opinion is in accordance with that of the Lord Ordinary on both points.

Lord COWAN concurred.

Lord BENHOLME—The trustees have acted here, I have no doubt, with the very best intentions in adding to the entailed estate, and I think it may be said in justification of the large excess of land purchased that it was uncertain when this trust would come to an end. It depended upon the life of the fourth Earl, so that it might very well have happened that the accumulations of the trust-estate would have enabled them to liquidate the price of these lands before the trust came to its termination. I merely suggest that as one reason for not hastily condemning them as guilty of an excess of power, because they only anticipated the funds which they thought might come into their hands. And had the fourth Earl lived for a certain time longer, they might have liquidated the debt, and all this additional estate would have come into the family without any charge. But however that may be, we see clearly that the Crown have taken an indulgent view of the position of the present Lord Fife. Had they taken the view that this was a sale, he would certainly have been far worse off than he is, taking it as a succession. But I think the Crown are entitled to say—If you take this as a succession, you must take it under the ordinary burdens that such a succession would be liable to; if these estates were now to be entailed for the first time, this would be a debt upon the estate, good against this part of the entailed estate, and you cannot take on any other footing except that this is a primary charge upon the estate. That leads to our holding, in terms of the joint case, that this formed a primary charge upon part of the succession.

The question whether the premiums of insurance are to be added to the interest, appears to me to be very clear indeed. Take the ordinary case of an unentailed proprietor succeeding to his father's estate of £10,000 a year, which is burdened to the extent of £5000 a year of interest. That £5000 of heritable debt is a proper deduction in the question of succession; but if that heir was to say to the Government or to the Revenue, "I have raised money by premiums of insurance to pay off this debt—I have opened policies which I have assigned to my creditors, and in calculating my life interest you must allow me these premiums"—the result would be that there would be hardly anything to the Crown at all. That is his own doing. It is a charge which he makes upon the estate voluntarily, and I think it comes very fairly under that sort of charge which the successor himself has created. Nothing he can do can get rid of the interest of the money, which is a proper charge to be made as a principal charge against the succession; but the operation by which he proposes to pay off that by policies of insurance is a burden which he makes upon himself, and he has no right to take it into account in this question. I am, therefore, of the same opinion as the Lord Ordinary.

Lord NEAVES—I think we have no alternative here as the case is presented to us. The question is whether the additional claim made by Lord Fife shall be allowed. I quite agree that the case has been made up on a totally wrong principle. I am far from saying that the trustees did anything wrong. I think everything they did was done with a view to the welfare of the family whom they were protecting; but supposing it were to be held as a kind of implied condition of the trust, as it came to be constituted, that Lord Fife was only to succeed upon his paying off these debts, it would really come to be virtually the same thing as a purchase, because it would just come to this, that the £139,000 would be paid off by twenty-five years' expectation of life, or whatever that might be, about £5000 or £6000 a year, and what he is allowed is merely £7000 a year, at 5 per cent. on the sum; and the allowing of the 5 per cent. is a very curious stretch, for it is not the interest that is paid by Lord Fife, but it is a supposed interest. But how premiums of insurance could ever be introduced into the question, I cannot conceive. The value of the money itself would have been an intelligible thing to take, but that would not have answered the purpose. Therefore, I don't think this interest has been made a charge; and I don't think it would have been in fulfilment of the trust for the trustees to set agoing an entail covered with debt to the extent of £139,000, for which these lands might have been evicted. We have no alternative but to act on the materials before us, and as the Crown are willing to allow this, I have nothing to say.

The interlocutor of the Lord Ordinary was therefore adhered to.

Agent for the Crown—Solicitor of Inland Revenue.

Agents for Lord Fife—H. & A. Inglis, W.S.

Wednesday, Dec. 12.

FIRST DIVISION.

DONALD *v.* DYCE NICOL.

Obligation—Property—Road—Personal Bar. Circumstances in which held (alt. Lord Barcaple) that a person was not barred from enforcing implement of an obligation to pay the price of ground which had been thrown into a public road.

Title to Sue. Observed (per Lord Ardmillan) that where a party has at the raising of an action a substantial right to sue, the formal title may be completed *pendente processu.*

In this action Mrs Jane Robertson or Donald, residing at Bishopston, in the parish of Banchory-Devenick and county of Kincardine, relict of the deceased James Donald, was pursuer, and James Dyce Nicol, Esq., of Badentoy, M.P., was defender. The summons concluded that the defender should be ordained to make payment to the pursuer of the sum of £82, 10s. sterling, with the legal interest from the term of Whitsunday 1853, being the date when the defender entered upon the possession and occupation of the ground hereinafter condescended upon, for the purpose of forming the road hereinafter mentioned: And farther, should be ordained duly and sufficiently to fence the lands of Bishopston, the property of the pursuer, in so far as this has been rendered necessary by the intersection of the said lands by the said road, and that at sight and to the satisfaction of a skilled person to be named by our said Lords: And also to make payment to the pursuer of the sum of £1 sterling per annum as the expense of herding the cattle on the said lands of Bishopston, rendered necessary by the intersection of said lands, and the defender's failure or neglect to fence the same, and that from the term of Whitsunday 1854, for the year preceding that term, and so forth yearly thereafter until the defender shall duly and sufficiently fence the said lands as aforesaid.

The pursuer's late husband was, when he died in 1852, in possession of the lands of Bishops-

ton, which had been vested in his father, but he had never made up a title thereto in his own person. The lands of Bishopston are adjacent to the estate of Badentoy, belonging to the defender, and that of Auchlunies, the property of Peter Duguid, Esquire. Prior to 1853, a road running from north to south intersected the estates of Badentoy and Auchlunies, and as the proprietors of these estates were anxious to incorporate the said road with their respective lands, to further some improvements they had in contemplation, they applied to the road trustees to have the said road shut up, and for authority to construct a new road in place thereof through the lands of Bishopston. This application was made to the road trustees in 1853, at which time the pursuer was tenant in possession of Bishopston. A committee of the road trustees having inspected the roads, and made a report, the trustees, at a subsequent meeting held on 31st October 1853, in respect that the requisite notices by advertisement, that the road in question was intended to be shut up, had not been given, nor parties heard in terms of the established regulations, renewed the appointment of the committee, and of new remitted to them to proceed in the matter, in conformity with said regulations, and to report to a future general meeting.

In the meantime the defender had been negotiating with the pursuer and her son, James Donald, who was then a pupil, and his tutors, for their consent to the construction of the proposed road, and their consent had been obtained on the terms specified in the following letter, written by Mr Duguid on behalf of the defender:—

"*Auchlunies, 7th May* 1853.—To James Donald, eldest son of, and the trustees and curators appointed by, the late James Donald, proprietor of Bishopston.—Gentlemen,—As you have consented to allow the new line of road leading from Auchlunies towards Badentoy to be made through the lands of Bishopston—that the work may be proceeded with immediately, I hereby, on the part of Mr Dyce Nicol of Badentoy, and authorised by him, promise that he will pay you the amount of damages that may be found due to you by the Commutation Road Trustees, in payment of the land occupied by this road, or otherwise. If I do not hear from you to the contrary, I will understand that you are satisfied with the obligation, and the work will be commenced in the course of next week.—I am, Gentlemen, your obedt. servt., (Signed) "PETER DUGUID."

To this letter the said James Donald and his curators appended respectively the following docquets:—

"I agree to this above.
(Signed) "JAMES DONALD."

"*Manse of Banchory-Devenick, 11th May* 1853.—We, the above referred to tutors and curators of the above subscribing James Donald, agree to the foregoing proposal.
(Signed) "WILLIAM PAUL.
"GEORGE DONALD.
"WILLIAM BEVERLEY."

The letter from Mr Duguid was enclosed in the following letter, addressed by him to the Rev. William Paul, who was one of James Donald's tutors:—

"*Auchlunies, 9th May* 1853.

"My dear Sir,—I enclose letter of obligation to James Donald and the trustees under his father's settlement. This Mr Nicol requested me to grant for him, that he may finish some improvements which the old road interferes with. I hope this will be satisfactory to the trustees; and to prevent mistakes, I got James Donald to sign his name at the foot of the enclosed, approving. I hope you find yourself better of having a rest at home.—Yours very truly,
(Signed) "PETER DUGUID."

The proposed road was thereafter constructed, but no steps were taken by the defender to prosecute the application which he had made to the Road Trustees. Accordingly, in August or September 1864, the pursuer erected a dyke across the road, and the defender thereupon caused the dyke to be removed, and applied for an interdict against the pursuer further interfering with the road. He also, on 22d September 1864, presented an application to the Road Trustees, in which, referring to the former proceedings in 1853, he prayed that the road should be included in the schedule of commutation roads. The pursuer appeared and objected to this being done, and the Road Trustees, at a meeting on 1st May 1865, resolved that, as questions in regard to the road were in dependence in Court, it "would not be judicious to put the road, in the meantime, on the parish list." At another meeting, on 3d October 1865, a letter was read from Mr Nicol withdrawing his application, and the application was held as withdrawn.

The defender, on record, made the following statement:—

"Stat. 10. The defender is now, and has all along been, perfectly ready and willing to fulfil the obligation undertaken for him by Mr Duguid, specified in the before-mentioned letter of 7th May 1853, and to pay to James Donald, junior, and the trustees of his father, or to such other person as shall produce a title thereto, the amount of damages which may be found due by the Commutation Road Trustees in payment for the land occupied by the said road or otherwise. No claim, it is believed, has ever been made against the Commutation Road Trustees, or any sum found due by them."

He stated, *inter alia*, the following pleas:—"1. The pursuer's averments are neither relevant nor sufficient to support the conclusions of the action. 2. The pursuer has no title to insist in this action. 3. The pursuer has no title, either as proprietrix or tenant, to demand compensation or damages in respect of the construction of the road in question, because she has not now, and never had, any title to, or possession of, the ground occupied thereby. 4. The obligations undertaken by the defender in the letter of 7th May 1853, not having been undertaken to the pursuer, she can insist in no claim in respect thereof. 5. The defender's obligations being to pay the amount of damages that might be found due by the Commutation Road Trustees, he is entitled to be assoilzied, in respect that no damages have as yet been found due by the said trustees; and he has not failed to implement his obligations."

The record was closed on 23d May 1865, and on 17th June 1865 an interlocutor was pronounced by Lord Barcaple, in the action of interdict in regard to which the defender was allowed to lodge in this action a condescendence of *res noviter*. This condescendence consisted of a narrative of the interlocutor in the interdict case, the fact that it had become final, and the defender's withdrawal of his application to the Road Trustees.

In the interdict case Lord Barcaple had repelled

the reasons of suspension, and refused the interdict with expenses, observing in his note :—

"This application for interdict is brought upon the ground that the road through the property of the respondent, which she was proceeding to shut up *brevi manu*, is a public road. There is a strong presumption against any party having a right at their own hand to shut up what is *de facto* a made road actually used by the public. But the Lord Ordinary has come to the conclusion that, in the very peculiar and anomalous circumstances of this case, neither the public nor the complainer have a title on which they can claim, even in a possessory question, a right to pass through the respondent's property. It is not either a servitude or a public right of way that is contended for by the complainer. The alleged right took its origin in the construction of the road for the first time in 1853, and in an agreement in regard to it with the respondent's author. The nature of that transaction, and the terms of the agreement founded on, clearly import that the road was to be a commutation or statute-labour road, and was to come in place of another commutation road which the complainer wished to have shut up. It was only by authority of the Statute-Labour Road Trustees that the new road could have become a commutation road, and the old one be shut up. By the agreement founded on, which is set forth in Reason 5, and is dated in May 1853, the complainer undertook to pay the respondent's author 'the amount of damages that may be found due to you by the Commutation Road Trustees.' This seems to refer to the duty laid upon the trustees, as Statute-Labour Road Trustees, by the Act 1669, c. 16, to estimate the damage done to heritors by such a change. Before this agreement was entered into, the complainer and Mr Duguid, an adjoining heritor, had petitioned the Statute-Labour Trustees to shut up the old road, and place the new one on the district road funds, and a committee had been appointed on 30th April 1853 to inspect the roads, and report. On 31st October following, the committee reported in favour of the application. But the meeting of trustees, in respect that the requisite notices had not been given that it was intended to shut up the road, nor parties heard, remitted of new to the committee, and nothing further had been done in the matter. It is clear that the respondent's author permitted the road in question to be made through his lands upon the distinct understanding of all parties that it was to be made a public road, placed upon the commutation funds, and under the charge of the Statute-Labour Road Trustees. There is no ground for holding that he would have consented to its construction upon any other footing. The road not having been adopted by the trustees, neither the respondent nor the public have any claim upon them to keep it in repair, and in the present position of matters the trustees could not legally spend any of their funds upon it. They are under no legal liability in regard to it, and for anything that appears they may decline ever to have anything to do with it. The complainer founds upon his agreement with the respondent's author, and upon his consent to the construction of the road, as depriving the respondent of the title to object. It is admitted that no compensation has been paid either to the respondent's author or to herself, and, what is of more importance, the understanding on which the road was made has entirely miscarried, and it is sought to be kept open on an anomalous footing unknown to the law, and quite different from that which was in view when the respondent's author allowed it to be made. When the complainer made the road at his own expense, as he seems to have done, and prevailed upon the former proprietor of the respondent's land to allow him to do so, he necessarily took upon himself the risks attending such an irregular and anomalous course of proceeding, and in particular the risk of getting the trustees to adopt the road. If the trustees had even now come forward to adopt the road, and place it upon the funds, the respondent might have been unable to prevent them doing so, and possibly a question might have arisen as to whether the compensation was due to her or her author. But in taking this step, the trustees must have acted strictly according to law, and, in particular, they must have fixed the amount of compensation due to the proprietor—(Justices of Clackmannan *v.* Magistrates of Stirling, 5th December 1772, M. 7619.) In the existing state of things, when the trustees have not adopted the road, and are not asserting any rights, or undertaking liabilities in regard to it, the Lord Ordinary is of opinion that the respondent as proprietor is entitled to refuse passage through her lands, and that she cannot be prevented *doing so* by the mere *de facto* existence of the road, unless the necessary steps shall be taken for making it a public road of a kind recognised by the law. If the respondent is entitled to shut up the road, she may of course allow it to be used on payment to her of compensation, or on any other condition which she chooses to impose. But the Lord Ordinary does not adopt the view which was pressed for her, that she has acquired right, as disponee of the lands, to the obligation undertaken by the complainer to her author to pay the compensation for the road. It is unnecessary to dispose of that point in this case, and he need only say that he does not proceed upon it in the present judgment."

Along with his condescendence of *res noviter*, the defender stated the following additional plea : —"8. The understanding on which the road was made having entirely miscarried, and the pursuer having taken possession of the ground on which the said road was constructed, the defender is not bound to pay for the value of the said ground."

And the pursuer, in answer, added a plea in the following terms :—"5. The pursuer being ready and willing to allow the defender and the public the full use of the road in question, and having only shut it up in the meantime in exercise of her right so to do until payment of the compensation due to her in respect of the formation of said road has been made, the defender is bound to pay said compensation, and is not entitled, and cannot now withdraw from the obligation granted by him, or on his behalf, in the letter of 7th May 1853."

The Lord Ordinary pronounced the following interlocutor :—

"*Edinburgh*, 10*th March* 1866.—The Lord Ordinary having heard counsel for the parties, and considered the closed record, productions, and whole process—Finds that the road in question never having been adopted by the Commutation Road Trustees, and the pursuer having resumed possession of the said road and the ground on which it was formed, she cannot now insist in the conclusions of this action : Sustains the eighth plea in law for the defender ; assoilzies him from the conclusions of the action, and decerns : Finds the pursuer liable in expenses ; allows an account

thereof to be given in, and when lodged remits the same to the auditor to tax and report.

" E. F. MAITLAND.

" *Note.*—This is an unfortunate litigation ; but the Lord Ordinary can only deal with the case in the aspect which it now presents.

" The original defect in the pursuer's title has been cured by production of an assignation by her stepson, from whom she acquired the property.

" The conclusions of the action are founded on the written obligation quoted in article sixth of the condescendence, and are for the value of the land on which the road was formed, and severance-damage, and to fence the road. But the pursuer shut up the road and excluded the defender and the public from it. She successfully resisted an application by the defender to have her interdicted from doing so, on the ground that it never was a public road. And she has permanently built a wall across it. The defender's obligation was to pay the amount of damages that might be found due by the Commutation Road Trustees, of course implying that this was to become a commutation road, as to which the trustees are by statute bound to fix the amount of compensation due to the proprietor. But as the trustees have never adopted it, and the pursuer has resumed the ground, things are not in a position in which she can ask either the value of the ground or to have the road fenced. It appears to the Lord Ordinary that she has acted in a manner inconsistent with her present claim. If she has now any claim against the defender, it must be of a different kind. " E. F. M."

The pursuer reclaimed.

SOLICITOR-GENERAL and TRAYNER, for her, argued :—The Lord Ordinary has proceeded on an entire misapprehension of the pursuer's actings. Her sole object in building the dyke across the road and in opposing the interdict was to compel the defender to implement his obligations. She never meant to put an end to the agreement.

CLARK and ADAM supported the Lord Ordinary's interlocutor, and farther argued :—The pursuer has no title to enforce the agreement. If any one had a right to do so, it was the late James Donald's trustees or James Donald, junior, or his curators. The assignation granted by James Donald to the pursuer, *pendente processu*, was of no avail.

At advising,

The LORD PRESIDENT—It appears that Mr Donald, the husband of the pursuer, had succeeded to this property of Bishopston from his father, but had made up no title ; and it occurred to Mr Nicol that it would be advantageous to him to have an alteration made on the road in question. But, in order to have it brought through the lands of Bishopston, it appears to have been thought desirable to obtain the consent of the parties interested, and accordingly the letter of 7th May 1853 was addressed to Mr Donald, junior, and to the trustees and curators appointed by the late James Donald, his father. The proposal in that letter was agreed to by James Donald, the minor, and the gentlemen to whom it was also addressed, but expressly in their character of tutors and curators of James Donald. The proceedings for making the road went on, and the road was formed. It does not appear that any arrangement was made for ascertaining the sum to be paid to the parties interested in the ground. But it turned out that the late Mr Donald had made a trust-deed, which I shall again refer to, whereby he conveyed his property to trustees ; but, as he had himself made up no title to Bishopston, that conveyance was ineffectual. An agreement was made among the members of his family, and it was arranged that young Donald should, for a certain consideration, convey the heritable property to his stepmother, the pursuer. Accordingly a title was made up in the person of young Donald, by serving him as heir to his grandfather, and on 12th September 1861 he executed a conveyance to his stepmother. Then a question arose with Mrs Donald in regard to the sum to be paid for making the road, and, the parties not having come to a settlement, Mrs Donald shut up the road, and would not allow any passage along it. She built a wall across it—it does not appear to have been a very substantial one—and obstructed the passage. That led to a process of interdict, in which Mr Nicol wished to prevent the obstruction, and it appears that while that was going on proceedings were also pending before the Commutation Road Trustees. In the interdict, there was a judgment against Mr Nicol, and he then announced that he did not intend to proceed farther in regard to the substitution of the new road for the old one. In the meantime —in December 1864 — this action had been raised. Mr Nicol maintained various defences, among others that the pursuer had resumed possession of the road, and acted inconsistently, and so put an end to the transaction. He farther maintained on various grounds that she had no title. The Lord Ordinary has found that the pursuer has "acted in a manner inconsistent with her present claim," and that, if she has any claim against the defender, she must adopt some other course. This ground of judgment is not satisfactory to my mind. It does not appear to me, looking to the whole course of these proceedings, that the conduct of this pursuer was with a view to the resumption of the ground, and an extinction of the bargain. All she said was—"You have not fulfilled your bargain, and I will not, until you do so, allow you any longer to use my ground as a road." I think this appears distinctly throughout the whole of her pleadings. She says throughout that she is ready and willing to allow the defender and the public the use of the road, and that she only shut it up in the exercise of her right so to do until payment of the compensation due to her has been made. It was not a maintaining of this wall to the effect of extinguishing the transaction, but just the reverse. I therefore cannot sustain this ground of defence. But then there are other defences stated which we must consider. It is stated—and this appeared to be the chief defence relied on in the argument—that this lady was not *in titulo* to maintain this action, that the property was not hers, and that she had no right to the claim to compensation under the agreement. The ground of that is that the late Mr Donald had conveyed the property to trustees, and that they are no parties here ; and the defender says also that the pursuer's purchase was one from these trustees ; and not only so, but he says, farther, that the property acquired by the pursuer did not comprehend the *solum* on which the road had been formed, but only what was possessed by her at the time ; and, farther, that this is a claim for compensation for something which had been done before the conveyance to her, and that that claim was not transferred to her before this action was raised. I cannot say that any of these grounds of defence are any more satisfactory than the one which has been sustained. I think there is in Mrs Donald a sufficient title to sue this action. The conveyance by the late James

Donald to trustees was ineffectual, and the title to the property was in James Donald, the son, and he did convey it in 1861 to the pursuer, in fulfilment of an agreement to do so. It is said that that deed merely conveys the subjects as "presently possessed" by Mrs Donald. Why, a road passing through a property is very seldom *in terminis* excepted. The description plainly was meant to convey all that had belonged to old Donald. But if there were any doubt about this matter, it is altogether removed by the assignation. But, farther, it is said this compensation belonged to the father's estate. I cannot go into that view. The transaction was one with young Donald and his tutors. The offer is addressed to them as trustees and tutors, but they accept it expressly as tutors. The defender's obligation was to young Donald and them. They are the creditors in it, and young Donald has conveyed all his rights to the pursuer. I see no difficulty in regard to that matter. The mode in which the compensation was to be ascertained is described in the offer and acceptance to be "by the Commutation Road Trustees." Now, who is to accomplish that? I think it is very clearly the duty of the defender to do so. This is obvious from the nature of the transaction; but, farther, when the offer was made he had already put the machinery of the Road Trustees in motion; and, besides, his conduct following upon their minutes shows whose duty it was supposed to be. I think it was plainly part of the transaction that Mr Nicol was to carry through the matter. The parties interested were no doubt to be heard, but it was the defender's duty to take the steps to carry it through. That being the case, and being of opinion that this lady did not break through the transaction by building the wall, has she put an end to her rights by instituting this action? I think not. I see no way the pursuer had of compelling the defender to go on to get the compensation ascertained except by bringing an action claiming what she considered her due. The case, then, being before us, and that being the attitude of the parties, I think it is quite right that the compensation should still be ascertained by the trustees. I am disposed to recal this interlocutor, and stay further procedure, to give Mr Nicol an opportunity of resuming the proceedings before the trustees. There are conclusions in regard to interest and other things, but I think it will be better not to dispose of these until we see what the trustees do. They may settle the whole matter, and I think they have power to do so, and to carry out in its integrity, and according to its fair meaning, the bargain made by the parties.

Lord CURRIEHILL concurred.

Lord DEAS also concurred, and pointed out that in the original defences the only defence stated was want of title, and that although there was a statement that the pursuer had shut up the road, no plea was founded upon it. He also remarked, in regard to the question of title, that the disposition in the pursuer's favour was executed in implement of an agreement entered into previously, whereby the mother was to get the disposition, and all claims in regard to the land. There was therefore a good title anterior to the summons, altogether irrespective of the assignation.

Lord ARDMILLAN also concurred. In regard to the question of title, he thought there was a good title before the assignation; but he was also of opinion that where the substantial right to sue an action was in a person when he raised his action, it was quite legitimate to strengthen the title by an assignation obtained *pendente processu*. In support of this view he referred to the case of Welsh *v.* Rose and Robertson, 11th Feb. 1857, 19 D. 404. On the merits, he could not take the view of the Lord Ordinary. The pursuer's case had all along been that she was entitled to payment, and was not bound to give the use of the road without payment. There was no reason to doubt that this was a well-founded position for her to take; and it would be becoming, after having heard the views of the Court, that the defender should now do all in his power to give effect to them.

The case was superseded till January to give the defender an opportunity of stating what he proposed to do. The pursuer was found entitled to her expenses up to this date.

Agent for Pursuer—W. N. Fraser, S.S.C.
Agent for Defender—James C. Baxter, S.S.C.

PETITION—MACKENZIE.

Tutor-nominate—Power of Sale. Circumstances under which power to sell heritage granted to a tutor-nominate, a *curator bonis* being first appointed to receive and invest the price when realised.

This was a petition by a widow who was tutor nominate to her three pupil children for authority to sell a small house and garden in Inverness, the property of the children. The rental of the subjects was only £10 or £12. The petition also prayed the Court "to ordain the sum to be realised for the said property, after deducting expenses, to be reinvested in the name of the petitioner, or in the name or names of such other person or persons as to your Lordships shall seem proper, on such conditions as your Lordships shall think necessary for securing the interests of the said pupils, and the heirs entitled to succeed to them in the event of their dying in pupillarity."

The petitioner averred that the house required to be rebuilt, or to undergo a thorough repair, which would cost, to make it tenantable, £60. She farther averred—"The said pupils are quite unable to repair the said house without borrowing money upon the security of the same. They have no income whatever except from the rents of the said house and garden; and as the petitioner, their mother, is in poor circumstances, keeping a small toy shop, and being only enabled by strict economy to support herself and the [illegible], it will be most unfortunate if they are compelled to borrow the money required for the said repairs, and to pay the interest thereof, for which there is no prospect of any adequate return."

BIRNIE, for the petitioner, argued—The power craved is usually granted to tutors-nominate only when it is necessary to pay debts. This was the case in Bellamy, 17 D. 115; Mackenzie, 17 D. 314; and Sawers, 12 D. 905. But it has also been granted, when the exigency is of a different kind, as in Earl of Buchan and Others, 16. S., 238. In order to remove any difficulty arising from the fact that a tutor-nominate finds no caution, the petitioner here proposes that the price of the subjects when realised should be handed over to a *curator bonis* to be named by the Court, who will of course find caution. This is the course which was followed in the case of Sawers, 12 D. 905. The following cases were also referred to:—Finlayson, 22d Dec. 1810, F. C.; White, 17 D. 599; Auld, 18 D. 487; and Mathieson, 19 D. 917.

The petition had been intimated in common form and served on the persons who would succeed to the property in the event of the pupils dying in pupillarity; but no one appeared to oppose.