

be a mere restraint of trade. I may also say that I cannot regard this agreement as one annexed to particular heritable subjects, and therefore the principle of the English cases relating to licensed property is inapplicable, and I do not offer an opinion as to the extension of this principle to Scotland under other circumstances. The result of my opinion is that the appeal should be dismissed.

LORD ADAM concurred.

LORD KINNEAR—I entirely concur with all that Lord M'Laren has said, and I have very little to add. I think it is very doubtful whether the obligation which it is now proposed to enforce is not too wide in its scope, and at the same time too indefinite to fall within the principle upon which obligations in restraint of trade may be supported when they are limited to a definite purpose and a fixed area, but I prefer to rest my judgment on the ground explained by Lord M'Laren, that by our law contracts involving *delectus personee* are not assignable. I do not think it is properly an exception to this rule to say that they may be assigned with the consent of both parties, because an assignation of that kind to which both contracting parties consent is in effect a new contract for the determination of the original contract and the substitution of a new agreement into which a third person is brought in to take the place of one of the original parties. But that distinction is probably immaterial to the present case because, for the reasons Lord M'Laren has given, it appears to me to be perfectly obvious that no consent can be inferred on the part of the respondent in this case to the assignation made by his employer. The application of the principle to the circumstances of the case appears to me not less obvious, because the contract by which a man is engaged to teach in schools belonging to another is eminently a contract involving relations of personal confidence, and I think that by its terms the agreement in question brings out the personal character of the undertaking on both sides with very great clearness. Apart from that consideration, which I think is quite enough to dispose of the case, I also agree to what Lord M'Laren has explained, that the obligation which it is proposed now to enforce is by necessary consequence from the assignation a different contract, and a more burdensome one, than that which the respondent originally undertook. It is said that the undertaking not to teach in the pursuers' schools may be severed from the rest of the contract and enforced as a separate undertaking although the remaining parts of the contract are determined. I am unable to assent to that view. There is no separate consideration for the undertaking not to teach. It is to begin to be enforced from the moment the employment begins, and if the rest of the contract goes I am unable to see anything to support the unilateral undertaking not to teach as a contractual obligation in law. The argument was founded, I think, mainly if not

entirely on the cases to which Lord M'Laren has referred. I do not myself think that our law and the law of England are so identical with reference to this particular point as to make these cases serviceable for the purpose for which they were used. The doctrine which, according to the explanations given by the learned judge, they seem to illustrate is that upon the demise of interests in land covenants touching the thing demised may be assigned as distinguished from covenants that are personal to the parties to the original contract as to the land, even although they affect the occupancy of the thing demised but not the thing itself. I am not prepared at this moment to say whether that is the rule on which this Court would proceed, but I am not at present satisfied that it is applicable in our law, because the rule regarding the transference of interests in land, both as regards the principle on which it is founded and the method of transference seems to me to be materially different from that which I find explained in these cases. But if these cases were applicable to our law I think it clear enough from the explanation given by the learned judges that they are not applicable to this case, because there is no demise of any interest in land whatever—there is nothing but a personal obligation undertaken by the respondent in favour of Abraham and nobody else, and I am unable to find anything in the cases cited to support an assignment of such an undertaking.

LORD PRESIDENT—I am of the same opinion.

The Court refused the appeal.

Counsel for the Pursuers and Appellants—Ure, K.C.—T. B. Morison. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—W. L. Mackenzie. Agent—David Milne, S.S.C.

Saturday, November 28.

SECOND DIVISION.

[Lord Pearson, Ordinary.

BEATH & KAY v. NESS.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), Schedule I, secs. 1 (b) and 12—Workman Holding Decree for Compensation not Reviewed—Effect of Receipt of Full Wages in Employment of Same Employer.

A workman, who was the creditor in a decree under the Workmen's Compensation Act 1897 finding him entitled to a weekly payment, accepted employment from the debtors in the decree, his employers before the accident, and received from them his former wages in full. No steps under the Act were taken by the employers

to establish that the workman's incapacity had ceased or to have the weekly payments due under the decree reviewed by the Sheriff. There was no express agreement to hold the sums paid in wages as superseding the workman's claims under the decree, and while the workman was receiving full wages a demand was made by his agents for payment of the amount due under the decree.

Held (rev. judgment of Lord Pearson) that the workman was precluded by his acceptance of employment and full wages in the same employers' service from demanding payment of compensation under the decree for the period during which he was so employed, and charge for sums claimed as due under the decree *suspended*.

Messrs Beath & Kay, engineers and ironfounders, Dundee, presented a note of suspension against Richard Ness, engineer there, in which they sought to suspend a charge at the instance of the respondent for payment of certain sums alleged to be due to the respondent as compensation under the Workmen's Compensation Act 1897, and expenses, conform to interlocutor dated 19th March 1902.

The following narrative is taken from the opinion of the Lord Ordinary (PEARSON):—"In this case the complainers, who are ironfounders in Dundee, seek to suspend a charge for payment of certain sums of money alleged to be due to one of their workmen as compensation under the Workmen's Compensation Act 1897.

"The accident happened on 27th September 1901, and resulted in the loss of the respondent's left eye. The application for compensation was presented in the Sheriff Court at Dundee on 10th January 1902. Proof was taken on 21st February, and the Sheriff's award was given on 19th March. It bears that the respondent's wages prior to the accident were 34s. a-week, and that he was entitled to compensation at 17s. a week for two weeks in October 1901, and since 15th February 1902, until the further orders of Court. No payment of compensation under that award has yet been made, but the complainers have tendered to the respondent a sum which he says is much less than is due to him.

"The dispute arises from the fact that since the accident the respondent has for considerable periods, both before and since the date of the award, been working in the complainers' employment and drawing his full wage of 34s. These periods of full wages were, as I understand, from the end of October 1901 until 15th February 1902; from 26th February to 6th April 1902; and from 21st April until the end of October 1902. With these exceptions, which are considerable, he had, at the date of the charge, been off work since the accident.

"The complainers say that he was off work, not as the result of the accident, but through slackness of trade. This, however, is not admitted by the respondent, and the complainers have made their tender on the

footing that they are responsible for compensation at 17s. a-week during the whole time the respondent was off work since the date of the award; but that they are not bound to pay him any compensation for the period when he was earning full wages.

"There was originally a question between the parties as to an item of liability arising before the award was issued. The Sheriff-Substitute in his award of 19th March found compensation due from 15th February till the further orders of Court. But he is said to have done so in ignorance that after the proof was led the respondent returned to work, and had been working at a full wage for three weeks prior to the issuing of the award. This difficulty, however, is got over by the respondent having in the charge deducted the amount of compensation effecting to those three weeks.

"The complainers' position is, that for the periods during which full wages have been paid to the respondent no compensation is payable, as the statute provides expressly for 'a weekly payment during the incapacity,' and the earning of full wages demonstrates that the incapacity no longer exists. They accordingly tender, in addition to the expenses decerned for in the award, the sum of 17s. a-week during the time when he was not working."

No steps had been taken by the employers to have it declared that the workman's incapacity had ceased, or to have the weekly payments decerned for reviewed. No report from a medical man as to the workman's condition had been obtained.

There was no express agreement between the parties to hold the payments of full wages as superseding the claim for compensation to any extent.

A correspondence between the parties' law-agents was produced. After an unsuccessful attempt to settle disputes by payment of a capital sum the workman's agents wrote on 20th May 1902 asking payment of the compensation accrued to date, and of the expenses decerned for. On 4th June 1902 they wrote as follows—"Referring to what passed at Court to-day, we beg to state that if your clients pay to our client compensation at the rate of 17s. per week for the periods during which he has been out of work, together with the expenses decerned for, he will accept such payment in full of his claims for compensation, and expenses to date, leaving it to the Sheriff to fix a nominal compensation until further orders of Court. . . . This letter to you is written without prejudice to our client's rights and pleas, and is not to be founded on."

The employers had applied to the Sheriff-Substitute to state a case for appeal, and on his refusal to do so presented a note to the Second Division to have him ordained to do so, but this note was refused by the Court.

On 18th December 1902 the workman's agents registered a certified copy of the Sheriff-Substitute's interlocutor of 19th March in the Books of Council and Session

for preservation and execution, and the charge complained of was given to the employers in virtue of a warrant upon the extract registered certified copy interlocutor. The employers thereupon brought the present suspension.

The complainers pleaded—“(1) The complainers having paid or satisfied the greater portion of the sums charged for, the charge should be suspended as craved. (3) The respondent having, by receiving wages from the complainers as condescended on, discharged his right to the greater part of the compensation charged for, and *quoad ultra* the complainers having tendered payment of all sums due by them, the charge should be suspended. (4) The respondent being, in the circumstances, barred from insisting in his claim for compensation, the charge given by him therefor ought to be suspended.”

The respondent pleaded—“(4) The charge complained of having proceeded upon a formal and valid decree which has never been ottempered, and having been duly executed, suspension should be refused, with expenses. (5) The complainers having failed to take the steps provided by the said Workmen's Compensation Act to obtain a revision of the Sheriff's award of compensation, the suspension ought to be refused.”

On 3rd November 1903 the Lord Ordinary pronounced the following interlocutor:—“Repels the reasons of suspension: Finds the charge orderly proceeded; and decerns”

Opinion.—[After the narrative quoted *supra*—“It is no doubt contrary to the fundamental principle of the Act that a workman should be entitled to compensation except during incapacity, partial or total. That is the basis of the liability. But when the incapacity has been affirmed in an award, the Act prescribes very carefully how the recovery of capacity may be established. It lays no duty on the workman to keep the employer informed as to his state of health. It is for the employer to be vigilant in that matter.

In the first place, he may require the workman to submit himself for examination by a medical man provided and paid by the employer. If the workman objects, or if he is dissatisfied with the result, he may submit himself to one of the ‘appointed’ medical men whose certificate is to be conclusive evidence of the workman's condition. If parties cannot agree, the weekly payment may be reviewed by the Sheriff at the request of either party. The parties may, of course, come to an agreement, and doubtless they very frequently do so. But if they do not agree, the award subsists as the rule of payment until it is reviewed at the request of either party.

“Here the incapacity which was affirmed in the Sheriff's award of 19th March has neither been reported on by a medical man nor reviewed by the Sheriff-Substitute. The only other possible mode by which the right to the weekly payment can be affected is by agreement of parties.

“Now, no express agreement is alleged. The ground of suspension is variously stated in the complainers' pleas-in-law as

payment or satisfaction, discharge, and bar. But I think the complainers' real ground of suspension here must be an implied agreement, to be inferred from facts and circumstances to the effect that the right to the weekly payments of compensation was to be suspended when and so long as the respondent was doing full work for full wages. Convalescence, or the receipt of full wages, certainly does not of itself operate to discharge, or even to suspend, the right to continued compensation under an award. But where full wages are in fact earned, and are paid to the workman by the same employer who is liable in the compensation, it would be easy to aver, and comparatively easy to prove, that while the one was paid and received, it was agreed that the other should be suspended. This would the more easily be inferred where the payments of compensation, which are in their nature weekly payments, were not demanded at all during the wage-earning period.

“I do not, however, find any such agreement averred upon this record, which sets out the bare facts and dates as to the employment and the wages earned. It may be contrary to the fundamental idea of the Act that compensation should be due for a period during which full wages were earned. But where none of the statutory modes of review has been adopted it would, in my opinion, be still more clearly against the spirit of the Act to hold that the efficacy of an award is impaired or suspended by anything short of the agreement of parties, express or necessarily implied. There is no averment that the payments were in fact given and received on the footing now contended for by the complainers, and it does not appear to me that the facts averred raise any such necessary implication. Perhaps the reason why no specific averment of an agreement is made is that the facts are inconsistent with any such agreement. The correspondence which is produced, and which was referred to in the discussion, is confined to the parties' law-agents. We do not know from any other source how the parties themselves viewed the matter. The letters show that parties were at first attempting to get over a difficulty arising on the Sheriff-Substitute's award by lodging a joint-minute, but they could not agree upon it. After an unsuccessful attempt to settle disputes by payment of a capital sum, the respondent's agents wrote on 20th May, ‘Please let us have payment of the compensation accrued to date, and of the expenses decerned for.’ Now, at this date the respondent was in fact earning a full wage with the complainers, and had been doing so ever since the Sheriff-Substitute's award of 19th March, with the exception of the fortnight from 6th to 21st April. That letter is therefore quite inconsistent with the notion that the wages were being accepted by the respondent as superseding the claim for compensation.

“Again, on 4th June his agents wrote making an offer which ought to have ended the matter. But it expressly stated

that it is made 'without prejudice to our client's rights and pleas, and is not to be founded on;' and as the offer does not appear to have been entertained by the complainers the matter remained quite open. Accordingly, even if the bare facts and dates were such as to warrant an inference of discharge or satisfaction, I should hold upon the correspondence that the inference is in this particular case excluded."

The complainers reclaimed, and argued—The claim for compensation only arose when the accident prevented the workman earning wages. When a workman was earning the wages he received before the accident there was nothing to compensate. The right to compensation lasted only during the period of incapacity. The decree subsisted no doubt till steps were taken in accordance with the Act to bring it to a termination, but it could be acted on only while the workman was not earning wages at all or earning less than he formerly earned by reason of the accident. By accepting employment at full wages after the accident the workman had impliedly agreed to discharge the master's liability for compensation during the period of such employment. The acceptance of such employment on the part of the workman might not have put an end to the decree, but the complainers while paying him full wages had paid the sum due him under the decree during the subsistence of the employment. The sums so paid should be deducted from the amount due, and the charge should therefore be suspended.

Argued for the respondents—He had obtained decree in general terms for payment of 17s. a-week till the further orders of the Court. At any time the Sheriff-Substitute could be called on to review this payment. The complainers had their remedy under the statute, and as long as they did not take the statutory remedy, but allowed the decree to stand, they had no right to complain. There had been no agreement, express or implied, that the terms of the decree should be altered. No such agreement was averred on record, and the correspondence showed that the agent for the respondent was, even when the respondent was working with the complainers, demanding payment of the amount to which his client was entitled under the statute. The 34s. a-week had not been paid under the decree, but had been earned by the respondent, and the mere fact that the injured workman was earning money did not bring the decree to an end. The respondent had lost the sight of an eye and was entitled to compensation, as his general earning capacity had been diminished—*Fraser v. Great North of Scotland Railway Company*, June 11, 1901, 3 F. 908, 38 S.L.R. 653.

At advising—

LORD JUSTICE-CLERK—This case is an extraordinary one, and the position in which it now stands is extraordinary.

The respondent applied in July 1902 for compensation under the Workmen's Com-

pensation Act in consequence of injury sustained while in the reclaimers' employment, and on 19th March 1902 the Sheriff-Substitute found compensation due at 17s., being the full sum permissible under the Act, the respondent's wages being 34s. a-week. The Sheriff-Substitute excluded from his award a period during which after the accident the appellant earned and was paid his full wages, but gave an award, "until further orders of Court," of 17s. from 15th February 1902, being the date at which the employment ceased. He did not find that the respondent being out of work was the result of incapacity for work.

It is admitted by the respondent that three weeks before the Sheriff-Substitute's award the respondent had been again employed by the appellants at his full wages; and that he continued until the beginning of April, when employment ceased for three weeks. He resumed work on 21st April and worked till October 1902 at full wages, when his work ceased.

The respondent has now, after registering the interlocutor of the Sheriff-Substitute, charged the reclaimers to pay £1, 14s., being compensation at 17s. a-week for two weeks in October 1902, and £38, 5s., being compensation from 15th February 1901 to 27th December 1902, under deduction of £2, 12s. 6d. for payments made between 6th February and 19th March.

The reclaimers declare their willingness on record to pay 17s. a-week for those weeks during which the respondent was not working and drawing 34s. a-week from the reclaimers.

It thus appears that under the decree and charge the reclaimers are required for a considerable period to pay to the respondent 17s. a-week over and above the full wages of 34s. which they have paid to him as their servant. If he were successful in maintaining this, the result would be that he would be receiving £2, 15s. a-week, being 17s. above full wages—in other words, he would be receiving the full wages due to him as a capable workman, while at the same time receiving 17s. in respect of incapacity to do any work, for 17s. is the full compensation applicable to total incapacity. This plainly would be grossly unjust, and it is difficult to understand how such a case can be sustained. When the respondent was working and receiving payments from the reclaimers at 34s. it can only have been upon one or other of two footings. Either he was receiving full wages because he had capacity for doing full work, on the tacit understanding that his claim for compensation had ceased except for a nominal sum to keep the case open for the future, or he was receiving some part of the amount for what he was able to do, and another part of the amount because of his incapacity to do full work. In either view 34s. would be all that he could be entitled to, for anything beyond that could not be compensation under the Act. The 34s. must be either full wages, in which case there could be no claim for payments under the Act, or part of it might be wages and

part compensation for inability to earn full wages. There could be no claim for any sum for compensation which would bring the amount received to a higher amount than the amount of the full wages.

It seems to me therefore that the contention of the reclaimers is sound, and that they are entitled to the remedy they ask against the unconscionable attempt of the respondent to exact from them a sum which is more than the full wages he could have earned had he never suffered from an accident.

On these grounds I cannot concur in the judgment of the Lord Ordinary, and would move that his interlocutor be recalled.

The reclaimers stated that they did not object to a nominal sum of compensation to keep matters open should the injury formerly received develop fresh lesion hindering the respondent from earning full wages in the future, and that is, I think, all that the respondent can demand.

LORD TRAYNER—The material facts in this case which require attention (for the case is a very special one) appear to me to be as follows:—The respondent on 27th September 1901, while in the complainers' employment, met with an accident which deprived him of one of his eyes. He was, in consequence, off work for about four weeks, but returned to the employment of the complainers in the month of October, and was then paid the same wages which he had been earning before the accident, namely 34s. per week. He continued in their employment at the same wage until 15th February 1902, when he was discharged—the complainers say because trade was slack, and they no longer needed the respondent's services. Meantime on 10th January 1902 the respondent presented an application to the Sheriff-Substitute to have his right to compensation in respect of his injuries, fixed, and pending that application he again returned to the employment of the complainers on or about 26th February at the same wage as formerly. On 19th March the Sheriff-Substitute disposed of the respondent's application, finding him entitled to compensation at the rate of 17s. per week (being the maximum compensation that could be awarded under the statute), for two weeks in October 1901, and from the 15th February 1902, until the further orders of Court. The Sheriff-Substitute in his interlocutor took no notice of the fact (if he was informed of it) that the respondent at the date of that interlocutor was, and had been for three weeks, in the complainers' employment at his full wage of 34s. per week, but he did not allow the respondent any compensation for the time between the end of October 1901 and the 15th February 1902, during which time the respondent was receiving full wages from the complainers. The respondent does not now claim compensation for the three weeks I have referred to, although the Sheriff-Substitute's order entitles him to it. The respondent continued in the complainers' employment from 26th February

until 6th April, was then off for a fortnight, resumed work with the complainers on 21st April, and continued in their employment from that date until the end of October.

The respondent has charged the complainers to make payment to him of the sum of £38, 5s., less the sum of £2, 13s. 6d.—that is for the compensation of 17s. per week for 45 weeks, less the three weeks he was on full wages pending his application to the Sheriff. Of these 45 weeks the respondent was in the employment of the complainers, and receiving full wages (34s. per week) 33 weeks, so that under the charge complained of the respondent seeks to recover 17s. a-week for 33 weeks, during which he was receiving from the complainers full wages. The mere statement of such a claim shows not only that it is contrary to the spirit and purpose of the Act under which it arises, but that it is inconceivable in itself. Notwithstanding that the charge must be sustained if it is in accordance with the respondent's legal right. But I think it is not.

The Lord Ordinary holds that the respondent is entitled to what he claims because the complainers have not adopted the remedy which the Act provides for either diminishing or ending the payment of compensation found due by the Sheriff-Substitute. If the respondent during the 33 weeks he was earning full wages had been earning them in the employment of some other than the complainers, the view of the Lord Ordinary might perhaps be considered a sound view. I do not say it would be so, but it would in that case have been easier to adopt it. It might be thought in such a case that if the complainers took no steps such as the Act provides for ascertaining the fact that the respondent's incapacity to earn full wages had ceased, and their consequent liability for compensation had ceased, that they had themselves to blame for a liability which they took no measures to avoid. But I think the case is radically changed where the circumstances are as here presented. When the respondent returned to the complainers' employment in October 1901 and received full wages—that is, wages equal to what he had earned before his accident—it became an admitted fact that his incapacity to earn full wages had ceased. If so, he was not entitled to claim further compensation. I take it, therefore, that on the respondent's return to the complainers' employment one of two things happened. Either the respondent got full wages on the implied agreement between him and the complainers that no further compensation was due or claimable in respect that the incapacity, during which alone any compensation was due, had ceased, and that therefore the right to get or obligation to pay compensation had come to an end; or that the payment of 34s. a-week was, in the first place, to be held, to the extent of one-half of that sum, as payment of the compensation, and the other half the remuneration given for such services as the respondent, in his partially

disabled condition was able to render. Whichever of these views is taken, it puts an end to the respondent's claim. In the one view he agreed to the compensation being regarded as ended, in which case there was no need to go back to the Sheriff-Substitute to have that declared; in the other view he has already been paid what he now claims.

The complainers are willing and offer to pay the respondent the full compensation for the period he has been out of employment without inquiry whether that arose from incapacity or slackness of trade. It may be thought that this is fully more than the respondent could demand, but the complainers are willing to give it. It seems to me that such an offer exhausts all that the respondent can reasonably or in any fairness ask.

It was pointed out that this was in terms what the respondent asked in the letter of 4th June 1902. I should have been pleased had the respondent intimated here his willingness to abide by that offer. But he refuses to do so. It was explained to us that that offer was made at a time when the complainers were applying to the Court to have the Sheriff-Substitute appointed to state a case for the opinion of the Court, but was promptly withdrawn when the Court refused that application. I am of opinion, on the whole matter, that the Lord Ordinary's interlocutor should be recalled and the charge complained of suspended.

LORD MONCREIFF—The respondent's claim that he is entitled to the compensation of 17s. a-week awarded him by the Sheriff's interlocutor of 19th March 1902, "since 15th February 1902 till the further orders of the Court," over and above the full wages (34s. a-week) paid to him by the complainers during the period of seven months or thereby out of the remainder of the year 1902 over which the charge extends, seems on the mere statement of it to be unconscionable. But the respondent's counsel tells us that the respondent is in law entitled to the sums which he demands on this simple ground, that so long as the Sheriff's interlocutor remains unreviewed in the way provided by the statute, he, the respondent, is entitled to receive 17s. a-week from the complainers whether he is or is not fit for work, and whether he is or is not receiving full wages from the complainers or from any other employer.

I understand that the complainers are not prepared to maintain that if the respondent had not been earning full wages in their employment during the seven months in question, they would not have been liable to pay the full compensation contained in the decree, even although the respondent had been earning wages with other employers. Their position is that they do not in the meantime find it necessary or desire to have the weekly payments reviewed by the Sheriff, but at the same time they maintain that in the circumstances the respondent is barred from claiming the compensation awarded for the

period during which he received full wages from them.

I am of opinion that, on more than one ground, the complainers are entitled to succeed. In the first place, I am prepared to sustain their contention on the ground that when a workman who is creditor in such a decree chooses to ask for and accepts employment from his debtors, his former employers, and receives from them full weekly wages, he is absolutely precluded by his own actings from, during such employment and payment, enforcing the decree against the employers; and that no matter how loudly he or his advisers may protest that his rights under his decree are reserved, he must be held confessed for the time at least as being no longer incapacitated.

But alternatively the complainers' case may be stated with equal force to this effect—that during the whole of the time that the respondent was in their service they paid him weekly the full amount decreed for, and as much more in addition. At present I do not see what answer the respondent can make to this way of putting the complainers' case. The 17s. a-week due under the decree are paid to him by the complainers on the footing that he is partially incapacitated from work; he is therefore not in a position (under this alternative) to say that the work which he did for the complainers was the work of a man who was no longer incapacitated, nor to maintain that the additional 17s. paid to him by the complainers was inadequate pay for such work as he, the incapacitated workman, was able to render.

The truth, I suppose, is that the respondent was really no longer incapacitated, and that he did his full work and got his full wages; but that does not affect the question.

In these circumstances I am of opinion that the complainers were not bound to go before the Sheriff to have the award reviewed—I mean, of course, as regards the period during which the respondent worked for them and was paid full wages. I therefore am unable to agree with the Lord Ordinary, and have only one other observation to make. The Lord Ordinary seems to reflect on the conduct of the complainers in not accepting the offer made by the respondent's agents on 4th June 1902. I may observe in passing that that proposal indicates a consciousness on the part of the respondent or his advisers that his present claim is unreasonable. But in regard to the complainers' non-acceptance of that proposal I observe that it is hampered with certain conditions which, without saying more about them, seem to me to explain the complainers' failure to accept them.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Lord Ordinary and suspended the charge complained of.

Counsel for the Complainers and Reclaimers—Salvesen, K.C.—C. D. Murray.

Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent—G. Watt, K.C.—Duncan Smith. Agents—W. & J. L. Officer, W.S.

Saturday, November 28.

FIRST DIVISION.

MURRAY v. MACLAY.

Minor and Pupil—Custody—Orphans—Guardian Appointed by Mother after Father's Death—Religion—Material Welfare—Guardianship of Infants Act 1886 (49 and 50 Vict. c. 27), secs. 2 and 5.

The uncle and nearest male agnate of two pupil orphan children presented a petition praying the Court to find and declare that the children ought to be brought up in the Roman Catholic religion, and to approve of a scheme for that purpose. The father of the children had been a Roman Catholic. The mother of the children, who survived her husband for three months, had been a Protestant prior to her marriage, but became a Catholic thereafter. It was doubtful whether or not she continued to be a Roman Catholic after her husband's death. After their father's death the children were under the charge of their mother, who sent one of them to a Protestant Sabbath School, and ten days before her death made a will appointing a Protestant to be tutor and guardian of the children. The children were being educated by this guardian as Protestants. The father had not given any directions as to the religion in which he wished the children brought up. Prior to their mother's death the children were in a neglected condition, but their health and material comfort had substantially improved since the guardian had taken charge of them. The Court *refused* the petition.

Michael Murray, moulder, Glasgow, was accidentally drowned in Glasgow in August, 1902, and left a widow and two pupil children—Sarah, born May 27, 1893, and Catherine, born December 28, 1899. The two children lived with their mother until her death on November 12, 1902. On November 2, 1902, the mother executed a will appointing Mr James Maclay, writer, Glasgow, to be the tutor and guardian of her children, and declaring it to be her wish that they should be brought up in Maryhill Industrial School (a Protestant Industrial School), or, failing that, in some good institution. After the death of the mother Mr Maclay took the charge of the children, and was educating them as Protestants.

Murdoch Murray, moulder, 22 Church Place, Garscube Road, Glasgow, a brother of the father of the children, and their nearest male agnate, presented a petition craving the Court "to find and declare that the

said children ought to be brought up in the Roman Catholic religion, and to approve of a scheme for that purpose; and to decern and ordain the said James Maclay to educate and bring up the said children in terms of said scheme; or otherwise to decern and ordain the said James Maclay to deliver the said children to the petitioner, or such other person as your Lordships may appoint; or to make such other or further orders with reference to the custody, guardianship, and education of the said children as to your Lordships may seem proper."

The petitioner stated, *inter alia*, that the father and mother of the children had been married in St Joseph's Roman Catholic Church, Glasgow; that the father had always been a Catholic; that the mother had not always been so, but she was received into the Roman Catholic Church before her marriage; that both spouses continued to be Roman Catholics until their deaths; that the two children of the marriage were baptised in the Roman Catholic Church, and the parents attended St Joseph's Roman Catholic Church, and were in the habit of taking their children there; that for some time prior to the father's death, and until the mother's death as after mentioned, Sarah attended St Joseph's Roman Catholic School, and had also made her first confession; that on her deathbed the mother was attended by the Reverend John Charnock, and at his hands received the last rites of the Roman Catholic Church, and was also attended by a Catholic nurse, Joanna Britten, of St Elizabeth's Nursing Home; that the father's relatives were all Catholics, and the mother's Protestants; that the petitioner objected to the children being brought up as Protestants, and desired them to be brought up in the Roman Catholic faith; that the petitioner was willing to undertake the responsibility of maintaining and educating the said children, and that he was prepared to submit a scheme and find caution for the due upbringing of the children in a Roman Catholic industrial school or orphanage.

Mr Maclay lodged answers, in which he stated, *inter alia*, as follows—"On 12th October 1902, whilst visiting with a view to discovering children not attending any Sabbath School, the respondent visited the house of Mrs Murray at 106 Hopehill Road. He there found Mrs Murray ill and in bed, and was informed that her daughter Sarah had recently commenced to attend the Sabbath School at Woodlands U.F. Institute, of which he was superintendent.

"There was nothing to suggest to him that Mrs Murray and the children were not and had not always been Protestants.

"... Respondent ... visited two or three times a-week from that time till Mrs Murray's death on 12th November.

"It was evident that Mrs Murray's illness would eventually terminate fatally, and she herself was fully aware of this.

"Respondent spoke to her about the children. She informed the respondent that there were none of the relatives on