Guild as proposed by your Lordship, to be proceeded with.

LORD MONCREIFF — I am of the same opinion, and for the reasons which your Lordships have fully stated.

The Dean of Guild's judgment proceeds on a finding in fact that this house has been taken down in whole or in part in order to be altered. If that were so, the case would appear to fall under the terms of section 158 of the Burgh Police (Scotland) Act 1892. But I find no ground on record for that finding in fact, and there has been no proof. On the contrary, it appears plain that what your Lordships have pointed out happened, namely, that part of the front wall was damaged by reason of operations on a neighbouring property, and that the wall was taken down in order to be put up again. I do not think that that is a case to which section 158 applies.

LORD YOUNG was absent.

The Court sustained the appeal and recalled the interlocutor appealed against, repelled the 2nd and 3rd of the additional pleas-in-law for the respondent Gallon, and remitted the cause back to the Dean of Guild to proceed.

Counsel for the Petitioner and Appellant — Salvesen, K.C. — Kemp. Agents — Whigham & Macleod, S.S.C.

Counsel for the Respondent — Guy. Agents—W. & J. L. Officer, W.S.

Tuesday, June 4.

FIRST DIVISION.

[Lord Low, Ordinary.

CALEDONIAN INSURANCE COMPANY *v.* MATHESON'S TRUSTEES.

Superior and Vassal—Casualty—Composition—Clause of Relief—Implied Entry—Statute—Supervenient Legislation—Obligation—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4.

By disposition granted in 1866, and duly recorded, A acquired on an *a me vel de me* holding the *dominium directum* of certain subjects from B, who held them under C. B bound himself and his heirs and successors (1) to free and relieve A in all time coming "of and from payment of the whole feu-duties and casualties payable by me or my heirs to my superiors" and (2) to enter with the superiors, "and if my heirs and successors shall not so enter," he bound his heirs and successors "to pay the whole composition exigible from" A "on receiving an entry direct from the over-superiors." B died in 1877. Thereafter C demanded payment of a composition from A, who claimed relief from B's testamentary trustees. *Held* (1) that they were not liable under the first branch of the clause of relief in respect that the composition claimed was not a casualty payable by B or his heirs to their superiors; and (2) that they were not liable under the second branch of the clause in respect that the primary obligation upon B's heirs and successors thereunder was to enter with the superiors (the obligation to pay composition being merely accessory in the event of their failure so to enter) and it had become impossible for them to do so owing to supervenient legislation.

Superior and Vassal—Casualty—Composition—Clause of Relief—Statute—Supervenient Legislation—Conveyancing Act 1874 (37 *and* 38 *Vict c.* 94), *sec.* 4.

In 1868 A acquired from B the *dominium directum* of certain subjects by disposition duly recorded. B bound himself and his heirs to relieve A of all casualties due to the superior in all time coming. B died in 1877 after the Conveyancing Act 1874 had deprived A of the power of putting forward B's heir to meet a demand by the superior for composition. Thereafter C demanded composition from A. *Held* (by Lord Low, Ordinary) that B's heir was bound to relieve A of the composition demanded.

In 1866 the Caledonian Insurance Company acquired the *dominium directum* of certain subjects in Edinburgh from Robert Matheson, who held them under the Governors of George Heriot's Hospital. This disposition was duly recorded. It contained the following clause:—"To be holden . . . *a me vel de me* for payment to me and my heirs and successors of one penny Scots money in name of blench farm yearly, and doubling the same at the entry of heirs and singular successors, and declaring that the said Caledonian Insurance Company and its foresaids shall be freed and relieved by me and my heirs and successors, now and in all time coming, of and from payment of the whole feu-duties and casualties payable by me or my heirs to my superiors, as well as from all cess, teinds, minister's stipend, and other public and parochial burdens payable in respect of the said lands or subjects and others, and from all augmentation thereof, all such upper feu-duties and casualties and cess, teinds, and minister's stipends and public and parochial burdens, and all augmentations thereof being payable by me or my foresaids, now and in all time coming, out of the remainder of the foresaid lands belonging to me not hereby disponed. . . . And farther, I bind and oblige myself, my heirs and successors . . . to enter with the superiors . . . And if my heirs and successors shall not so enter, . . . then I bind and oblige myself and my heirs and successors to pay the whole composition exigible from the said Caledonian Insurance Company on receiving an entry direct from the over-superiors, and also the whole feu-duties and casualties which may hereafter become payable by it and them to said superiors."

In 1868 the Caledonian Insurance Company acquired from Robert Matheson the *dominium directum* of certain other sub-

jects also in Edinburgh, and held by him under the same superiors. This disposition contained the following clause:—"And I (the disponer) bind myself to free and relieve the said Caledonian Insurance Company and their foresaids of all feu-duties, casualties, and public burdens imposed and to be imposed and all augmentations thereof both prior to the said term of entry and in all time coming thereafter." This disposition was duly recorded.

Robert Matheson died in 1877, after the Conveyancing Act 1874 had deprived his heirs of the power of entering with the superiors in pursuance of the obligation imposed upon them in the disposition of 1866. His eldest son made up a title by special service to the whole lands in which his father had been infeft, including those disponed to the Caledonian Insurance Company.

In 1900 the Governors of George Heriot's Hospital called upon the Caledonian Insurance Company to make payment of a year's sub-feu-duties in name of composition due on the death of Robert Matheson.

The Insurance Company admitted that a casualty was due, and raised an action against Matheson's testamentary trustees to have it found and declared "that the defenders are bound to relieve the pursuers of any casualty now payable to or exigible by, or that may hereafter become payable to or exigible by, the superiors (the Governors of George Heriot's Hospital) for and in respect of" the lands described in the dispositions of 1866 and 1868.

On 26th October 1900 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds (1) that the defenders are not bound to relieve the pursuers of the composition demanded from them by the Governors of George Heriot's Hospital as having become due upon the death of the deceased Robert Matheson in respect of the subjects disponed to the pursuers by the said Robert Matheson by disposition dated the 11th and 12th, and recorded in the Register of Sasines the 20th, days of July 1866; and (2) that the defenders are bound to relieve the pursuers of the composition demanded from them by the said Governors as having become due as aforesaid in respect of the subjects disponed to the pursuers by the said Robert Matheson by disposition dated 11th and 12th, and recorded in the Register of Sasines the 14th days of December 1868: Therefore finds, decerns, and declares in terms of the conclusions of the summons to the extent and effect of the second of the above findings, and *quoad ultra* dismisses the summons, and decerns," &c.

Opinion.—"The pursuers acquired the mid-superiority of certain subjects in Edinburgh from the deceased George Matheson of West Coates, by dispositions dated respectively in 1866 and 1868.

"Mr Matheson died in 1877, and the Governors of George Heriot's Hospital, who are the superiors of the subjects in both of the dispositions, have demanded from the pursuers payment of a composition of one year's sub-feu-duties in respect of each of the subjects.

"The pursuers state that they are advised that the casualties are due, and the object of this action is to have it found that Mr Matheson's trustees are bound to relieve them of the casualties in terms of clauses of relief contained in the dispositions.

"The clause of relief in the disposition of 1866 is substantially different from that in the disposition of 1868, and it is therefore necessary to consider the clauses separately.

"In the former disposition Mr Matheson bound himself, his 'heirs and successors,' to relieve the pursuers 'in all time coming of and from payment of the whole feu-duties and casualties payable by me or my heirs to my superiors. . . . And further, I bind and oblige myself, my heirs and successors, at the expense of me or my foresaids, to enter with the superiors, . . . and if my heirs and successors shall not so enter, then I oblige myself, and my heirs and successors, to pay the whole composition exigible from the said Caledonian Insurance Company or its foresaids on receiving an entry direct from the over-superiors.'

"I am of opinion that that clause does not entitle the pursuers to be relieved of the composition in question. Mr Matheson, in the first place, undertakes to relieve the pursuers only of casualties payable 'by me or my heirs.' These words do not include the composition payable upon the entry of a singular successor. Further, the latter casualty is dealt with at the end of the clause, where Mr Matheson undertakes that he and his heirs and successors shall enter with the superior, and that they will relieve the pursuers of any composition which they may be called upon to pay by reason of his heirs or successors failing to enter with the superior. I do not think that the pursuers can found upon that clause, because they are liable to pay composition in respect of the implied entry created by the Conveyancing Act, and not because Mr Matheson's heirs have failed to enter with the superior. The obligation to relieve of composition was undertaken in view of the law as it existed at the date of the disposition, under which Mr Matheson's heirs would have been entitled to enter with the superior, and thereby render it impossible for the superior to exact composition from the pursuers. The Conveyancing Act, however, put it out of the power of Mr Matheson's heirs to enter, and I am of opinion that the obligation to relieve of composition, in the event only of the heir failing to enter, cannot be enforced when the composition has become due not through any failure on the heir's part but because a supervening statute has changed the law.

"The clause in the disposition of 1868 is in the following terms:—'I bind myself to free and relieve the Caledonian Insurance Company and their foresaids of all casualties . . . both prior to the said term of entry, and in all time coming thereafter.'

"The defenders contended, in the first place, that a composition was not, prior to the Conveyancing Act, a casualty of superiority. It seems to me that I must regard that point as having been settled adversely

to the defenders by the judgment in *Farquharson* v. *Caledonian Railway Company*, 2 F. 141.

"The defenders further contended that the obligation could not be enforced by reason of the change in the law which was made by the Conveyancing Act. But for that Act Mr Matheson's heir could and would have entered with the superior, and a composition could not have been claimed from the pursuers.

"I have already expressed the opinion that that change in the law relieved the defenders of the obligation of relief contained in the disposition of 1866, but that is because the obligation was expressly based upon the existing state of the law. Mr Matheson bound his heir to enter with the superior, and it was only if the heir failed to enter that the pursuers were to be relieved of any composition which they might thereby be obliged to pay. The heir, in my opinion, could not be said to have failed to enter when a subsequent statute put it out of his power to enter.

"In the disposition of 1868, however, the obligation to relieve of casualties is not conditional but absolute, and the question seems to me to be whether the change in the law operated by the Conveyancing Act so altered the incidence of the casualty that it would not be just and reasonable to regard it as falling within the purview of the contract.

"Now, I take it that when Mr Matheson died the position of matters would, if the Conveyancing Act had not been passed, have been this: the superiors—the Governors of George Heriot's Hospital—would have been entitled to call upon the pursuers to enter with them as their vassals, and to pay a composition, and to enforce that demand by a declarator of non-entry. The pursuers, however, could have met that demand by putting forward Mr Matheson's heir. The superiors would have been bound to receive the heir, although—and I think that this is important—they could not have compelled him to enter. The result of the Conveyancing Act, therefore, was simply this, that the true vassal could no longer defeat the superior's claim to a composition by putting forward the heir in a bare midsuperiority. There has accordingly been no change in regard to the casualty, but the pursuers can no longer resort to a device which would formerly have been open to them, to avoid payment of the casualty. It seems to me that that is not a change in the law which entitles the defenders to refuse to implement an absolute and unconditional obligation to relieve the pursuers of all casualties.

"The defenders stated one other argument with which I must deal. It appears that the superiors have claimed composition from the pursuers as being due in consequence of the death of Mr Matheson, the disponer. The defenders argue that no such casualty can be claimed in consequence of Mr Matheson's death, because his heir entered with the superiors, and was received by the superiors as their vassal. What happened was this. On Mr Matheson's death his eldest son made up a title by special service to the whole lands in which his father had been infeft, including those disponed to the pursuers, and paid to the superiors the relief duty. The defenders argued that the superiors, having accepted Mr Matheson's heir as their vassal, cannot claim a composition from the pursuers as being due in consequence of the death of Mr Matheson. It seems to me to be plain that that is not a ground upon which the pursuers could have resisted the demand of the superiors for payment of composition, because the pursuers having been entered by virtue of the provisions of the Conveyancing Act, there was no room for an entry to Matheson's heir.

"I am therefore of opinion that the defenders are not liable to relieve the pursuers of the composition payable for the lands disponed in 1866, but that they are liable to relieve them of the composition for the lands disponed in 1868."

The pursuers reclaimed against the above interlocutor in so far as it dealt with the disposition of 1866, and argued—The true construction of the contract between the disponer and disponee was that the disponer would either enter or pay composition; the Legislature having rendered the first alternative obligation impossible, the disponer's heirs were bound to perform the second. Though the pursuers were entered by the operation of the Conveyancing Act, the obligation to enter imposed upon the disponer's heirs remained unfulfilled, and though the Legislature had rendered its fulfilment impossible, it had not rendered it impossible for them to pay composition, and it left the contractual obligation unaltered—*Dunbar's Trustees* v. *British Fisheries Society*, December 19, 1877, 5 R. 350, July 12, 1878, 5 R. (H.L.) 221; *Dunbar* v. *Scott's Trustees*, July 18, 1872, 10 Macph, 982. In any case, the pursuers were entitled to relief under the obligation to pay all casualties due to the superiors.

Argued for the defenders—Section 4, sub-section 4, of the Conveyancing Act had discharged the defenders' obligation to enter by putting performance of it out of their power—*Baily* v. *De Crespigny* (1869), L.R., 4 Q.B. 180; *Brown* v. *Mayor &c. of London*, February 1, 1861, 30 L.J., C.P. 225; *Lindsay* v. *Bett*, July 13, 1898, 25 R. 1155; Addison on Contracts (9th ed.), p. 134. No provision was made in the disposition for change of circumstances, and in the absence of such provision supervenient legislation, rendering the fulfilment of the obligation there undertaken impossible, must be held to have discharged the obligation—*Mayor of Berwick-on-Tweed* v. *Oswald*, May 10, 1854, 23 L.J., Q.B. 321; 3 E. & B. 653; *Barkworth* v. *Young*, December 15, 1856, 26 L.J., Ch. 153, at p. 163. The case was similar to those in which the continued existence of the subject was essential to the contract, and its destruction operated a discharge from all the obligations of the contracting parties—*Taylor* v. *Caldwell*, May 6, 1863, 32 L.J., Q.B. 114; *Appleby* v. *Myers*, June 21, 1867,

L.R.,2 C.P. 651; Anson on Contracts (9th ed.), p. 333. The obligation to pay all casualties did not include composition—*Straiton Estate Company* v. *Stephens*, December 16, 1880, 8 R. 299.

At advising—

LORD PRESIDENT—The question is whether the defenders are bound to relieve the pursuers of a composition demanded from them by the Governors of George Heriot's Hospital as having become due upon the death of Robert Matheson in respect of subjects the mid-superiority of which was disponed by him to the pursuers by disposition dated the 11th and 12th, and recorded in the Register of Sasines the 20th, days of July 1866.

Robert Matheson held parts of the lands of Coates under the Governors of George Heriot's Hospital as the superiors thereof for payment of certain feu-duties, and by the disposition just mentioned he conveyed to the pursuers, in consideration of the price of £6562, 10s. [*His Lordship then read the clause in the disposition which is quoted supra.*]

It is to be observed, in the first place, that the obligation undertaken by Mr Matheson is only to relieve the pursuers of casualties "payable by me or my heirs"—words which do not include composition payable upon the entry of a singular successor, the latter casualty being afterwards dealt with in the undertaking by Mr Matheson that he and his heirs and successors shall enter with the superior and relieve the pursuers of any composition which they might be called upon to pay by reason of his heirs and successors failing so to enter.

Robert Matheson died in 1877, and the Governors of George Heriot's Hospital have demanded from the pursuers a composition of one year's sub-feu-duties in respect of the said subjects.

As the law stood at the date of the disposition by Mr Matheson to the pursuers, lands fell into non-entry upon the death of the last-entered vassal, and remained in that condition until a new vassal was entered, so as to fill the fee. Where lands had been sold and conveyed by the last-entered vassal it was competent for the heir of that vassal to come forward and claim an entry upon payment of relief-duty, thereby protecting the ancestor's disponee from the necessity of paying composition as the condition of obtaining an entry. So standing the law, the obligation upon Robert Matheson and his heirs to relieve the pursuers of the whole feu-duties payable by him or his heirs to his superiors bound him and his heirs to relieve them of the casualty of relief, but not of the casualty of composition which the Governors of Heriot's Hospital claim, and of which the pursuers now ask to be relieved by the defenders. Their first answer to this claim therefore seems to me to be a good one, viz., that Robert Matheson and his representatives are not bound, upon a sound construction of the first obligation of relief, to relieve the pursuers of the casualty which they are asked to pay to the Governors of Heriot's Hospital, viz., a composition.

By the second obligation Robert Matheson bound himself and his heirs and successors to enter with the superior, and if his heirs and successors should not so enter, he bound himself and them to pay the whole composition exigible from the pursuers on their receiving an entry from the over-superiors. But the change in the law effected by the Conveyancing Act 1874 entered the pursuers as vassals of the Governors of Heriot's Hospital, thus filling the fee, and rendering impossible of fulfilment the obligation that Mr Matheson's heirs and successors should enter. If, however, the leading obligation was thus rendered imprestable by subsequent legislation, it appears to me that the accessory obligation to relieve the pursuers of the composition which they are liable to pay to the over-superiors must also fall to the ground. The intention of the parties in the disposition of 1866 was that the middle fee should be kept up, but it was in effect destroyed by the operation of the Conveyancing Act of 1874, and there was thus *rei interitus* as regards that fee.

I may add that the general rule is that such an obligation must be construed with reference to the law as it existed at the time when it was undertaken, and that it cannot be enforced if fulfilment of it, or of any of the conditions attached to it, has been rendered impossible by subsequent legislation. In this connection I may refer to *Lindsay* v. *Bett*, 25 R. 1155; *Oswald* v. *Mayor of Berwick*, 3 E. & B. 653, 23 L.J., Q.B. 321; *De Crespigny*, L.R., 4 Q.B. 180, 38 L.J., Q.B. 98; *Brown* v. *Mayor of London*, 9 Com. Bench (N.S.) 726, 30 L.J., C.P. 225.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM concurred.

LORD M'LAREN—I agree in all your Lordship's observations, and in the reasons for the judgment.

LORD KINNEAR—I agree with your Lordship. There can, I think, be no question as to the rule which your Lordship has stated, that the rights of parties are to be interpreted with reference to the law in force at the time their contracts are made, and not with reference to some subsequent law of which the parties knew nothing when they were contracting. But it is hardly necessary in the present case to have recourse to any general rule, because as matter of construction it is certain that the stipulations which we have to consider were intended to regulate rights and liabilities existing at the time that the contract was made which have been altogether abolished by the Act of 1874. There is no possible law for the construction of this contract to which we can look except the law prior to the Act of 1874. The object of the stipulations was to keep up a barren mid-superiority for the protection of a purchaser, and the Act of 1874 says that that is a thing which shall no longer be done. The natural consequence would seem to

be that specific regulations for the maintenance of a condition of things which the Act abolishes became inoperative, and that becomes all the more clear when, as your Lordship has pointed out, regard is had to the particular stipulations intended for that purpose in this deed. In the first place the disponee binds himself and his heirs and successors to relieve the purchaser of all feu-duties and casualties "payable by me or my heirs to my superiors." It is perfectly obvious that the liabilities to which this obligation of relief relates are the liabilities of the existing investiture, the feu-duties and casualties payable by the disponer to his own superior, that is, the liabilities arising from the terms of the charter constituting him and his heirs vassals of the superior in a certain estate, and it is equally clear that the heirs referred to in this clause are the heirs of the investiture. But then the investiture has come to an end. It has been entirely extinguished by the provisions of the Act of 1874 operating upon the conveyance. A new investiture has taken its place, and the disponer and his heirs have no concern whatever with any rights and liabilities of the new investiture, because they have no longer any interest in the subject. They are out of the feudal relation altogether, and have nothing whatever to do with the land. Therefore it seems to me perfectly clear that this stipulation has ceased to have any force or to have any legal meaning or effect with reference to the estate in question. Then a question of some difficulty is created by the second obligation, because there the disponer obliges himself and his heirs and successors to enter with the superior. Now, that has become a legal impossibility. So long as the disponer remained in life the fee was filled by him, and when he died, if the law had remained unaltered, it would have become vacant, and his heirs would have been obliged to enter with the superior. But then, before he died he had been completely divested and the disponees had been vested in his place by the Act of 1874, because the registration of their disposition entered them with the superior. Therefore there was no vacant fee at his death to which his heirs could possibly enter, and the fulfilment of the obligation which he had undertaken for them became impossible. Now I think with your Lordship that it is a well-established rule that where a condition of a contract is legal and possible at the time when the contract is made, but becomes impossible and illegal afterwards by the Act of the Legislature, no action will lie for non-performance of the undertaking which the law as it now stands will not allow to be performed. The disponer had undertaken by a perfectly legal and practicable obligation to enter with his superior so as to protect his disponee. The Act of Parliament says that shall not be done, and it appears to me to follow of necessity that the person who has undertaken the obligation cannot be treated as in breach of contract for failing to do what Parliament has made impossible. I think it is not only the performance of the obligation which the Legislature has made impossible, but the condition upon which it arises has been prevented from ever emerging, because the obligation is to enter whenever the fee becomes vacant, and no fee can now become vacant so long as a conveyance *a me* in favour of a living person stands recorded in the Register of Sasines, and therefore the condition upon which this disponer and his heirs could have been called upon to perform this obligation does not exist. The subject is gone. Well then, the question comes to be, whether the remaining obligation that if the disponer's heirs do not enter they shall pay the composition exigible from the disponees on receiving entry direct from the superior, can be enforced. I agree, for the reasons which your Lordship has given, that that cannot be enforced against them because it is an accessory obligation both in terms and in substance. It is an obligation accessory to the primary obligation to enter, and if the primary obligation has ceased then this accessory obligation, which is merely machinery to enable the primary obligation to be enforced, necessarily falls with it. I think the reclaimer's counsel conceded that if during the interval between the date of the disposition and the passing of the Conveyancing Act the disponees themselves had gone to the superior and demanded confirmation of their infeftment, which would have had the effect of entering them directly with the superior, they could not have enforced this demand for relief from the composition. It was said that that would be because they could not complain of the necessary consequences of their own act, but that concession I think is fatal to the reclaimer's argument, because it is an exceedingly clear illustration of what I think is otherwise plain enough, that this obligation to relieve from the composition is not a separate and independent obligation at all, but is absolutely tied up with the primary obligation of the disponer to enter. If it had been a separate obligation it might not have mattered how the composition came to be exigible—whether on the demand of the disponee or by some other method,—because the obligation to pay composition might quite well stand as a separate and independent obligation. But the reason why it could not be enforced is that the condition on which it arises is that the disponers shall fail to enter, and they could not be said to have failed to enter if their entry was excluded by the act of the disponees themselves; but neither can they be said to have failed to enter if their entry is excluded by the act of the law. If the Legislature has already filled the fee they cannot enter, and there is no failure on their part to fulfil their primary obligation to enter, and their accessory obligation to pay the composition for their disponees if they make such failure does not become prestable. The whole difficulty no doubt arises from the legislation by which Parliament has

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