

case, leaving it to the Lord Ordinary, who is much better able than we are, to determine what the amount of those expenses should be.

LORDS DEAS, MURE, and SHAND concurred.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming-note for Matthew Henry and others against Lord Kinnear’s interlocutor of 26th May 1883, Recall the interlocutor *in hoc statu*, and remit to the Lord Ordinary to receive the condescendences and claims tendered by the reclaimers on payment of all expenses hitherto incurred by the respondents, which will not be available at the future stages of the cause; But find no expenses due in respect of the discussion in the Inner House: And remit to the Auditor to tax the account of the said first-mentioned expenses, and to report to the Lord Ordinary, and remit to his Lordship to decern for said expenses when taxed.”

Counsel for Reclaimers and Claimants Matthew Henry and Others—M’Kechnie. Agents—Ronald & Ritchie, S.S.C.

Counsel for Reclaimers and Claimants Robert Anderson and Others—Jameson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondents and Claimants Mr Anderson and Another—J. P. B. Robertson—Dickson. Agent—A. Morison, S.S.C.

Counsel for Respondent and Claimant the Curator *ad litem* to Bertha Mackenzie—Mackintosh—Graham Murray. Agents—Mackenzie & Black, W.S.

Tuesday, July 3.

## SECOND DIVISION.

[Sheriff of the Lothians.]

### SPALDING v. VALENTINE & COMPANY.

*Process—Interdict—Mistomer in Small Debt Summons—Error in giving Christian Name, and Error in stating Christian Name of Defender.*

A person carrying on business as “Mrs B. Spalding,” was cited before the Small Debt Court in an action in which she was designed as “Mrs Grace Spalding.” The summons was served upon her personally. She did not appear, and decree passed against her in absence. The pursuer, the debt not having been paid, executed a pouncing of goods in her premises. She then raised a process of interdict against the sale of her goods under the pouncing, her ground of action being that she had not been duly cited in the small debt action, and that the pouncing was therefore illegal. She did not deny that she was due the debt. The Sheriff-Substitute (HAMILTON) dismissed the action on the ground that it was excluded by the Small Debt Act, sec. 30. The Sheriff (DAVIDSON) adhered on appeal. She appealed to the Second Division. The Court, on the ground that there was no substance in the objection to the citation, and

that the debt was not denied, *affirmed* the judgment of the Sheriffs.

Counsel for Appellant—Salvesen. Agent—Alexander Clark, S.S.C.

Counsel for Respondents—Scott—Shaw. Agent—P. Morison, S.S.C.

Tuesday, July 3.

## FIRST DIVISION.

### PAGAN, PETITIONER.

*Parent and Child—Custody—Patria potestas.*

A father engaged in a profession which involved his residence in Africa, presented a petition in which he asked that his children, who were all in pupillarity, and resided in Scotland with their mother, should be removed from her custody and boarded and educated in the house of a person named by him. *Held* that the father was entitled as matter of right, without proof of disqualification of the mother, to regulate the place of residence and education of his children, and petition *granted* accordingly.

This was a petition by John Pagan, civil engineer, for the custody of his children. The petition set forth that he was married to Isabella Macgregor in September 1871, and that he was forty years of age, while his wife was thirty-eight. The surviving children of the marriage were three girls, aged respectively 10, 7, and 5, and one boy aged 4. At the date of the marriage, the petitioner, after filling several positions in England, went in 1879 to the Gold Coast as engineer and surveyor-general. The petitioner averred—“The petitioner has recently received information in regard to the respondent’s ill-treatment of her children, which makes it absolutely necessary, in the interests of the children, that they should be removed from their mother’s custody. The petitioner would himself have returned from Africa to make the needful arrangements, but the nature of his duties makes it impossible for him at present to obtain leave of absence.” The ill-treatment alleged was that the children were not properly clothed, that they were insufficiently fed and neglected, and treated with cruelty.

The petitioner further averred—“The petitioner has ascertained in addition that the respondent is systematically endeavouring to poison the minds of his children against him. She is training them up in the belief that the petitioner is a person of bad character, and she is trying to turn his children against him by making charges against him to them and in their presence which are utterly destitute of foundation. From her habits and the kind of company she is keeping she is not a suitable person to be entrusted with the custody of the children, either looking to their bodily wants or their moral and religious training.”

The petitioner detailed the arrangements he proposed to make for the board and education of the children.

Mrs Pagan lodged answers in which she denied the truth of the averments on which the pursuer sought to deprive her of the custody of the children.

Argued for the petitioner—A father was entitled to exercise his *patria potestas* unconditionally unless there were averments against him which if proved would deprive him of the custody of his children. In such a case a proof might be allowed of these counter averments, but there was no such case here—*Lang v. Lang*, January 30, 1869, 7 Macph. 445; *Stewart v. Stewart*, June 3, 1870, 8 Macph. 821; *A B v. C D*, February 3, 1870, 42 Scot Jur. 224; *Russell*, March 8, 1873, 10 Scot. Law Rep. 314; *Fraser on P. and C.* 67; *Bloe v. Bloe*, June 6, 1882, 9 R. 894; *Lilley v. Lilley*, January 31, 1877, 4 R. 397; *Muir v. Milligan*, July 18, 1868, 6 Macph. 1125. Alternatively, that the petitioner should be allowed a proof of his averments—*Gulland v. Henderson*, March 16, 1878, 5 R. 768.

The respondent replied—This case was different from any of those cited by the petitioner, because the father here was abroad, and was not asking for personal custody, and there had been no separation of the husband from his wife. The fact that the petitioner was out of the kingdom, and did not propose to take charge of the children himself, made the case a very special one.

At advising—

LORD PRESIDENT—I think that the rule is quite settled by a series of decisions as well as by constant practice, that where neither spouse is in any way disqualified for the custody and care of the children of the marriage, and there is no special circumstance of any kind, the right of the father to regulate the place of the residence and education of his children cannot be withdrawn by any discretion exercised by the Court. I think that the rule has been very properly so settled, because otherwise there would be brought before the Court any dispute between spouses as to the ordinary domestic relations of everyday life, and these, it seems to me, are plainly not suitable subjects of adjudication either by a court of law or of equity.

Now, as regards the particular circumstances of this case, I do not wish to consider any of them except one, and that one is founded on by the respondent. I assume that this lady is not personally disqualified from having the care and custody of her children left in her hands. There are no doubt allegations in the petition to a contrary effect, but these have not been sent to proof or established in any way, and of course as mere averments we cannot assume them to be matters of fact. The special circumstance to which I have alluded is this, that the petitioner is not at present resident in the United Kingdom, having gone abroad in the exercise of his profession. But I cannot, however, say that I regard this as a circumstance which in any degree alters the position of the petitioner in this matter. Even if he had been within the kingdom he might not have been able to take the personal superintendence of his children's education and residence. He might have been a great deal too busy, or he might have been living in a part of the kingdom which was not suitable for their residence or education. Either of these circumstances would have been just as strong as his being out of the kingdom altogether, but neither of them could for a moment be regarded as sufficient to deprive him of his right as a father to regulate his children's residence and education. These are matters entirely for the exercise of his judgment, and unless it can be shown that there is something

which the Court will regard as preventing him from exercising a sound judgment in the matter, I apprehend that we cannot interfere.

LORD DEAS—I have no hesitation in coming to the same conclusion. There is here no allegation whatever against the husband, and I do not think that there is any allegation against the wife which is relevant to be sent to proof. In short, there is no relevant allegation against either the one or the other of the parties, and we have before us the pure question of law, which of the two parties—the father or the mother—is entitled to regulate the education, custody, and maintenance of their children? The only peculiarity is that pointed out by your Lordship, that the husband is at present furth of the kingdom. He is abroad in pursuit of his profession, and it is not said that he is doing anything wrong in being abroad. He is trying to make a livelihood, and to obtain the means of fulfilling the obligation which the law lays on him of maintaining his wife and children. I do not look upon the case as one in which there is a shadow of reflection on either party, and I cannot see how the mere fact of the father being furth of the kingdom should be regarded as a ground for depriving him of his rights over his children when it is admitted that had he remained in the country he would have been entitled to regulate the upbringing of his children. That being the only peculiarity in the case, I do not see any doubt that the petitioner is entitled to succeed in his application.

LORD MURE—I am of the same opinion. The rule that a father has the right to regulate the custody and education of his children, except where he is shown to be personally disqualified, is an absolute rule, unless it may be in the case of a child at its mother's breast. That is not the case here. The father is abroad, and the mother is at home, but it is not said that he is doing anything capricious in removing his children from their mother's care—at all events, he is merely exercising his right, and we have no discretion in the matter.

LORD SHAND—It is not disputed that if the father had been resident in this country he would, as a matter of absolute right, have been entitled to control the residence and education of his children. Now, I cannot see how the mere fact of his being out of the country can be a circumstance which will deprive him of his rights in this matter. There is nothing, so far as I can see, to prevent him from deputing his right to some one so long as he remains abroad. I think therefore that we should grant the petition, but I think the order should contain some directions with regard to the access to her children which the respondent is to have.

The Court pronounced this interlocutor:—

“Grant the prayer of the petition, reserving right to the respondent, in the event of a reasonable arrangement not being made to afford her access to her children, to apply to the Court by motion, and decern.”

Counsel for Petitioner—Mackintosh—Guthrie. Agent—J. Young Guthrie, S.S.C.

Counsel for Respondent—J. P. B. Robertson—Macfarlane. Agents—John Clerk Brodie & Sons, W.S.