for the respondent—This was a case in which the Court should refuse the petitioner the custody of his children. He was in most embarrassed circumstances, had no home to offer his children, and was earning no certain livelihood. The children were in delicate health, and required careful tending, and the contemplated change would be most detrimental to them. The arrangement which had been acted upon for so long could not now be broken.

At advising—

Lord President—The children here are in pupillarity, and the father's claim to their custody is founded on the *patria potestas*.

Now, the only answer to such an application as is made by the petitioner would be an allegation that to restore these children to the custody of their father would be to inflict upon them some moral or physical injury, and no such allegation has been made.

The only reason which has been assigned in answer to the father's claim is that owing to his poverty he is unable to provide for their education and maintenance. Cases no doubt might occur in which it might be shown that a father was so abjectly poor that to hand over his children to his custody would be to subject them to great hardship and privation, and in such cases questions of great nicety and difficulty would arise. That, however, is not the state of matters here, for we learn from the letter which has just been read by the petitioner's counsel that the board and education of the children has been provided for, and the petitioner has himself arranged the mode in which their vacations are to be spent.

In these circumstances I do not see how we can refuse the father's application, which is founded on his natural right—a right which is deeply seated in our law, and which can only be restrained upon the ground which I have already stated.

Lord Mure—I am entirely of the same opinion. I think, looking to the statement which has now been made as to the education of these children, and also as to the provision which is to be made for them during vacation, that the Court cannot refuse to grant this application. Looking to the absence of any allegation against the moral conduct of the father, or any averment of such delicacy on the part of the children as would prevent

their attending the school selected for them, I do not think that any relevant ground has been stated why the petitioner should not have the custody of his children.

LORD SHAND—It is a matter of importance to keep in mind who the parties to this application are. It is the paternal grandfather who desires to retain the custody of these children, while it is the father who is making the application to have them delivered up to him. It is thus not like competition between a father and a mother for their custody. The paternal grandfather derives any rights which he may have from their father and cannot well enter into competition with him.

The arrangement under which the children went to live with their grandfather was merely temporary, and might at any time have been broken by the petitioner at pleasure. He now desires the children to attend a school which he has selected, and to spend their holidays with him, and no suggestion has been made that the moral or physical welfare of the children would in any way suffer by this arrangement. The mere fact that the father is living in lodgings can be no ground for depriving him of his lawful rights, while what was said about his being in pecuniary difficulties is met by the circumstance that it is not alleged that his creditors are in any way desirous to press their claims against him. I think in that state of matters the father's right is clear, and should be given effect to.

LORD ADAM—I entirely concur.

The Court found the petitioner entitled to the custody of the children, and continued the case until Tuesday the 13th July, to allow of some arrangement being come to as to the delivering up of them to the petitioner.

On Tuesday the 13th July counsel for the respondent stated that it had come to his knowledge since the judgment of the Court on Thursday the 8th July that the children were not within the jurisdiction of the Court, and that according to his information the children had been removed on the 27th May, and that he was unaware of where they were at the present time.

LORD PRESIDENT—The respondent has had for some time the custody of these children, and when the father applied to us to recover their custody the respondent defended, and upon various grounds refused to give up the children to their father. After the case had been decided we were informed that these children were no longer in the respondent's custody.

I go no further at present in referring to the statement which was made to us. I only say that the respondent has failed egregiously in his duty to these children in permitting them to be taken from his custody.

We can listen to no excuse, but we pronounce a peremptory order upon the respondent to cause the children to be delivered up to the petitioner within a time to be fixed by us, and to appear himself personally at the bar this day week and state what has been done.

The Court fixed Monday 19th July at 10 o'clock as the time at which the children were to be given up within the office of the petitioner's agent in Glasgow.

On Tuesday the 20th July the respondent appeared personally at the bar and respectfully stated that he declined to give up the children or to give any information as to their whereabouts.

The Court pronounced the following warrant:—

"The Lords having resumed consideration of the petition and answers, and the respondent the Reverend Peter Leys appearing personally at the bar in pursuance of the order pronounced on the 13th current, and reporting that he had done nothing to obtemper the said order, that he declined to surrender the custody of the petitioner's children, and that he declined to inform the Court where the children now are, Grant warrant to messengers-at-arms and other officers of the law to take into their custody the persons of the two pupil children, Norman Leys and Kenneth Leys, in the petition mentioned, wherever they may be found, and deliver them into the custody of the petitioner, 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 this warrant into effect: Further, in respect of what is above stated concerning the said Reverend Peter Leys, Find him guilty of contempt of Court, grant warrant to officers of Court and other officers of the law to apprehend the person of the said Peter Leys and incarcerate him in the prison of Edinburgh, therein to remain in custody till liberated by order of the Court or of the Lord Ordinary on the Bills, as after mentioned: Remit the petition and proceedings to the Lord Ordinary on the Bills in vacation, with power to him to pronounce such orders as shall be proper and necessary, and specially to order the liberation of the said Peter Leys, respondent, if and when his Lordship in his discretion shall think fit, and authorise execution to pass on a copy of this deliverance and warrants herein contained, certified by the Clerk of Court; and decern *ad interim*."

Counsel for Petitioner—W. Campbell. Agent—W. Considine, S.S.C.

Counsel for Respondent—Comrie Thomson—Shaw. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, July 20.

FIRST DIVISION.

JAMIESON AND ANOTHER (LIQUIDATORS OF THE CALIFORNIA REDWOOD COMPANY, LIMITED) *v.* THE MERCHANT BANKING COMPANY OF LONDON (LIMITED).

Company—Foreign—Liquidation—Stay of Proceedings—25 and 26 Vict. cap. 89 (Companies Act 1862), sec. 87.

In a liquidation under supervision of the Court the liquidators applied to the Court for an order to restrain an English bank which