provided for the general relations of superiors and vassals without having its attention called to all the particular contracts by which in special cases the rights and liabilities of such persons might be regulated. If that results in any disadvantage to the disponees in the present case, I am afraid there is no principle in law or in equity by which we can relieve them from it. The disadvantage which is created by the operation of an Act of Parliament must lie where the Act of Parliament leaves it, and we have no power, and certainly there would be no justice in interfering if we had the power, to impose a liability on one of two contracting parties which Parliament has left to rest upon the other. Therefore as far as regards the title of 1866 the Lord Ordinary's interlocutor is right and must be adhered to.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Ure, K.C.—Craigie. Agents—T. & R. B. Ranken, W.S.

Counsel for the Defenders and Respondents—Solicitor-General, Dickson, K.C. — C. D. Murray. Agents—Morton, Smart, & Macdonald, W.S.

Friday, June 7.

FIRST DIVISION.

MARCHETTI, PETITIONER.

Parent and Child — Custody — Petition by Father to Recover Custody of Child from Mother — Procedure — Interim Order — Warrant Granted in First Interlocutor — Husband and Wife—Minor and Pupil.

A father presented a petition for custody of his pupil child, who was nine years of age, alleging that while absent from his house with the child his wife had disappeared, after posting letters in which she said that by the time they were received she and the child would be dead; that he had discovered where they were; that he believed that his wife intended to destroy herself and the child when she threatened to do so, and that there was danger of the threat being carried out unless the child were instantly removed from her custody.

The petitioner moved the Court, in pronouncing the usual first order, meanwhile to grant warrant to messengers-at-arms and other officers of the law to take the child into their custody and deliver him to the custody of the petitioner. The Court *granted* warrant as craved.

After the warrant was executed and the petitioner had obtained custody of the child, the mother lodged answers containing averments of cruelty on the part of the petitioner. One of the Judges saw the child and ascertained that he was equally attached to both his parents. The petitioner declared his willingness to take his wife back to America, where his home was, but she declined to go.

The Court, in respect that the petitioner had obtained custody of the child, found it unnecessary to pronounce any further order, and *dismissed* the petition.

Hutchison v. *Hutchison*, December 13, 1890, 18 R. 237, *followed.*

Parent and Child—Custody — Petition by Parent for Custody—Question of Status —Foreign Law.

In a petition by a father, whose home was in the United States, for the purpose of recovering the custody of his pupil child from its mother, to whom the petitioner alleged that he was married, the mother lodged answers containing averments to the effect that although she had gone through a form of marriage with the petitioner in Italy, their marriage was illegal by the law of Italy as well as by the general consent of Christendom, the parties being uncle and niece, and maintained that the child being consequently illegitimate she was entitled to the custody. The Court *declined* to consider the question of status involved in this defence.

In a petition presented by Frank Marchetti, merchant, Pawtucket, Rhode Island, U.S.A., and his mandatory, for custody of his pupil child Thomas Marchetti, who was nine years of age, the petitioner craved the Court to find him entitled to the custody of his said child; to decern and ordain his wife Mary Marchetti forthwith to deliver up the said child to the petitioner or to 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 said child wherever he may be found and deliver him 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 Mary Marchetti, or anyone acting on her behalf, and all others from withdrawing or attempting to withdraw the said child Thomas Marchetti from the jurisdiction of your Lordship's Court."

The petitioner averred that in September 1900 his wife and child left home for a short holiday at a seaside resort about thirty miles from Pawtucket, and that on 22nd September his wife suddenly left the hotel where she and the child were residing, "after having posted letters to the petitioner, the proprietor of the said hotel, and a number of friends, stating that she had resolved to drown herself and the said child, and that by the time the said letters were received she and her said child would be dead."

The petitioner also averred that his wife and child had been traced to Scotland, and

were residing with an ice-cream vendor in Broxburn, and further averred as follows—"The respondent is a person of immoral character and of violent and ungovernable temper, and incapable of taking charge of a child. The petitioner believes that it was her intention to destroy herself and the said child when she last threatened to do so, and he has reason to believe that there is danger of the threat being carried out unless the said child is instantly removed from her custody."

Counsel for the petitioner when moving for intimation and service moved the Court in the same interlocutor to grant warrant in terms of the prayer of the petition quoted *supra*, and referred to the case of *Hutchison* v. *Hutchison*, December 13, 1890, 18 R. 237. He stated that the petitioner was on his way to this country, and that arrangements had been made for placing the child in neutral custody to await his arrival.

LORD PRESIDENT—Great caution is required in dealing with an application of this kind, but I think that in the very special circumstances of the case we should grant an order that the child should be delivered to the petitioner or to some one having his authority until the case can be considered after answers are lodged. In some of its *prima facie* aspects the case is an extraordinary one. It is alleged that the respondent disappeared after posting letters to the petitioner and other persons, stating that by the time the letters were received she and the child would be dead. She left America, where she had been resident with her husband, and it is stated that she is now residing at the house of an ice-cream vendor at Broxburn. A person of her temperament might disappear again, or do violence to the child, upon hearing that this petition had been presented. When the petition is considered with answers, if the respondent lodges any, she may be able to get the order for custody altered. Meanwhile, however, it appears to me that we should grant the order asked.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

On 21st May 1901 the Court ordered intimation and service, and granted warrant in terms of the prayer of the petition quoted *supra*.

Mrs Marchetti lodged answers, in which she made averments of cruel and harsh treatment on the petitioner's part towards herself and her child, and alleged that blows and threats were a daily experience, and that the child lived in extreme terror of his father. She also averred that although she had gone through a form of marriage with the petitioner in Italy, their marriage was illegal by the law of Italy, as well as by the general consent of Christendom, the parties being uncle and niece.

At the hearing in the Summar Roll on 6th June, counsel for the petitioner moved the Court to proceed by way of remit to find out the wishes of the child.

Counsel for the respondent maintained that the child was illegitimate, and that the respondent was consequently entitled to the custody.

The Court declined to consider the question of status involved in this defence.

One of their Lordships saw the child, and ascertained that he had a great affection for both his parents, and would prefer to remain with both. The petitioner, who had arrived in this country, was willing to take his wife back to America with him, but she declined to go.

The parties having failed to come to any arrangement, the Court, following the course adopted in *Hutchison*, *supra*, pronounced this interlocutor :—

> "The Lords having resumed consideration of the petition, with the answers thereto, and heard counsel for the parties, in respect that the custody of the child Thomas Marchetti has been recovered by the petitioner, Find it unnecessary to pronounce any further order: Dismiss the petition and decern," &c.

Counsel for the Petitioner — Dewar. Agents—Cornillon, Craig, & Thomas, S.S.C.

Counsel for the Respondent—A. J. Young. Agents—Robertson & Wallace, S.S.C.

Friday, June 14.

SECOND DIVISION.

[Sheriff of Aberdeen.

M'DONALD *v.* KYDD.

Landlord and Tenant—Lease—Failure of Landlord to Put Subjects in Tenantable Repair—Right of Tenant to Retain Rent.

A lease for 19 years of certain agricultural subjects bore that in respect the proprietor had put the buildings thereon in habitable condition and repair, the tenant bound himself to keep and leave them in the like condition at the expiry of his lease. During the currency of the lease the subjects were sold, with entry at Whitsunday 1899. The new proprietor intimated to the tenant that he would not take the buildings over from him as in habitable condition in terms of his obligation. The tenant thereupon retained the half-year's rent due to the original proprietor at Whitsunday 1899. In an action at the instance of the latter against the tenant, the pursuer admitted that the repairs contemplated by the parties had not in fact been carried out at the date of the lease, and it was proved that since that date the landlord had not put the buildings into habitable condition and repair. *Held* that the tenant was entitled to retain the half-year's rent in question until the landlord's obligation to put the buildings in habitable condition and repair had been fulfilled.

Archibald M'Intyre M'Donald, as commissioner for the Earl of Crawford, brought