

"The above is my order in the meantime. I would like them forward not later than the 23d current, as Mr Scott leaves for the winter, and would like to see the most of them planted before he leaves. Terms, cash within a month; and you must be as good to me as you can.

JOHN CURRIE.

"P.S.—Send me catalogue as soon as possible. I will want a great many tea-scented roses."

But this was not the position of matters, for on 30th October we have this other letter:—

"Enclosed is invoice of gooseberries sent per rail; we run short of Warringtons. To-morrow or next day we will send 1000 Whitesmiths, 2000 Warringtons, 1550 Glenton Green, which will make up the 21,000. Those sent are all named in bundles, except most of the bundles of Sulphurs, which are without name. The Ironmonger and Golden Lion we sent to make up, which you will like. The plants are fine 1, 2, and 3 years, as you agreed to when here.

JOHN STEWART & SONS."

Plants of 1, 2, and 3 years old are thus mentioned by the pursuers, and it is not until December 30th that any objections are made by Mr Currie, although there were frequent letters passing between them in the interval. After the reply of Messrs Stewart, refusing to take back the plants, there is nothing whatever said about returning them. Whether the plants were agreeable to contract or not, I do not think the pursuers were bound after so long an interval to take them back; the defender was barred by *mora*. On the whole, I am for sustaining the interlocutor of the Sheriff.

LORD COWAN—There are in the Sheriff's interlocutor two passages which I think quite sufficiently dispose of this case—(*His Lordship here quoted the passages in the interlocutor above referred to*). Mr Currie had agreed to take plants 1, 2, and 3 years old, and he consequently was bound to take plants assorted in this way. He says he is only bound to take those of three years old, but that is not so, and he may not, as the Sheriff says, "pick and choose"—taking the more valuable plants and sending back those of one year's growth only,—those which had a much smaller marketable value. On these grounds I concur in your Lordship's view.

LORDS BENHOLME and NEAVES concurred.

Counsel for Appellant—Millar, Q.C., and Reid. Agent—W. B. Glen, S.S.C.

Counsel for Respondents—Solicitor-General (Clark), Q.C., and Darling. Agents—Lindsay, Paterson, & Hall, W.S.

Saturday, March 8.

## SECOND DIVISION.

PETITION—RUSSELL AND MANDATORY.

(*Ante*, p. 170.)

*Petition—Custody of child.*

A father and his mandatory, (he being in America) having petitioned the Court to order custody of his child to be given to his sister, prayer of the petition granted.

This was a petition presented by James Russell, and his mandatory Mr J. L. Lang, Writer, Glasgow.

The petitioner is now in America, and he asked that the custody of his child, who has for some time back been living in family in Glasgow with the respondents—Mary and Annie Hill—should be given over to his sister, Mrs Elizabeth Russell or Morrison, who is also living in Glasgow. He stated that he left his child with his sister on his departure for America, and that he believed her to be perfectly qualified to undertake the child's guardianship, but that shortly after his departure the respondents took the child from his sister, on a false representation that they were authorised by him to do so. The Misses Hill, who were sisters of the petitioner's deceased wife, stated in answer that an arrangement was made in the hearing of the petitioner, before he went to America, that they should undertake the guardianship of their sister's child, and that they had accordingly kept and clothed it since his departure. For this expenditure no arrangement was made as to remuneration. They had become much attached to the child, and they alleged that the present petition was the result of ill-will which the petitioner conceived to the defenders from other circumstances, and not of a desire for the good or welfare of the child. In any circumstances, they urged that they were entitled to be repaid or have sufficient security for the repayment of the sums disbursed by them before delivering up the child.

At advising:—

LORD COWAN—I have no doubt whatever about this petition. It is an application by a father for the custody of his child, now six years of age. The father is entitled to use his own discretion and judge of the treatment of the child. Had the two ladies, the Misses Hill, come forward and stated grounds as to character, or circumstances in regard to the person to whom the child was to be entrusted, the case might have been altered, but we have here no allegation of any kind whatever against Mrs Morrison as not being a proper person to whom the custody should be given. Again, had the father been of generally dissolute habits, there might have occasion for the Court to interfere. It is not, so however here, and the fact of Mr Russell being in America does not alter matters, he having duly entrusted Mr Lang with a mandate, and directed that his sister should have the custody.

LORD NEAVES—The father avers that the child is unjustly and cruelly detained from him, but he makes no charge of bad treatment by the aunts. The idea that the Law of Scotland deprives a man of his *patria potestas* because he goes abroad is quite untenable; nor will the Court in any way lend its aid to coerce the father.

LORDS JUSTICE-CLERK and BENHOLME concurred.

The Court unanimously granted the prayer of the petition.

Counsel for the Petitioner—Watson and J. L. Lang. Agents—Muir & Fleming, S.S.C.

Counsel for the Respondents—Fraser and Rhind. Agents—Drummond & Mackenzie, S.S.C.