

School of Woodlands United Free Church, and therefore it was his knowledge that the child attended a Protestant Sunday School that led him to come into communication with the widow at all. When he did see her, after some conversation apparently about the condition of the children and her own condition, and after she had explained to him that there was nobody to take any interest in the children at all, she asked him to make arrangements for getting them into the Maryhill Industrial Home, which I understand is a Protestant institution, and then in consequence of this discussion she appointed him the guardian of her children. Now, he says that when the will was executed he had no idea that there was any question of the religion of the children involved at all, and it was quite natural that it should not have occurred to him that any question of that kind could arise, because the origin of his acquaintance with the family was the discovery of the child at a Protestant Sunday School. But when he did learn that the father had been a Roman Catholic he asked the mother if she was a Protestant. She emphatically said that she was. He further asked her whether she wished the children brought up as Protestants. She replied that she did. Now, after that conversation had taken place this respondent accepted the office of guardian upon the mother's nomination, and I think he has quite rightly and perfectly carried out the duty he undertook when he understood it was his duty to bring up the children as Protestants. Therefore we have nothing before us except the case in which the father has expressed no desire on the subject, while the mother has expressed her distinct desire and the guardian legally appointed by the mother has announced his intention of carrying out what he understands to be his duty by bringing up the children as Protestants. I entirely agree with what has been said by your Lordships that we could not in these circumstances—and as far as my opinion goes in any circumstance—order a Protestant guardian to bring up children in the Roman Catholic religion, or draw up a scheme of education for the children, either in religion or in other matters. The only remedy, if we thought the guardian was wrong in bringing up the children as Protestants, would be to put them into the hands of some competent and proper person, who, being a Roman Catholic, should bring them up in his own faith. And I think that is in accordance with the Act of Parliament, because the Act of Parliament provides that if it is for the welfare of the children the Court must remove the guardian and appoint another person in his place. It is quite clear that there is no sufficient ground for such a proceeding as that, and I think also that there is no ground for the intermediate proceeding of telling this gentleman that he is to bring up the children otherwise than he is doing, and contrary to his own belief as to what is most for their welfare.

The Court refused the prayer of the petition.

Counsel for the Petitioner—Campbell, K.C.—Graham Stewart. Agent—Charles George, S.S.C.

Counsel for the Respondent—Younger. Agents—J. & J. Ross, W.S.

Saturday, December 5.

SECOND DIVISION.

[Sheriff Court at Perth.

MACDONALD, FRASER, & COMPANY,
LIMITED v. DEWAR.

Sheriff—Process—Decree by Default—Non-Appearance at Diet of Proof Fixed without Interlocutor.

Where a diet of proof had been fixed by a Sheriff-Substitute in open court upon the motion of the pursuers after notice to the defender, and the diet had been intimated to the defender, but no interlocutor fixing the diet had been written out or signed, held that it was incompetent for the Sheriff-Substitute to pronounce decree by default for non-appearance against the defender for failure to appear at the diet.

In an action for payment of £81, 12s. 8d., raised in the Sheriff Court at Perth by Macdonald, Fraser, & Company, Limited, Perth Auction Mart, against Donald Dewar, Craigs, Auchterarder, the Sheriff-Substitute (SYM) on 17th March 1903, before answer, allowed the parties a proof of their respective averments and to the pursuers a conjunct probation, and ordered the case to the roll of 20th March that a diet might be fixed.

The pursuers appealed, and on 25th May 1903 the Sheriff (JAMESON) recalled the Sheriff-Substitute's interlocutor, and before answer allowed the parties a proof of their respective averments, the defender to lead in the proof, and remitted to the Sheriff-Substitute to fix a diet of proof, and proceed with the cause.

On 29th May 1903, on the motion of the pursuers' agents, after intimation to the agent for the defender, a diet of proof was fixed in open court for 2nd July. No interlocutor fixing the diet was written out by the clerk or signed by the Sheriff-Substitute. Intimation that the diet had been fixed was given by the pursuers' agents to the agent for the defender, and they asked him if he intended to go to proof on the date fixed. The defender's agent replied that he did not intend to lead any proof on that date.

On 2nd July 1903 the Sheriff-Substitute pronounced the following interlocutor:—
“In respect the defender has failed to appear at the diet of proof fixed for this date, holds him as confessed, and decerns against him in terms of the prayer of the petition.”

The defender appealed to the Court of Session, and argued—The interlocutor of

the Sheriff-Substitute of 2nd July could not be upheld. No diet of proof had ever been fixed in terms of section 23 of the Sheriff Courts Act 1876, so it was impossible for the defender to be in default for non-appearance.

Argued for the pursuers and respondents—No doubt an irregularity had occurred in there not being a written and signed interlocutor recording the fact that a diet of proof had been fixed for 2nd July. But an interlocutor of this kind was merely a minute of what was done on the Bench. In a matter of this kind it was quite enough if the judge fixed the diet of proof verbally in open court. It was admitted that the diet of proof had been fixed in this manner, and ample notice that it had been so fixed was given to the defender. An irregularity of this kind was in the same position as a blunder in the words of an interlocutor. It could be corrected if necessary—*Clark & Macdonald v. Bain*, November 16, 1895, 23 R. 102, 33 S.L.R. 86.

LORD JUSTICE-CLERK—The idea that a man can be in default for non-appearance, whether in civil or in criminal proceedings, at a diet which is not appointed by any interlocutor appearing on the face of the record of the proceedings, is quite novel, and I cannot assent to it. I think, therefore, that this interlocutor, which bears to be a decree in respect of failure to appear at a diet of proof when the diet had never been fixed by interlocutor ought to be recalled and the case remitted to the Sheriff to proceed.

LORD YOUNG and LORD MONCREIFF concurred.

LORD TRAYNER was absent.

The Court sustained the appeal, recalled the interlocutor appealed against, and remitted the cause to the Lord Ordinary to proceed.

Counsel for the Pursuers and Respondents—Campbell, K.C.—Graham Stewart. Agents—Carmichael & Miller, W.S.

Counsel for the Defender and Appellant—Munro—A. A. Fraser. Agents—Sibbald & Mackenzie, W.S.

HOUSE OF LORDS.

Monday, December 7.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, and Lord Robertson.)

EDINBURGH AND DISTRICT WATER TRUSTEES v. CLIPPENS OIL COMPANY, LIMITED.

(*Ante*, November 27, 1900, 38 S.L.R. 121, and 3 F. 156.)

Police—Water Supply—Aqueduct—Pipe—Right of Support—Minerals under Pipe—Act of 1819 (59 Geo III. cap. cxvi.), secs. 38 and 73—Act of 1843 (6 and 7 Vict. cap. lxxxix.)

By an Act of 1819 “for more effectually supplying the city of Edinburgh and places adjacent with water,” the Edinburgh Joint Stock Water Company were empowered to “lay the necessary pipe or pipes for that purpose . . . making satisfaction to the owners and occupiers of the ground.” Among the lands scheduled were the lands of Pentland and Straiton, and shortly after the passing of the Act a pipe was laid under the powers thereof which traversed these lands. There was no proof that any compensation had been paid to the owners of these lands for the laying of the pipe. The Act of 1819 made no specific provision with regard to compensation for minerals required as support for the pipes laid. The Water Company in question was a private company, but the Act imposed important obligations upon the company in the public interest.

By an Act passed in 1843 to enable the company to bring in an additional supply of water certain regulations were introduced in regard to the working of or receiving compensation for minerals under and adjacent to “the works of the company.”

In an action of declarator and interdict at the instance of the successors of the Water Company against the proprietors and lessees of minerals in the lands of Pentland and Straiton, *held (aff. judgment of the First Division)* that under the Act of 1819 the pursuers were entitled to support for their pipe; that the provisions of the Act of 1843 as to minerals did not apply; and that the defenders were not entitled to work the minerals in the lands of Pentland and Straiton adjacent to or under the pipe in such manner as to injure the said pipe or to interfere with the continuous flow of water through it; and interdict granted against their doing so.

This case is reported *ante ut supra*.

The Clippens Oil Company, Limited, defenders and reclaimers, appealed to the House of Lords.

At delivering judgment—