it is not necessary for us to decide that question, and it has not been fully argued, but the present inclination of my opinion is against the competency.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the pursuer on the appeal, Dismiss the same, and affirm the interlocutors of the Sheriff, dated 23rd October and 16th November 1893, appealed against, and decern: Of new decern against the pursuer for the sum of £5, 16s, 3d. decerned for in the interlocutor of the Sheriff dated 16th November 1893: Find the defender entitled to expenses in this Court," &c.

Counsel for Appellant—N. J. Kennedy—Greenlees. Agent — James Ross Smith, S.S.C.

Counsel for Respondent—Guthrie—Clyde. Agents—Lindsay, Howe, & Co., W.S.

Tuesday, January 30.

FIRST DIVISION.

STEVENSON *v.* STEVENSON.

Parent and Child—Husband and Wife—Custody of Child — Guardianship of Infants Act 1886 (49 *and* 50 *Vict. c.* 27).

A wife having, on the plea of ill-health, obtained her husband's permission to go on a visit and take her children with her, subsequently refused to return to her husband or deliver the children to him.

In a petition by the husband for delivery and custody of the children, to which the wife lodged answers, the Court *held* (1)—following decisions in *Lang* v. *Lang*, January 30, 1869, 7 Macph. 445; *Steuart* v. *Steuart*, June 3, 1870, 8 Macph. 821—that it was irrelevant in a question of the custody of the children, for the wife to aver that she had been cruelly treated by her husband; and (2) *granted* the petition, in respect that the answers set forth no reasonable ground for apprehending moral or physical injury to the children if their custody was given to the father.

This was a petition by Colonel James Stevenson of Braidwood, in Lanarkshire, for delivery and custody of the children of the marriage between him and Mrs Florence Louisa Gibbs or Stevenson, viz., Samuel, born in May 1886, and Adela and Laura, born in June 1887 and March 1889 respectively.

The petitioner stated that his wife had left his house of Braidwood, taking the three children with her, ostensibly for the purpose of visiting her parents, on 20th March 1893, that she had thereafter, upon entirely unfounded and frivolous grounds, raised a suit against him in the English Courts for judicial separation, and that she had refused to deliver up the children or to return to him except upon condition that she should have the custody and control of the children, which he declined to give her.

Answers were lodged for Mrs Stevenson. She founded on section 1 of the Custody of Children Act 1891, and also on section 5 of the Guardianship of Infants Act 1886, and opposed the petitioner's demand "on the ground that it will endanger the health and morals of the children to award him such custody, and also on the ground that, having regard to the welfare of the said children, to the conduct of the petitioner, and to the wishes of the respondent, it is inexpedient that any order should be pronounced awarding the custody of the children to the petitioner." She further maintained that the petition should be refused "in respect that the petitioner has neglected and taken no interest in the said children, and in particular has allowed them to be brought up by the respondent at her own expense for such a length of time, and under such circumstances as to deprive him of any ground for alleging that he has in any one particular duly discharged his parental duties."

In support of these grounds for opposing the petition the respondent made statements to the following effect—The petitioner had married her as his third wife. His whole available income was swallowed up in supporting the younger children of his first marriage. He had never contributed anything to the support of the respondent or her children. They had been supported out of an allowance of £600 settled on the respondent by her father. Soon after the marriage the petitioner had begun to treat her with cruelty and unkindness, and on certain specified occasions he had used personal violence towards her. In consequence of the petitioner's conduct towards her the respondent had become so ill in 1886 that her mother had insisted on her paying her parents a visit, and she was permitted to do so by the petitioner. She accordingly left her husband's house with her children on 3rd December 1886, and from that time she remained with her children at her parents until 23rd May 1892. During this period the petitioner frequently visited her, but he showed no interest in his children and contributed nothing to their support during this whole time. The respondent's father frequently urged the petitioner to provide a suitable residence for his wife, and as an additional inducement increased the respondent's allowance to a £1000 a-year. The result was that an arrangement was made that the petitioner and respondent should make their residence at Braidwood, and the respondent went there with her children in May 1892. Since then the petitioner had frequently threatened her and used abusive and insulting language towards her, and had on occasions specified treated her with personal violence. He frequently used bad language before his children, and the eldest child had begun to learn the habit. The respondent would have left the petitioner

on account of his conduct towards her, but for his stating that if she did so he would retain the children. In March 1893 she asked the petitioner's leave to go with the children to visit her parents on the ground of impaired health, and in order to procure his consent she agreed that her visit should be limited to a few weeks. Shortly after leaving Braidwood she intimated that she could not return to him, and instituted a suit for separation in the English Courts.

"It is absolutely essential to the health and well-being of the children that they should continue to reside with the respondent. The petitioner has shown no affection for the children, and has taught them to use profane and blasphemous language by habitually using it in their presence. He has shewn no care of them when ill. Further, he has on some occasions treated the children with actual cruelty. In particular, on one occasion in the course of the winter 1892-93, he stamped violently with his shooting boots upon the foot of the son of the parties causing it to swell and become inflamed; on another occasion he thrashed the elder daughter in a severe and painful manner; while at other times his conduct has been such as to alarm and terrify the children. In short, he is of a very excitable nature, and when excited is apt to act even towards his children in a violent manner."

He had no income, and had repeatedly asserted that if the respondent left him he would send the children to a board school.

Argued for the petitioner — It was settled that the father was the natural custodian, the right to have the custody of the children being originally part of the *patria potestas*. The Court would only deprive the father of the custody if it were shown that the children would suffer in life, health, or morals—*Lang* v. *Lang*, January 30, 1869, 7 Macph. 445; *Steuart* v. *Steuart*, June 3, 1870, 8 Macph. 821; *Symington* v. *Symington*, March 18, 1875, 2 R. (H. of L.) 41; *Sleigh* v. *Sleigh*, January 20, 1893, 30 S.L.R. 272. The Guardianship of Infants Act might give the Court a freer hand, but the considerations were the same now as before — *per* Lord M'Laren in *Sleigh* v. *Sleigh*, 30 S.L.R. 275. The fact that a man had treated his wife cruelly had not been held a sufficient reason for depriving him of the custody of his children—*Lang* v. *Lang*, *supra*; *Steuart* v. *Steuart*, *supra*; *Beattie* v. *Beattie*, November 10, 1883, 11 R. 85. Nor was the fact that a man was alleged to have no income a reason for taking his children from him —*Mackenzie* v. *Mackenzie*, March 5, 1881, 8 R. 574. The respondent had not relevantly averred that the children were in any physical or moral danger in their father's house, and she was in an unfavourable position as she had taken the law into her own hand and got them into her own custody by deceit. The petition should accordingly be granted.

Argued for the respondent—The respondent's averments were relevant to show that if left in the petitioner's custody the children would be in danger of physical and moral injury. Further, according to recent English decisions, where a man had treated his wife with cruelty, the Court would award her the custody of the children, even though the cruelty had not been sufficient to justify a judicial separation—*Smart* v. *Smart*, L.R. 1892, App. Cas. 425; *in re Elderton*, 1883, L.R., 25 Ch. Div. 220. There was nothing inconsistent with these decisions in *Sleigh* or the other cases quoted by the petitioner. The petition should therefore be refused.

At advising—

LORD PRESIDENT — The petitioner is a Scotsman resident on his estate of Braidwood in Lanarkshire. The present application to the Court is occasioned by his wife having removed his children from his house, as she now avers in her answers, on the pretence that she was taking them to pay a few weeks' visit with her to her parents in England, but really with the intention of never returning and of keeping the children in England.

This is a bad beginning to the respondent's case, and places her in an unfavourable position so far as conduct is concerned. She can take no advantage by the fraud she perpetrated on her husband, and her case must be considered as if she and not her husband were *in petitorio*. Now, when the answers are analysed it will be found that despite their great length there is very little substance in them. What we are in search of is some definite reason for believing that it would be injurious to the interests of the children that they should remain in their father's house, which is their proper home, and from which they have been surreptiously removed. The answers are largely taken up with complaints of the petitioner's conduct towards his wife. But even taking these statements as true, they cannot be held to be relevant, having regard to the decisions in *Lang* and *Stewart*, the applicability of which does not seem to be materially affected by the Infants Act of 1886. Moreover, it is impossible to disregard the fact that the respondent has not sought the remedy of separation which this Court could have given her if she had had an authentic case of cruelty.

So far as the allegations in the answers relate to the petitioner's conduct towards the children, they amount to very little that is substantial, and do not seem to me to present a case giving rise to any reasonable conviction that the children will be injured in health, minds, or morals by living in their father's house. On the other hand, our refusing the petition would perpetuate the breaking up of this family.

In reading the conclusion that the prayer should be granted, I have in consideration the welfare of the children, the conduct of the parents, and the wishes as well of the mother as of the father.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court granted the petition.

Counsel for the Petitioner—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for the Respondent—M'Lennan. Agent—J. Murray Lawson, S.S.C.

Tuesday, January 30.

FIRST DIVISION.

[Lord Low, Ordinary.

WATSON *v.* MORISON & OTHERS.

Reclaiming-Note — Competency — Court of Session Act 1868 (30 *and* 31 *Vict. c.* 100), *sec.* 52.

The Court of Session Act 1868, by sec. 52, provides that—"Every reclaiming-note . . . shall have the effect of submitting to the review of the Inner House the whole prior interlocutors of the Lord Ordinary." *Held* that it is not competent for a person to reclaim against an interlocutor pronounced on his own motion for the purpose of submitting prior interlocutors to review.

In October 1893 Mrs Ann Cowans or Watson, Windygates, Fife, brought an action against Robert Morison, accountant, Perth, and others, for the purpose of having a trust-disposition and settlement and relative codicils and a holograph letter of instructions reduced.

On 23rd November 1893 the Lord Ordinary (Low) held the production satisfied by the production of an extract of the trust-disposition and codicils and of a draft of the holograph letter.

Upon 5th December 1893 the Lord Ordinary approved of issues lodged by the pursuer.

Against this interlocutor the pursuer reclaimed for the purpose of having that of 23rd November submitted to review.

The defenders argued it was incompetent for a person to reclaim against an interlocutor pronounced on his own motion.

The pursuer argued that she desired to bring a prior interlocutor under review, and was enabled to do so by reclaiming against a subsequent interlocutor by virtue of the 52nd section of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), which provides that "Every reclaiming-note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary.

At advising—

LORD PRESIDENT—The reclaimer has not satisfied me of the competency of her reclaiming-note, the objection to which is palpable. The interlocutor against which the reclaiming-note is presented was pronounced on her own motion, as is evidenced by the fact that the issues which the Lord Ordinary approves of, are those very issues which were lodged by the pursuer as the issues proposed by her for the trial of the cause.

Apart from the 52nd section of the Court of Session Act 1868, no argument was advanced in support of the proposition that a party is entitled to reclaim against an interlocutor pronounced on his own motion, and good sense forbids the idea. Now, the 52nd section does not purport to enable a party to reclaim against a particular interlocutor, who formerly could not have reclaimed against that interlocutor. It merely says, so far as the reclaimer is concerned (and therefore so far as this question is concerned), that every reclaiming-note shall have the effect of submitting to review the whole of the prior interlocutor, instead of merely the interlocutor primarily and directly reclaimed against. The hypothesis of the section is that there is a competent reclaiming-note against the interlocutor purporting to be reclaimed against, and the criteria of that competency are not altered by the 52nd section.

I am therefore of opinion that this reclaiming-note should be refused as incompetent.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent at the hearing.

The Court refused the reclaiming-note as incompetent.

Counsel for Pursuer and Reclaimer—Young—Clyde. Agents—Reid & Guild, W.S.

Counsel for Defenders and Respondents—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Tuesday, January 30.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

CARRUTHERS *v.* EELES.

Succession—Trust—Vesting—Condition.

A truster directed his trustees after the death of the survivor of him and his wife to make provision for the education of any of his children under twenty-one at that time, and to pay and convey his moveable and heritable estate to his four children equally, share and share alike, "and the survivor or survivors equally, and that at the term of Whitsunday or Martinmas immediately following the death of the survivor of my said wife and me, or the majority of my youngest child, whichever of these events shall last happen, on the following conditions—the share of the premises of each child shall be a vested