

A further argument was submitted to us on behalf of the respondents, based upon the general conditions of the consignment note which formed the contract of carriage between the pursuers and the Caledonian Railway Company. One of these conditions is to the effect that "all goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods, and also to a general lien for any other moneys due to them from the owners of such goods upon any account. Now it was said that it has been established in this case that the North Eastern Railway Company (not the Caledonian Railway Company) had an account of £188 against the receivers of the goods, and that as the boat was only of the value of £61, 10s., the North Eastern Company were entitled to apply its value in payment of this account. It is significant that this argument seems to have been presented for the first time at the hearing before us. There is no trace of it in the elaborate judgments of the two Sheriffs, and I am not surprised, for there are neither averments nor pleas on record which properly raise it. Further, assuming that the right claimed existed in the Railway Company, it was incumbent on them to show not merely that they had an account against Messrs Laing to the amount stated, but that the value of the boat in dispute required to be applied to meet that account. For all that appears the Railway Company may have been in possession of other property belonging to Messrs Laing which was unaffected by equities in favour of third parties. It is enough, however, to say that a special defence of this nature ought to have been distinctly tabled, so that the pursuers might have had an opportunity of investigating the facts. The only reference on the record to the monthly credit account and to the contract between the defenders and Messrs Laing for securing it, is made for the purpose of aiding the argument that the transit had ended. There is no reference whatever in the pleas to the conditions of the consignment note, nor any suggestion from beginning to end of the record that the defenders' lien could only be satisfied from the proceeds of the boat which the pursuers had stopped *in transitu* in their hands. In these circumstances we could not consider this contention without an amendment of the record (which the defenders did not ask our leave to make), and which if we held it relevant might involve further inquiry. In the whole circumstances I am of opinion that we ought to recal the interlocutor of the Sheriff and revert to the interlocutor of 7th February 1910. I would only add that no question was raised as to the amount payable by the defenders in the event of our agreeing with the judgment of the Sheriff-Substitute.

LORD ARDWALL was absent.

The Court recalled the interlocutor of the Sheriff and reverted to that of the Sheriff-Substitute.

Counsel for Pursuers (Appellants)—
Sandeman, K.C.—J. Stevenson. Agents—
Campbell & Smith, S.S.C.

Counsel for Defenders (Respondents)—
Cooper, K.C.—M. P. Fraser. Agents—
Cowan & Dalmahey, W.S.

Saturday, July 22.

FIRST DIVISION.

(SINGLE BILLS.)

ROBERTSON, PETITIONER.

*Parent and Child—Husband and Wife—
Abduction of Child by Mother—Petition
by Father to Recover Custody.*

A wife raised against her husband an action of separation and aliment on the grounds of his alleged cruelty and habitual drunkenness. The defender was assoilzied. Thereafter the husband presented a petition to the Court, in which he averred that his wife had left the house where she had been living, leaving no address, and had taken away with her the only child of the marriage, a girl two years old, and that she was taking (or had already taken) the child out of Scotland. He craved the Court to grant warrant to messengers-at-arms to take the child into their custody and deliver her to him, and to interdict the wife from removing the child from Scotland.

The Court *refused* to grant the warrant to messengers-at-arms to take the child from the custody of the mother, but *granted* interdict against the mother removing the child from Scotland.

David Slater Robertson presented a petition for the custody of the child of the marriage between him and Mrs Mary Irvine or Robertson.

The petition set forth—"The petitioner was married in St Serf's Church, Ferry Road, Leith, on 23rd July 1904, to the respondent Mrs Mary Irvine or Robertson, and the parties took up house together at No. 11 Mayville Gardens, Trinity. The petitioner is now thirty-two years of age and the respondent thirty-four.

"On 1st July 1909 Elizabeth Irvine Robertson, the only child of the marriage, was born.

"The married life of the parties has not been on the whole a happy one, although there have been periods of considerable length when the parties lived together happily enough. About three weeks after the marriage, and about a week after the parties took up house, the respondent took offence at a harmless remark made by the petitioner's father, and a few days afterwards, although on quite good terms with the petitioner, she left his house without warning and went to Glasgow, where she took a situation as a typist. After a short time the petitioner discovered where she was and she was induced to return home.

From time to time quarrels took place between the parties, and on a number of different occasions the respondent left the petitioner's house for a time and went to live with her mother. The respondent is of a hysterical temperament and very quick to take offence, while she took a very extraordinarily low view of the obligations which she had undertaken on her marriage.

"On 15th October 1910 the respondent, who was complaining of being run down in health, left the petitioner's house with a nurse and went to Bridge of Allan in order to have a rest and change, and on the understanding that she was to return in about a fortnight. She took the child with her, and she has never returned to the petitioner. After remaining in Bridge of Allan for a few weeks she returned to Edinburgh, taking the child with her, to an address which she concealed from the petitioner.

"On 4th January 1911 the respondent raised an action in the Sheriff Court at Edinburgh against the petitioner, concluding for separation and aliment and for custody of the child of the marriage. In the action the respondent averred that the petitioner had been guilty of cruelty to her, and that he was an habitual drunkard within the meaning of section 73 of the Licensing (Scotland) Act 1903.

"Pending the decision of the said action the petitioner, who is and has all along been anxious that the respondent should return to him, thinking that a demand by him for custody of the child might lessen the chances of the respondent returning to him, did not insist upon the custody of the child, but allowed the respondent to retain the custody. No order as to interim custody or access was pronounced in the said action, but an arrangement was come to whereby the petitioner was allowed to see the child for one hour each week in the respondent's house.

"After a lengthy proof before Sheriff-Substitute Orr, counsel for the parties were heard, when the respondent's counsel stated that he did not intend to maintain his second plea-in-law, namely, that the petitioner was an habitual drunkard and that the respondent was entitled to decree of separation on that ground. After hearing counsel the Sheriff-Substitute took the case to avizandum, and on 3rd July 1911 he issued an interlocutor in which he found that the respondent had failed to prove that the petitioner had been guilty of maltreating her, and assolized the petitioner from the conclusions of the action. In his note the Sheriff-Substitute suggested that in a spirit of forbearance and consideration the parties, for their own sake and for their child's, should make a new beginning in married life.

"On the day following that on which the said interlocutor was issued the petitioner wrote to the respondent an affectionate letter asking her to return to him, and offering if she wished it to take up house in a different neighbourhood, at the same time indicating that if she returned

to him he would never refer to what had taken place in the past. The respondent did not reply to that letter, but on 8th July 1911 her agents, Messrs Young & Falconer, W.S., Edinburgh, wrote to the petitioner's agents stating that she was considering the matter, and was thinking of making some offer with a view to her returning to the petitioner. The petitioner's agents stated to the respondent's agents that the petitioner had no desire to do anything which might prevent his wife coming back to him, but suggested that as the petitioner had been very patient, and had put up with a very limited amount of access for a period of about nine months, he should be allowed to take the child away for an afternoon, his agents offering their personal guarantee that in the meantime, pending her decision as to returning, the child would be returned to the respondent. This suggestion was made on Tuesday, the 11th July, and was communicated to the respondent on Wednesday, the 12th July, by her agents, but up to Tuesday, the 18th July, she had not taken any notice of the suggestion, nor replied to the letter her agents had written her on the subject. Neither had she up to that time instructed them as to her intentions in regard to returning to the petitioner.

"Up to the Whitsunday term the respondent had been residing with a Mrs Ternent at 23 London Street, and the petitioner had been in the habit of going there weekly on Saturday or Sunday, as might be arranged by the respondent, to see his child. At the term Mrs Ternent removed from her house at London Street, and on one occasion the petitioner was asked to go to a house in East Claremont Street belonging to a friend of the respondent, to see the child. Subsequently he was invited to go to the house of the respondent's mother Mrs Elizabeth Irvine, who is a widow and resides at No. 15 Jessfield Terrace, Leith, on one or two occasions. The respondent was not residing there, and her address was not communicated to the petitioner, but the child was brought to the house by the respondent's sister, Miss Lena Irvine, in order that the petitioner might see her there. On or about Saturday, 1st July 1911, the petitioner discovered that the respondent was living at No. 22 Barnton Terrace, and on Saturday, 8th July, on the arrangement made by the respondent, he called there and saw the child.

"The respondent has a married sister who resides in Chicago, and the petitioner has been informed and he believes that it is the respondent's intention not to return to him but to go to Chicago and take the child with her. The petitioner is very much attached to his child, and he fears that if she is allowed to go beyond the jurisdiction her whereabouts will be concealed from him and he will never see her again. He is prepared to make suitable arrangements for the care of the child, and there is no reason why he should be deprived of her custody.

"On Saturday, 15th July 1911, the petitioner received a letter from Miss Lena

Irvine telling him to go to 15 Jessfield Terrace on Sunday, 16th July, at four o'clock to see his child. He did so. He saw Mrs Irvine, but after waiting until after five o'clock the child was not brought to the house, and he has not received from the respondent any explanation of her failure to send the child as she had arranged. Although his agents have applied to the respondent's agents for an explanation, they say they have not received any from the respondent. The petitioner on Monday, 17th July, made inquiries, the result of which was that he came to the conclusion that the respondent had removed from No. 22 Barnton Terrace, taking the child. His agents at once applied to the respondent's agents asking where the respondent had gone, but they state that the address of the respondent is unknown to them and to the respondent's mother, but that they believe that she has sailed for some port to them unknown. The petitioner believes that the respondent's request for delay was made to enable her to make plans for carrying off the child.

"In the circumstances above set forth the petitioner is entitled to a warrant to take the child, the said Elizabeth Irvine Robertson, into his custody. As there is reason to believe that the child will be removed from the jurisdiction of the Court unless the respondent is prevented from carrying out her designs (if indeed she has not already been removed therefrom) the petitioner is entitled to an interim warrant pending the running of any *inducia* which the Court may grant."

The prayer of the petition was—"May it therefore please your Lordships to appoint this petition to be intimated on the walls and in the minute book in common form, and also by sending a copy to Messrs Young & Falconer, W.S., the respondent's known agents, and to be served on the said Mrs Mary Irvine or Robertson personally, if she can be found, and if not, edictally, and at her last known place of residence, and at her mother's address, and to order the said Mrs Mary Irvine or Robertson to lodge answers hereto within eight days, if so advised, and thereafter on resuming consideration hereof, either with or without answers, to find that the petitioner is entitled to the custody of the said Elizabeth Irvine Robertson, and in the meantime to grant warrant to messengers-at-arms and other officers of the law to take into their custody the person of the said Elizabeth Irvine Robertson, wherever she may be found, and to deliver her 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 such warrant, and recommend to all magistrates elsewhere to give their aid and concurrence in carrying the warrant into effect: Further, to prohibit and interdict the respondent or anyone acting on her behalf and all others from withdrawing or attempting to withdraw the said Elizabeth Irvine Robertson from Scotland: Further, to authorise execution to pass on a copy of

the deliverance and warrant to follow hereon certified by the Clerk of Court: And to decern *ad interim*," &c.

Counsel appeared in Single Bills, and in support of the granting of the prayer of the petition referred to *Hutchison v. Hutchison*, December 13, 1890, 18 R. 237, 28 S.L.R. 190; *Marchetti v. Marchetti*, June 7, 1901, 3 F. 888, 38 S.L.R. 696; *Lumsden, Petitioner*, December 9, 1882, 20 S.L.R. 240. [The LORD PRESIDENT pointed out that the interest of the child was the main thing to be considered, and referred to *Stevenson v. Stevenson*, June 5, 1894, 21 R. (H.L.) 96, 31 S.L.R. 942.]

The opinion of the Court (LORD PRESIDENT, LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE) was delivered by

LORD PRESIDENT—The Court will order intimation and service, but is of opinion that a summary order cannot be pronounced authorising a messenger-at-arms to take a child of two from its mother. The Court will, however, pronounce an interim interdict against the mother removing the child from the jurisdiction.

The Court pronounced this interlocutor—

"The Lords appoint the petition to be intimated on the walls and in the minute book in common form, and also by sending a copy to Messrs Young & Falconer, W.S., the respondent's known agents, and to be served on Mrs Mary Irvine or Robertson mentioned in the petition, if she can be found, and if not, edictally, and at her last known place of residence, and at her mother's address, and ordain the said Mrs Mary Irvine or Robertson to lodge answers, if so advised, within eight days after service: Meantime prohibit and interdict the respondent or anyone acting on her behalf, and all others, from withdrawing or attempting to withdraw Elizabeth Irvine Robertson, the only child of the marriage mentioned in the petition, from Scotland."

Counsel for the Petitioner—R. S. Brown.
Agents—Bruce & Stoddart, S.S.C.

Monday, July 17.

FIRST DIVISION.

[Lord Salvesen, Ordinary.]

DICK v. ALSTON.

Agent and Client—Transaction between Agent and Client—Agent Financing Client's Commercial Business—Wife of Client Assisting her Husband's Business through Agent.

Circumstances in which a law agent and banker was assoltized in an action brought against him for damages and repayment of alleged improperly made gain, by a wife who had lost her fortune through making advances to and