Counsel for the Pursuer and Respondent—Shaw—Graham Stewart. Agents—Cairns, Mackintosh, & Morton, W.S.

Counsel for the Defender and Reclaimer—(Nicholson)—Sir C. Pearson—C. S. Dickson. Agents—J. A. Campbell & Lamond, C.S.

Saturday, July 14.

FIRST DIVISION.

MARKEY *v.* COLSTON AND OTHERS.

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

A father voluntarily handed over his child to the care of the directors of a charitable institution in this country. The directors of that institution, without obtaining his consent, sent the child to a branch of their institution in Nova Scotia. The father having applied to them without success for restoration of his child, presented a petition praying the Court to order them to restore the child. Before considering the merits of the case the Court ordered that the child should be brought back to this country. This having been done, and a report having been obtained as to the facts of the case, the result of which was to show that there would be danger to the life and health of the child in restoring it to its father, the Court *refused* the prayer of the petition.

John Markey, residing at No. 5 Queen Street, Leith, presented this petition praying for the custody of his infant son, who in February 1887 had been received into one of the homes of the Edinburgh and Leith Children's Aid and Refuge. The petitioner stated that his application to the directors of the institution was only for the temporary admission of his child to the Home, and that he now desired to resume the custody of the child.

Answers were lodged for James Colston and others, the directors of the Children's Refuge, which contained the following statement:—

"1. Early in the month of February 1887 the petitioner applied at the respondents' Shelter for Children at 150 High Street, Edinburgh, for the admission into the respondents' said Shelter of his infant son John Markey, stated by him to be fourteen months old. The petitioner stated to the nurse to whom he applied that the child had been much neglected, and that it had been fed on whisky. The respondent Mr Young went to see the child to ascertain if it was a fit subject for admission to the Refuge. He found it had been shockingly neglected, and he reported that it seemed to be in a dying state. In consequence of this report, and in the absence of suitable accommodation for such cases, the petitioner's application was refused, but the said nurse was sent to the City Poorhouse to endeavour to arrange for the admission of the child into the poorhouse. The nurse was told that the father must apply. This was communicated to the petitioner; but the respondents do not know whether any application was subsequently made by him.

"2. Later in February the petitioner again applied for the child's admission. He stated that he had made no previous application when it was pointed out to him that the child had been already refused admission, and he at last confessed that he was the same man who had previously applied. He then urged that the case was even more necessitous than it had been before. He said that his wife was behaving worse than ever; that she had sold her children's clothes for drink; that she had been seven days in prison for assault and breach of the peace, and that after coming out of prison she had deserted him. He also stated that owing to his employment on the Forth Bridge he was obliged to be away from his house from early morning till evening, and that the child was left all day on the floor of the house to look after itself. This account was substantially confirmed by a neighbour, Mrs Murray, who also pled for the child being taken into the Home. According to her account the mother of the child was sometimes out all night in the streets carrying the child with her, and she stated that the child at such times had hardly any clothing to protect it from the severe winter weather prevailing at the time.

"3. In these circumstances the respondents agreed to receive the child into the Shelter for Children, 150 High Street, Edinburgh. Before the child was received a form of application for its admission was signed by the petitioner. The information contained in the said form was obtained from the petitioner. These entries are referred to, and in particular the eleventh entry, which is as follows:—'11. State circumstances connected with child causing this application: Mother in prison, and father goes out all day, and has no one to look after the child.'

"4. The respondents had no means of ascertaining whether the statements made by the petitioner and the said Mrs Murray were correct. They believed them to be true, and they were amply corroborated by the appearance and conduct of the child when admitted. It bore all the appearances of the grossest neglect. The certificate of the nurse who received it, written at the time, is as follows:—'I hereby certify that I have stripped and examined the child referred to above, and find it very delicate, and sore on arm through neglect.—C. MALLOCH, Nurse.' She now states 'that it was a perfect skeleton, bones nearly through, and that it was ravenous for food.' When admitted it had absolutely no clothing whatever, and was covered only by an old dirty shawl lent by the said Mrs Murray, which was returned to her when the child was left under the respondents' charge.

"5. The petitioner subsequently signed a form of applicaton for the child's admission to the respondents' Homes. The Shelter above referred to is intended for the temporary relief of urgent cases. The Homes are for the reception of children for lengthened periods. Of this the petitioner was well aware when he signed the form of application last above mentioned, which is produced and referred to. The petitioner's application was acceded to by the respondents, and the child was sent to the respondents' Home at Merleton, Wardie, on 25th February 1887.

"6. When the petitioner first applied to the respondents, and all through his subsequent dealings with them, he led them to believe that

he desired them to take the entire charge of his child, and to act towards it in such a manner as seemed to them best fitted to promote its interests. They understood that not only was he unable to take charge of the child, but that owing to his wife's habits and other circumstances he saw no prospect of being able to look after it in the future. In accordance with an agreement endorsed on the form of application, second above mentioned, he undertook to pay to the respondents 2s. 6d. per week for the child, but he only paid altogether a sum of 5s. The petitioner is at present due for the board of the child £6, 10s. to the respondents.

"7. The child was kept at Merleton, at Wardie, from 25th February to about 12th April, when in consequence of an outbreak of measles at Merleton it was removed to Beattock, where Miss Stirling was in the habit of boarding children in their weaker condition. On 26th April it was taken by Miss Stirling, along with other children, to Nova Scotia. In Nova Scotia, in the neighbourhood of Aylsford, King's County, Miss Stirling has purchased a farm, on which she has erected and maintains, under suitable management, a house where children, destitute and neglected in this country, are sent out. These children are placed in suitable homes in Nova Scotia, and a prospect of comfort and usefulness is thus opened to them which would be impossible in this country. Shortly after the child had been taken to Merleton the father called, accompanied by his wife, and was taken into the house and shown the child. He then expressed himself satisfied as to the care that was being taken of the child, and said that he was leaving Edinburgh in search of work, and had come to bid it good-bye. The petitioner called once again to inquire after the child, and his wife also called on two other occasions. They left no address, and the respondents were thus unable to communicate with them before removing the child from Merleton, but in the interests of the child's physical and moral wellbeing, and in the exercise of the discretion which the petitioner had expressly committed to them, the respondents resolved to send the child to Nova Scotia. During the period of its residence in the Shelter and at Merleton the child rapidly improved in health, and it has continued to thrive during its residence in Nova Scotia, the climate of which is well suited for its constitution. The petitioner's wife called, after the child had been in the course of last summer taken to Nova Scotia, at the High Street Shelter, and was informed as to the child's then residence."

On 3d March 1888 the Court remitted to the Sheriff of the Lothians (CRICHTON) to inquire into the circumstances of the petitioner, and into the matters of fact averred in the answers, and to report.

On 16th March 1888 the Sheriff reported as follows:—"The statements of fact contained in the answers are substantially correct. The petitioner, however, denied that when he applied for admission for his infant son to the respondents' Shelter he informed Catherine Malloch, the matron, that his wife was in prison. He also stated that when he signed the application for the admission of the child to the respondents' Home he thought it was only to be there temporarily, and until his wife should, as he expressed himself, 'get back to her natural senses.' He added that he understood it was a sort of nursery where he could go and get back his child when he liked. On the other hand, Catherine Malloch stated that the conditions were fully explained to him, and that he expressed his thankfulness at the prospect of the child being well cared for, as he would never see his wife again. On one occasion when he called at Merleton to bid good-bye to the child he said he was satisfied the child was well taken care of, and that, above all things, it was to be kept from its mother. Miss Stirling admitted that she made no inquiry regarding the petitioner's address before the child was taken to Nova Scotia. I think it right to say that the statements of the petitioner and his wife cannot be relied on, as I found them in regard to several particulars untruthful.

"On Thursday the 8th of March I visited the house occupied by the petitioner and his wife at No. 5 Queen Street, Leith, where they have been residing since May 1887. It is a single room situated at the top of a land of four storeys, and at the end of a passage in which there are several tenants. It is about 9 or 10 feet in length, and about the same in breadth. The ceiling slopes to the front, where it is only about two or three feet from the floor. The part a person can stand upright in is about 6 feet high and 4 feet broad. The only articles of furniture in the room are an old iron bedstead, on which there is some straw in a very dirty packsheet ticking, but no bedclothes; a small form upon which two people could sit, and two small pails or tubs. Markey and his wife were in, also two of his children, girls, one aged six, the other eight. He said he was employed at the Forth Bridge, but had been off work for ten or eleven weeks in consequence of an accident. He had resumed work on Friday the 2d March, but he had not been at work on Monday or Wednesday, and had missed the boat that morning. He can earn from 18s. to 22s. a-week. He said that as soon as he had earned a few weeks' wages he intended to remove to a better house. I was surprised to see the two children living in such a miserable place in such good health, but I afterwards ascertained that since the month of December they had been living at the Emigration Home for destitute children at No. 6 Lauriston Lane, under the name of Murray, and had only been brought home that morning. When he was disabled in consequence of the accident he received from the Forth Bridge Company 10s. per week. He also received from a charitable society 2s. a-week.

The police informed me that they had visited petitioner's house on the 3d of January 1888, which they described as one of the most wretched dens they had ever seen. They found Mrs Markey very much under the influence of drink, and the petitioner lying on a shakedown in a corner, just awakened out of a drunken sleep. There was no bedstead in the room. Mrs Markey spoke to them in the most coarse and filthy language.

"I have ascertained that both the petitioner and his wife are persons of extremely intemperate habits. A Mrs Grubb who resides at Queen Street, Leith, said she could not say she had ever seen them sober. When Mrs Markey had money she would be three or four times every

day in the grocer's or publican's getting drink, which she took to her house. When she was unable to go herself her children were sent for it. The children were allowed to go about in the coldest weather with only one garment, and without shoes or stockings, or any covering for the head. The petitioner and his wife made it a matter of general talk that they will make money in consequence of their child having been taken away from them."

Lord President—There can be no doubt that the respondents, however benevolent their motive may have been, have committed a great mistake in removing the child to Nova Scotia without the consent of its father. It was a very strong step to take to say the least of it; therefore I think it is quite clear that we must first of all, before disposing of the petition, have the child brought back. I quite understand the difficulty that may have existed hitherto in bringing the child across the Atlantic in the middle of winter, but it seems to me that if we make an order upon the respondents to bring this child back to Scotland before the 15th May, that will afford sufficient opportunity for accomplishing the passage with perfect safety to the child's health and comfort. I therefore suggest that we should make such an order and desire the respondents to report what they have done in pursuance of that order by the 15th of May.

Lord Adam and Lord Kinnear concurred.

The child was brought back to this country and the Court then heard the case on the merits.

Argued for the petitioner—The consent given by the petitioner was that his child should be temporarily received into the respondents' Shelter until he was in a position to look better after it. No consent for its removal from this country was ever asked or obtained. The respondents' actings in removing the child were quite illegal, and now that the boy had been brought back to this country he should be restored to the custody of his parents. The petitioner was in regular work at the Forth Bridge, and was able and willing to maintain the child.

Argued for the respondents—In all cases of this kind the physical and moral interests of the child were the main question. Its condition on being taken into the Shelter was beyond dispute, and the character of the home from which it came was fully shown by the petitioner's statements in filling up the printed form, and by the Sheriff's report. Matters were no better now; the petitioner had not moved to a superior home as he had said he was going to do, and his circumstances were no better than they were at the time of the Sheriff's report. The respondents had no desire to keep the child; they had numerous cases where they were pressed to take charge of children and were prevented from want of funds. All they sought was the good of the child. If it was proposed to put the child into the custody of any respectable parties they would willingly acquiesce—*Kennedy* v. *Steel*, Nov. 16, 1841, 4 D. 12; *Leys* v. *Leys*, July 20, 1886, 13 R. 1223; *Macpherson* v. *Leishman*, June 4, 1887, 14 R. 780; *Sutherland* v. *Taylor*, December 22, 1887, 15 R. 254.

At advising—

Lord President—This is a petition by a workman, a ship-rigger in Leith, for recovery of the custody of his child. The right of a father to the custody of his child is beyond dispute, but when the father finds it necessary to bring a petition to recover the custody of his child, it is necessary to make inquiry as to how he lost it, and we have now full information on that point. It appears that in July 1887 the petitioner applied to the respondents, who are the directors of a charitable institution for the aid and custody of poor children, asking them to take his child into their institution and relieve him of the burden of its maintenance for a small weekly payment. At that time the child was ten months old. The respondents resist the prayer of the petition on the ground that the petitioner is not fit to take charge of the child, and that his wife is still less so, and that delivery will involve danger to the life and health of the child.

Now, this is rather a singular kind of case, and requires serious consideration, and we have all applied our minds to it very carefully; but the result at which I have arrived, and in which I understand your Lordships concur, is that in the circumstances the prayer of the petition should not be granted.

At the time the child was delivered to the respondents, the petitioner was living in a most wretched house in Leith, and his wife was in prison. The petitioner, when working at all, was employed on the Forth Bridge, and consequently was much absent from home, and there was no one at all to take charge of the child. In these circumstances it was very natural that he should avail himself of the charitable institution represented by the respondents. Further inquiry, however, has shown that not only were the parents in a wretched state of poverty, but that they were of confirmed intemperate habits. The consequence of this was that this child and the other children whom they have, were allowed to go about half clothed, or scarcely clothed at all, their clothes having been sold for the purpose of obtaining drink. There has been an inquiry by the Sheriff, which has resulted in bringing out these facts very clearly, and without going into the rather revolting details contained in the Sheriff's report I shall merely say that it seems to me that the health and the life of the child would be placed in great danger if it were delivered into the hands of its parents. It may be thought surprising that people in such a wretched condition should desire to have the child back again, knowing that it was well cared for where it was. There is, however, a trace of the motive which prompted them, which was apparently to make money by preying upon the charitable feelings of the respondents. That is indicated in the Sheriff's report as a matter that he had ascertained from the neighbours, and it is the only way to account for the presentation of this petition. I am inclined to believe that that was the motive which prompted this demand. But independently of that the circumstances are such that I think it is the duty of the Court to refuse the prayer of the petition.

Lord Shand—It is undoubtedly a serious thing to refuse the custody of a child to its parents, for

I presume that the husband and wife are acting together as to this application, and notwithstanding the exceptional and flagrant circumstances of this case I have felt that it was attended with some difficulty. After serious consideration, however, I have come to the conclusion with your Lordship that the Court ought to refuse this application. In recent cases, most of them occurring with reference to the provisions of the Conjugal Rights Act, both in this Court and in the House of Lords, it has been laid down that the interests of the child should be the primary consideration. I do not think it can be doubted that in this case the interests of the child demand the refusal of the application. In the first place, the proposal is not to take the child from its parents. The child was voluntarily parted with, and given over to the respondents to secure for it the home and comforts which their institution afforded. The petitioner says that he only intended to part with it for a short time. The whole circumstances show that such was not the purpose of the petitioner, but that he meant to hand it over for a considerable time to the charitable care of the respondents. The father accordingly is not now seeking to resist a proposal to take his child from him, but desires to get it back again after voluntarily parting with it. If the father desired the restoration of his child in such circumstances that the interests of the child would not suffer by its being restored, the application ought to be granted. The father would have a right to have it. On the other hand, it is clear that if it can be shown that there would be danger to the life and health of the child in handing it over to its parents, the Court would refuse the application.

It is quite clear on the evidence that when the child, ten months old, was received into the institution it was in a wasted and emaciated state, and reduced almost to a skeleton, in want of food and clothing, ravenous for food, and brought into the institution with only a shawl to cover it. If it appeared that the child was in delicate health, and that the father had no proper home to give it, and the Court were satisfied that to restore it to its father might cause its death, the Court would refuse to restore it. The only difference in this case is that the child by the care and attention it has received in the institution has been restored to health, and is well clothed and provided for. The evidence in the report of the Sheriff shows that though the child has now become strong and healthy since it has been well cared for, the result of restoring it to its parents would be that the child would suffer in its health, and that it would be starved and deprived of its clothing. The father lives in a very small room, in which there is no furniture or bed. It has been proved, as your Lordship observes, that both parents are in the habit of getting drunk, and that the mother is in the habit of pawning the children's clothes for drink. In the whole circumstances therefore, and as the paramount consideration is the welfare of the child, I concur with your Lordship that the application should be refused.

Lord Adam—I am of the same opinion. I am satisfied that to give up the child to its father would certainly result in injury to its health and life, and accordingly I concur with your Lordships in refusing the prayer of the petition.

The Court refused the petition.

Counsel for the Petitioner—G. W. Burnet—Forsyth. Agent—W. R. Rodger, Solicitor.

Counsel for the Respondents — Lorimer—Guthrie. Agent—R. C. Gray, S.S.C.

TEIND COURT.

Monday, July 16.

(Before the Lord President, Lord Mure, Lord Shand, Lord Adam, and Lord Kinnear.)

LORD ELIBANK AND OTHERS *v.* EARL OF WEMYSS AND ANOTHER.

Teinds — Sub-valuation — Approbation —Dereliction.

In an action brought in the Teind Court in 1886 for approbation of a report of the Sub-Commissioners in 1630 valuing the teinds of certain lands, the minister pleaded dereliction on account of large over payments of stipend having been made for nearly a century. *Held* that these over payments did not of themselves infer dereliction, and that, as it had not been proved that they were made in the knowledge of the sub-valuation or with the intention of abandoning it, the plea should be *repelled*, and decree *granted*.

On 19th May 1886 Lord Elibank, and Sir Graham Graham Montgomery of Stanhope, Bart., and Colin James Mackenzie, Esq. of Portmore, trustees of the said Lord Elibank, brought an action against the Earl of Wemyss, titular of the teinds of the parish of Aberlady in the Presbytery and county of Haddington, and the Rev. John Hart, minister of the said parish of Aberlady, for approbation of a sub-valuation of the teinds of the pursuers' lands of Ballencrieff and Lochhill situated in the said parish dated 10th May 1630. By this sub-valuation of the Sub-Commissioners appointed for valuing the stock and teind of the lands within the Presbytery of Haddington, the lands of Ballencrieff, so far as then pertaining to the pursuer Lord Elibank's ancestor Sir Patrick Murray of Elibank, and at the date of the action to the pursuers (except the lands of Poverhow), extending to 17 husbandlands, were valued to be yearly worth in constant rent, stock, and parsonage teinds *conjunctim*, 170 bolls victual, whereof 68 bolls oats, 51 bolls bear, and 51 bolls wheat, one-fifth whereof for teind being—

B.	F.	P.	L.
13	2	1	2⅘ oats.
10	0	3	0⅘ bear.
10	0	3	0⅘ wheat.
34	0	0	0

—the vicarage teind being £4, 5s. Scots, or 7s. 1d. sterling. And by the same sub-valuation the lands of Lochhill, then belonging to the heirs of Barnard Lindsay and his relict, and at the date of action to the pursuers, extending to 5 husbandlands,