At advising—

Lord Adam (after consulting with Lord Deas) —The prisoner here is charged with having forged and uttered two protecting certificates in the following terms—[*reads*]. Now, my brother Lord Deas and I are of opinion that the fabrication of documents such as these is in law forgery, and I therefore repel the objection and sustain the relevancy of the indictment.

The case then went to trial, and resulted in a verdict unanimously finding the prisoner guilty as libelled, but recommending him to the leniency of the Court.

Sentence of six months' imprisonment was pronounced.

Counsel for the Crown—Low, A.-D.

Counsel for the Panel—Ure.

COURT OF SESSION.

Thursday, January 8.

FIRST DIVISION.

[Sheriff of Edinburghshire.

CUNNINGHAM *v.* SMITH.

Minor — Process — Curator ad litem *— Where Illegitimate Minor was Defender and no Curator* ad litem *Appointed.*

Where an illegitimate minor who had no curator had unsuccessfully defended an action of aliment in the Sheriff Court without a curator *ad litem* being appointed to him, *held* on appeal (1) that a plea "that the action ought to be dismissed in respect the defender is a minor, and his tutors and curators, or his father as his administrator-in-law, have not been called as defenders," ought to be repelled; but (2) that the defender was entitled to have a curator *ad litem* appointed, who should determine whether the minor's interests had suffered by the neglect to make the appointment in the Sheriff Court.

The defender in this action of filiation was born on the 8th August 1859, and consequently was still a minor when the case was called in the Sheriff Court on 16th May 1878. He pleaded, *inter alia*—"(2) The action ought to be dismissed, in respect the defender is a minor, and his tutors and curators, or his father as his administrator-in-law, have not been called as defenders." He had no curator, but neither the Sheriff-Substitute (Hallard) nor the Sheriff (Davidson) considered it necessary to appoint a curator *ad litem* to him; the Sheriffs, proceeding entirely on the facts, found for the pursuer.

The defender appealed, and argued—(1) The action was badly called, because the minor's tutor and curators and his father had not as a matter of form been called. (2) The Sheriffs ought to have appointed a curator *ad litem* as soon as the defender's minority and want of guardianship was brought under their notice, and as a consequence of this neglect the whole proceedings were absolutely null, and ought to be set aside.

Authorities—*Dalgleish* v. *Hamilton*, June 26, 1752, M. 2184; *Calderhead* v. *Fyfe*, May 26, 1832, 10 S. 582; *Brown* v. *Wilson*, January 15, 1842, 4 D. 392; *Lockhart* v. *Thomson*, June 9, 1860, 22 D. 1176; Mackay's Court of Session Practice, i. 346; M'Glashan's Sheriff Court Practice (Barclay's ed.), sec. 512; Fraser on Parent and Child, 2d ed., 158 and 379.

Argued for the respondent—(1) It was not necessary in Sheriff Court practice to call tutors and curators, and that was reasonable, for the pursuer was not bound to know that the defender was a minor. (2) Reduction was not competent, because the decree was still unextracted, and was under appeal. The defender, however, might get a curator *ad litem* appointed now, who on cause shown might have the case opened up.

At advising—

Lord President—In this case of filiation it appears that the defender is a minor, and also that he is a bastard, and when the case came into Court he put this plea on record—"The action ought to be dismissed in respect the defender is a minor, and his tutors and curators, or his father as his administrator-in-law, have not been called as defenders." It appears to me that this plea is bad.

In the first place, it was impossible to call his father, because though every man has a father *de facto*, he had none *de jure*, and the Court could not ordain the father of a bastard to appear in an action, nor if he did appear could the Court recognise his presence. Nor, in the second place, can a bastard in the ordinary case have curators, because he has no relatives, and the intervention of the minor's relatives is necessary in order to the appointment of curators in the ordinary way. No doubt the Court in the exercise of its high equitable jurisdiction has appointed curators to minors who had no relatives whom they could call; but that has been done only when the minor was possessed of estate which could not otherwise be protected. Here it is plain that the defender has no such estate, and therefore as he has neither father nor tutors or curators, I think his plea that they should have been called is bad.

But it was contended by the counsel for the defender, that because the Sheriff had neglected to appoint a curator *ad litem* to him, the whole proceedings are void, and must be quashed as absolutely null. Now, I do not doubt that when the Sheriff's attention was called to the fact that the defender was a minor *indefensus* he ought to have appointed a curator *ad litem*. But it is a totally different matter to hold that the whole of these proceedings are null, and I am clearly of opinion that they are not. A minor who has no curator can do many things without having a curator appointed, subject only to this qualification, that the minor is entitled to have what he has done set aside within the *quadriennium utile* on the ground of lesion; and I do not doubt that judicial proceedings, like other actings by a minor, may be set aside *ex capite lesionis* within the *quadriennium utile*. Nor do I doubt that the defender would be entitled even in this process to show that in consequence of having had no

curator *ad litem* he had suffered lesion, and that the proceedings should be set aside and a trial of new ordered. But that is not what he asks for. I do not think that we could possibly entertain his request without in the first place remedying the defect of which he has so vehemently complained, by giving him a curator *ad litem*. Our first duty will therefore be to appoint a curator *ad litem*, and if he and the minor can show that the minor has been prejudiced by the want of a curator, we shall then consider what ought to be done. But at present we can do nothing more than appoint a curator.

Lord Deas and Lord Mure concurred.

Lord Shand—I am of the same opinion. The defender's first point is that his tutors and curators ought to have been called as defenders in the usual way, either edictally or personally. But it is admitted that he had no curators, and I cannot see either the necessity or meaning of calling curators in such circumstances. I think, however, that the Sheriff should have appointed a curator *ad litem*, because it is a general rule of our Courts that a minor should have a curator *ad litem* to see that the proceedings in the litigation are properly conducted on his behalf. And I think that this rule leads to two results in this case. In the first place, a curator *ad litem* should be appointed, and, secondly, if it can be shown that in consequence of the failure of the Sheriff to make such an appointment the minor has suffered prejudice, I think the proceedings may be opened up in order that this prejudice may be remedied if possible. I shall only add this further observation, that while it is the general rule that a minor should have a curator *ad litem*, that is not, in my opinion, an absolute rule. For instance, if a minor near majority has been acting as a trader on his own behalf without a curator, I should doubt whether it would be necessary to appoint a curator *ad litem* to him in any litigation arising out of the business in which he was engaged.

The Court appointed the minor's reputed father to be his curator *ad litem*.

Counsel for Appellant — Nevay. Agent — Robert Broatch, Law Agent.
Counsel for Respondent — Mair. Agent — Charles B. Hogg, Solicitor.

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*Thursday, January 8.**

FIRST DIVISION.

[Lord Curriehill, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* THE DUKE OF ABERCORN.

Revenue—Income-Tax—Annuity—5 and 6 Vict. cap. 35, sec. 102.

Section 102 of the Income-tax Act provided that income-tax should be chargeable upon "all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same, by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract."

The section further provided that "in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act, no assessment shall be made upon the person entitled to such annuity, interest, or annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorised to deduct out of such annual payment" the amount of such assessment.

Where the seller of certain lands compulsorily taken by a railway company agreed to pay the company annually, during the currency of the leases of the farms of which the lands so taken formed a part, a sum at the rate of 3 per cent. on the price paid by the company to the tenants, the company undertaking to relieve the seller of all claims of damages by the tenants, who were to continue to pay their rents in full—*held* that this annual payment being an annuity payable "as a personal debt or obligation by virtue of a contract," was within the above-quoted enactment, and was payable only under deduction of income-tax.

In 1865 the pursuers, the North British Railway Company, took compulsorily a portion of the estate of Duddingston, belonging to the Duke of Abercorn, who was the defender. The following was the agreement with reference to the tenants' claim for damages for the land so taken:—"(14) This present agreement shall not embrace the claims of tenants either for permanent or temporary damages during their existing leases, which the Company shall settle with the tenants independently of this agreement. But the Marquis of Abercorn agrees to pay towards the tenants' claims for permanent damage during the present leases bank interest not to exceed three per cent. per annum on the gross sums which he may receive from the Company for the land to be permanently occupied by the Company, and intersectional damages, but not upon the sum which may be allowed for deterioration to any adjoining feuing-ground. If any part of the lands to be permanently occupied by the Company shall be paid for as feuing-ground, interest shall be allowed thereon as above, on the agricultural value of £220 per acre, towards the tenants' claims for damages on account of the land to be so occupied by the railway, and the Marquis shall relieve the Company of any claim for intersectional damage at the instance of the tenants in regard to such feuing-ground so occupied by the Company."

A question having arisen between the parties as to whether the price agreed on was intended as the agricultural value only of the subjects, or whether it included a proportion for feuing value in terms of the above agreement, the pursuers maintaining the former alternative, and the defender the latter, this action was raised concluding for implement of the contract of sale by exe-

* Decided 7th January.