married and had an adverse interest. They were quite willing to resign the office of attorneys, but thought they should first communicate with Bell; but they objected to being removed from the trusteeship as *quasi*-suspect. There was no allegation against either of them to warrant removal.

Argued for W. P. Carroll—No defence was offered for Bell's conduct in the administration of the trust. But he was *in titulo* to make this appointment. The estate was in no peril, and there was no necessity to saddle it with the expenses of judicial management.

At advising—

LORD PRESIDENT—I do not think these trustees can continue to hold and administer this office. The circumstances under which they were appointed were very singular, and certainly not such as to command any confidence on the part of the beneficiaries. It is not disputed that when Mr Bell left the country he was insolvent, and left a large blank in the funds of the trust-estate. Having fled the country, he pauses in London and there appoints two gentlemen in his confidence as his attorneys for the better winding-up of his own affairs, and at the same time to act as his nominees in the trust. They are thus put in the position at once of debtors and creditors of the trust by the act of a fugitive bankrupt who has embezzled part of the trust-estate. It seems impossible to expect the beneficiaries to have any confidence in such an appointment. I am sorry that the new trustees have put themselves in such a position as to incur a certain shadow of suspicion; but it is right to say that I do not think that, beyond showing a doubtful discretion in accepting the office, there is anything to be said against them. I am of opinion we should relieve them of this double capacity, and we are prepared to sequestrate the estate without removing the trustees, and to appoint a judicial factor. We shall allow the petitioner her expenses out of the trust-estate, as it would be necessary to have judicial intervention to set the trust going.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

Petition granted, with the exception of the prayer for the removal of the trustees.

Counsel for the Petitioner — Cullen. Agents—Emslie & Guthrie, S.S.C.

Counsel for the Trustees—Jameson—Constable. Agent—W. J. Johnstone, S.S.C.

Counsel for W. P. Carroll—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Thursday, January 20.

FIRST DIVISION.

SLEIGH *v.* SLEIGH.

Parent and Child—Custody of Children—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap.* 27), *sec.* 5.

Where a husband refused to live with his wife, and, in a pending action of adherence at her instance, declared his intention not to adhere, the wife was *held* not entitled to the custody of two boys, pupil children of the marriage, on the ground that the father had not by his conduct abdicated his position as head of the family, and, there being no allegation against his moral character, that he ought to have the custody in the interests of the children.

Observations per Lord M'Laren on the effect of section 5 of the Guardianship of Infants Act 1886.

James Hume Sleigh, a Scotsman, in the employment of the Bank of Bombay, was married to Marie Erard, a native of Clarens in Switzerland, on 9th December 1878. Two sons were born of the marriage in 1880 and 1882, and a daughter in 1885. From 1878 to 1892 the home of the spouses was in Bombay, though occasional visits were paid to Europe for the sake of the health and education of the children.

Early in 1885 Mrs Sleigh brought her sons to Clarens from India, and thereafter sent them to reside with their grandfather George Slight, 11 Dryden Place, Edinburgh, where they remained till November 1888, when their mother removed them to a school in Germany; but in 1890, with the sanction of both parents, they were brought back to Edinburgh, where they were placed at school as day pupils, and entrusted to the care of their grandfather and their aunt Miss Jane Slight, who resided with him.

Mrs Sleigh returned to Bombay in the end of 1890, and it was admitted that the relations between her and her husband became very unhappy from that time, with the result that Mr Sleigh left his house in Bombay on 18th March 1892, and did not thereafter live with his wife.

Mrs Sleigh left Bombay in May 1892 with her daughter. After settling her daughter in Switzerland she proceeded to Edinburgh. Differences at once arose between her and her husband's relatives as to the custody of her two sons.

On 25th July 1892 she presented a petition to the Lord Ordinary on the Bills for custody of or access to her sons, and she was allowed a certain amount of access under the orders of the Court until 13th August 1892, when her husband arrived in Edinburgh from India, and took the custody of the two boys. In October Mr Sleigh placed them at a suitable boarding-school, and the Court, on a renewed application by Mrs Sleigh, which was finally disposed of by

interlocutor of the First Division, dated 17th December last, allowed her such access as was deemed reasonable during school-time, and ordered that half of their holidays should be spent with her, and the other half with their grandfather and aunt.

Mrs Sleigh lodged the present application on 8th December 1892. She alleged that George Slight and Miss Jane Slight were not fit and proper persons to be entrusted with the custody of the said children at any time, and should not be allowed to have access to them; and that her husband having recently left this country, intending to return to Bombay without any offer to take her back to his house or to adhere to her, she was now the only legal guardian of the children in this country; and she accordingly prayed the Court to find that she was entitled to the custody of her said children.

In her petition she averred that an action of adherence and aliment at her instance against her husband was then in dependence before Lord Wellwood, in which the second article of the condescendence and the answer thereto were as follows—"Cond 2. The defender deserted the pursuer, his wife, and his home in Bombay on or about the said 18th March 1892. The pursuer continued to reside there until she left India with her husband's consent on the 10th day of May 1892. The defender has intimated to the pursuer that he does not intend to resume cohabitation with the pursuer, and refuses to continue to live with her. *Ans.* 2. Admitted, subject to the following explanation—For some time before 18th March 1892 the defender found the pursuer's temper so ungovernable that his health was being impaired, and he was so distracted that he could not devote himself properly to his business. The defender has no other grounds for separating from his wife, but he found it impossible to have any peace or comfort when living in society with her. He consequently was obliged to separate from her. At the same time he has been and is prepared to fulfil all other obligations towards her."

She further averred that on two occasions in 1891 her husband had used violence to her, and stated that she attributed her husband's conduct in large measure to the hostile influences of his father and sister. In support of that view she quoted from letters alleged to have been sent by them to him and to other persons between September 1891 and March 1892, containing severe strictures on her character, and suggesting that her husband, if he thought fit, would be perfectly justified in chastising her. She also made averments against the grandfather and aunt in respect of communications made to the children regarding the relations between their parents, and in respect of their treatment generally.

Mr Sleigh lodged answers to the petition, in which he explained that he had always directed the upbringing and education of the children, though the carrying out of his wishes had been entrusted to the petitioner because his duties in Bombay prevented him coming to Europe whenever he chose. He denied generally the material averments in the petition, and in particular called upon the petitioner to produce the alleged letters, with regard to which he made no admission. He stated that he had offered to make a suitable allowance for his wife's separate maintenance, and to arrange that she should have reasonable access to the boys, but she refused the offer and applied to the Court. He averred that on one occasion she attempted to abduct the children, and stated his belief that if she obtained the custody she would remove them out of the jurisdiction of the Court and educate them abroad.

The Guardianship of Infants Act 1886, sec. 5, provides—"The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as it may think just."

Argued for the petitioner—The husband here had maliciously deserted his wife, and she was suing him in a pending action of adherence in which it might be assumed that she had practically got decree, there being no opposition. In these circumstances the deserting husband must be held to have waived his legal right to the custody of his children; though there was no precise authority, that might be inferred from the principle that a deserting husband cannot regulate the domicile of his wife. The ratio of *Symington's* case was to settle the custody in the way that was most likely to bring the parents together again. Here it should be given to the wife, who is asking for the re-establishment of the family broken up by the wrongous act of the husband. Successive legislation has trenched on the absolute power of the father in the old law; and now, since the Guardianship of Infants Act 1886, the Court in fixing the custody had to look to the "conduct of the parents"—which words were not limited to conduct as affecting the child, but extended generally to the relations between the spouses. Here the balance of affection was in favour of the mother. Besides, the question was not between the father and the mother, but between the nominees of the father and mother. The welfare of the children would not be consulted by entrusting them to the father's relatives, who were shown by their letters, which had been quoted and not denied, to be unfit custodiers—*Ketchen* v. *Ketchen*, July 2, 1870, 8 Macph. 952; *Symington* v. *Symington*, March 18, 1875, 2 R. (H. of L.) 41; *Pagan* v. *Pagan*, July 3, 1883, 10 R. 1072; *Webley* v. *Webley*, 1891, 64 L.T. 839; *Witt*

v. *Witt*, L.R. (1891) P. 163; Guardianship of Infants Act 1886, sec. 5.

Argued for the respondent—Nothing had transpired since the date of the last interlocutor regulating the custody and access to justify a change in the arrangements then made. Any objection to the course adopted should have been taken when the proposal was made and the parties were in Court. The mere circumstance of the father's residence abroad did not deprive him of his primary right—*Pagan*, July 3, 1883, 10 R. 1072. The Court could not displace the father unless his conduct made the Court consider him an improper guardian for the children—*Lang* v. *Lang*, January 30, 1869, 7 Macph. 445. The Court had exercised as large discretionary powers under the Conjugal Rights Act 1861, sec. 9, in actions for separation and divorce, as the Guardianship of Infants Act 1886 gives in all circumstances; the first consideration always had been what was best for the children. Clearly the best thing for boys of eleven and twelve was to be in direct relation with their father, on whom their prospects in life depended. The petitioner could not be assumed to be the best guardian, for her husband stated that he could not with due regard to his health continue to live with her. That statement, on the other hand, did not import that he was disqualified for the care of his children. The petitioner's application to the Court should have been made while her husband was at hand to answer her charges. The alleged letters passing between father and son and brother and sister were confidential, and what was produced was only a fragment of a correspondence. The fact that Slight might have written an injudicious letter of advice was no reason why the father's guardianship should be displaced.

At advising—

LORD PRESIDENT—This petition is presented as a separate and substantive application, differing in its quality and nature from the repeated applications which we have had as to the interim custody of the children of Mr and Mrs Sleigh.

The present petition has for its object to deprive the father of the guardianship of the pupil sons of the marriage. It is rested in argument on somewhat high ground. It was, in the first place, argued to us on the mother's behalf that we might take the case on the footing that there must be a decree against the husband in the action of adherence against him, that he must be taken as not obeying it, and from these premises it is said to be a necessary conclusion that he must be taken as having abdicated his position as head of the family, with the result that the mother was to be regarded as head. It was admitted that there was no direct authority for that contention. I think it is one for which much support in authority would be required. It is impossible to assimilate the case of this husband to that of a husband against whom a decree of divorce or a decree of separation *a mensa et thoro* has been pronounced. The very condition of the pursuer's argument is that she wishes to live with him. I point to this for the purpose of showing what is the true nature of this application.

We have to consider whether the law compels us to remove the husband from the position of being entitled to the guardianship of his sons on any other grounds. I cannot discover any. He has differences with his wife, and declines longer to live with her. But against his character morally nothing has been said. He occupies a responsible position in his profession in India, and though there has been much disposition to criticise his conduct, it has not been shown to us that he is not—apart from these differences with his wife—of respectable conduct and good morals. We have to consider what is the interest of the children—what are the probable consequences to them of leaving him with their custody on the one hand, or removing him from his position as their guardian on the other. I think it is not going too far to say that it would be a grievous injury to the children if the father were deprived of the interest in them and control of them which his position as their father and guardian implies. At present he is having them educated in a good school. We have had occasion more than once during these disputes to see the spirit in which his guardianship has been exercised, and I have not been able to see anything undue in his assertion of his position, or any disposition to press it to extremes, or to prejudice their future relations with the petitioner, their mother.

Now, the boys being at this school, it was arranged, and it was embodied in our former order, that half of their holiday be spent with their mother, and half with the relatives of their father. That was proposed last December. It was considered carefully by the petitioner. She did not then suggest that the boys would suffer from being in the care of their father's relatives—Mr Slight and Miss Slight—for half of their holiday. If she had then thought that the result would be the poisoning of the boys' minds against her, we should have heard of it then. She now brings forward as evidence of the conduct and attitude of these persons certain letters which have been commented upon. I think these letters, assuming them to have been written by Mr and Miss Slight in the terms set forth in the petition, are very greatly to be regretted. But their dates, and the explanation given from the bar by her counsel as to how their contents came to be in her hands, show that they were well known to her when the Court was asked to consider as to the disposition of the children's holidays in December last.

Looking to the facts that these letters were in the petitioner's own knowledge, that we do not know (while she did) the circumstances in which they were written, or the remainder of the correspondence of which they form part, we must be careful of giving to them too high importance. But this is to be said, that the application

based upon them is not an application to prevent the children residing with the writers of them during a holiday; it is the extreme and high-flying remedy of transferring the guardianship of the children from the father to the mother. I am satisfied that that course ought not to be taken.

LORD ADAM—I am of the same opinion. The application relates not to the case of the daughter of the marriage, of whom the mother has at present the custody, but of the two sons. Now, we had occasion only a week or two ago to dispose of a petition as to the custody of the sons, and we then regulated the access which the wife is to have, and approved of their being sent to a school selected by the husband.

What we are now asked to do is in substance to take away the boys from the guardianship of the father, and to give the guardianship to the mother. We are told that her immediate object is to end the arrangement made only a week or two ago, and at the end of the present session to place the boys at another school, and during vacation to keep them with herself. That is to say, the object of the petition is to give the petitioner the sole control of these boys. If so, she would have power to dispose of them as she pleased. I see no ground for removing the father from the guardianship of these boys. Nothing, apparently can be said against his moral character, or his being a fit person to regulate the bringing up of his own children. I think it will be better for the welfare of these children that they are brought up by the father. It might be a hardship to the mother if she were being altogether deprived of access to them, but of that there is no fear.

I agree that we ought to refuse to remove the father from the guardianship of the children.

LORD M'LAREN—Under the Guardianship of Infants Act 1886 the Court has an unqualified discretion to deal with applications as to the custody of children, the guiding consideration being "the interest of the children." I think that in laying down for us this principle the statute has not at all displaced the common law as interpreted in the decisions, because it is a matter very clear in the historical development of the law of this subject that the interest of the children has been treated as the ruling consideration. It was no doubt kept in view that the father, as head of the family, had powers and rights over the children, who looked to him on their part for support and advancement in life. Now, while the statute gives to the Court a large discretion according to what appears to be the interest of the children, it does not alter the position of the father as head of the family. We therefore approach a case of this class with this fact to begin with, that the father is the guardian, and cannot be displaced from that position except on sufficient legal grounds.

I should assent to the proposition that, looking to the children's interest, a father who was of dissipated habits, or who had done something whereby he had forfeited the respect of his friends, might become thereby an unfit guardian for his children. In such a case it might be for the interest of the children that they should be put under the guardianship of their mother, though with this unfortunate result for the children, that, generally speaking, her means of advancing them in life are not comparable to those possessed by the father.

But here we have no such case. The father has done nothing to forfeit the esteem and respect of others, so far as has been established to us, or to make him unfit to be guardian to his sons. No doubt there are unhappy dissensions between the parents. But we have no means in this action of determining their merits. We see what they say about them in the petition and the answers, and we observe that the wife has shown a commendable spirit in desiring, for the sake of her family, to resume cohabitation with the husband.

But when nothing can be said to show that the husband is morally unfit to be his sons' guardian, it follows that the petition must be dismissed, and that the ordinary law that the husband, as head of the family, may regulate the residence and upbringing of his children must have effect.

LORD KINNEAR concurred.

The Court refused the petition.

The petitioner's counsel moved for expenses—*Lilley* v. *Lilley*, January 31, 1877, 4 R. 397.

It was objected for the respondent that the expenses of a second petition should not be allowed. In the case of *Cuthbertson* expenses had even been given against the wife. That order was not asked here, but she should have none.

LORD PRESIDENT—We think that it is not the law that a wife can present application after application at the husband's expense. We think there was no good reason for this petition, and that the motion should be refused.

Counsel for the Petitioner — Graham Murray, Q.C.—Fleming. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Respondent—Sol.-Gen. Asher, Q.C.—Cooper. Agents — Duncan Smith & Maclaren, S.S.C.