

ness of the decision was not challenged. It appears to have regulated the practice since it was pronounced in 1890, save where the difficulty has been surmounted by a clause in the articles of association. That is not the case here. I am therefore constrained to hold that this objection too is substantial. The result is, I fear, that the whole procedure to which these objections relate must be gone through again, due regard being paid to the statutory requirements. I reach this result with regret, for, as the reporter observes, "the procedure in the petition itself has been regular, and the steps taken by the company have probably been such as to enable the shareholders to understand the position of affairs and the effect of the resolutions submitted at the meetings." But although this may be so, we cannot overlook the failure in this case to follow closely the provisions of the Act of Parliament.

LORD MACKENZIE—It is always with regret that the Court feels compelled to insist on a due observance of what in one view of it may be represented as a formal matter. But I think in dealing with the body of legislation embodied in the Companies Act the only way to deal with the matter is to require that due observance be paid to the provisions of the statute.

Of the three points mentioned by the reporter the last seems to me to be fatal to the contention of the petitioners here. It was conceded that the case of *Alexander v. Simpson* (1889, 43 Ch. D. 139) could not be challenged. It appears to me conclusive on the matter, and the attempt which was made by Mr Macmillan to distinguish this case on the ground of speciality was not successful.

The second point mentioned by the reporter also seems to me to be not matter of form but matter of substance. If, as the reporter points out, a reference had been made in the notice calling the later meeting to the print of the memorandum and the articles formerly sent to the shareholders, or if information had been given them that the memorandum and articles to be submitted at these meetings were copies of those previously sent, then it might have been possible to get over the difficulty that the notice given by the advertisement did not contain the terms of the memorandum and articles. Unfortunately that was not done, and therefore I think that point is also fatal.

In regard to the first point, the view I take, after considering what was decided by Swinfen Eady, J., in the *Penarth Pontoon Company's* case ([1911], W.N. 240) is that the attention of the shareholders does require to be directed to the point that certain procedure prescribed by the Act must be observed in order that the conditions which Parliament has attached to a special resolution may be complied with. It is, in my opinion, essential, if sound general practice is to be followed, as the reporter points out, that some information must be given to the shareholders that the resolution proposed is, when passed and confirmed, to be a special resolution.

Accordingly in the result I come to the same conclusion as your Lordship.

LORD SKERRINGTON—I concur in the course which your Lordships consider ought to be followed. I desire to note that nothing in our decision to-day will compel anybody to describe a "special resolution" as an "extraordinary resolution," and that nothing which we decide to-day will throw any light upon the question whether the decision of the Court of Appeal in *Alexander v. Simpson* (43 Ch. D. 139) ought or ought not to be followed in Scotland. Counsel for the petitioners admitted that that decision was conclusive unless he could show that it did not apply, which he was unable to do.

LORD CULLEN—I am of the same opinion. As regards the first point, I am not disposed to question the soundness of the view that in the notice calling the first meeting the resolution intended to be proposed does not fall to be denominated an "extraordinary resolution." Under reference, however, to sub-sections (3) and (4) of section 69, I think it will be worthy of the consideration of the petitioners, in their renewed proceedings, whether the notice should not state that it is intended to propose the resolution as a "special resolution."

As regards the second point, it is clear that the notice sent did no more than state the form of the resolution, and gave no information as to its substance and practical import. I am unable to see how this defect can be regarded as cured by the fact that at a previous stage and for a different purpose the shareholders had been put in possession of the means of knowledge.

As regards the third point, the decision in the case of *Alexander v. Simpson* (43 Ch. D. 139), referred to by the reporter, has not been challenged by the petitioners, and I am of opinion that they have not succeeded in distinguishing that case from the present one.

The Court continued the petition.

Counsel for the Petitioners—Macmillan, K.C. — Cooper. Agents—Macpherson & Mackay, S.S.C.

Wednesday, November 26.

FIRST DIVISION.

[Sheriff Court at Hamilton.

WARD v. WALKER.

Process — Workmen's Compensation — Minor and Pupil—Title to Sue—Pupil without Guardians — Workmen's Compensation Act 1906 (6 Educ. VII, cap. 58).

Held (1) that in accordance with immemorial practice an action may be properly brought into Court by a pupil without guardians in his own name, and thereafter a curator *ad litem* be appointed, and (2) that there are no specialties in the Workmen's Compen-

sation Act 1906 excluding the application of that general rule to arbitrations under that Act.

Opinion reserved per the Lord President as to the rule to be followed in Special Cases.

Macdonald's Trustees v. Medhurst, 1915 S.C. 879, 52 S.L.R. 698, commented on.

Peter Ward junior, *appellant*, being dissatisfied with an award by the Sheriff-Substitute (SHENNAN) at Hamilton in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), brought by the appellant against Gideon Walker, wood-floor manufacturer, Blantyre Sawdust Mill, Blantyre, *respondent*, appealed by Stated Case.

The Stated Case set forth—"This is an arbitration in a claim for the recovery of compensation in respect of the death of Euphemia Ward from accident alleged to have arisen out of her employment with the respondent. The defendant for whom compensation is claimed is the illegitimate son of the deceased, born on 8th August 1912. Proceedings were instituted on 22nd August 1918 at the instance of Peter Ward senior, labourer, 18 Middle Row, Blantyre, who designed himself as tutor and administrator-in-law for his infant grandson Peter Ward junior. In his averments Peter Ward senior stated that he was the father of the deceased Euphemia Ward, and that Peter Ward junior was her illegitimate son. After various adjournments at the instance of the pursuer proceedings were sisted on his motion on 17th December 1918. On 2nd May 1919, on the pursuer's motion, the sist was recalled, and on 16th May 1919 he lodged a minute moving the Court to amend the instance so that the action should proceed in the name of Peter Ward junior alone. On 22nd May 1919 the agent for Peter Ward junior lodged a motion craving the Court to appoint Peter Ward senior tutor *ad litem* to the pupil Peter Ward junior. I heard parties' procurators on 23rd May 1919. On 27th May 1919 I gave judgment. I allowed the instance to be amended as craved by deleting the name of Peter Ward senior therefrom, leaving the action to proceed at the instance of Peter Ward junior. I refused the motion to appoint a tutor *ad litem* to Peter Ward junior as incompetent, and in respect that there was no longer any pursuer in the action I dismissed it."

The *questions of law* were—"1. Was it competent for me to make the instance valid by appointing a tutor *ad litem* to the pupil pursuer? 2. Was I right in dismissing the action?"

The *note* appended to the award was as follows:—"This is an action to recover compensation for behoof of the illegitimate son of the deceased Euphemia Ward, who was killed by accident in the defender's premises while she was in their employment. The action was raised originally by Euphemia Ward's father as tutor and administrator-in-law for her child. Recognising that he does not hold that position, he has withdrawn from the case, leaving

the action to proceed at the instance of the pupil child, who was born on 8th August 1912. This instance is plainly incompetent, and the motion now made is that I should make the instance valid by appointing a tutor *ad litem* to the pupil. As the law at present stands I am of opinion that it is not competent for me to make the appointment craved. The question was discussed very fully by Lord Johnston in *Macdonald's Trustees v. Medhurst*, 1915, S.C. 879, and a reasoned opinion was delivered against the competency of appointing a tutor *ad litem* to a pupil. In my view it is my duty to follow that opinion. It is obvious that there is danger of serious hardship being entailed on this child if it has a good claim. I know of no method by which a pupil having no tutor can have its rights vindicated at law except by having a factor *loco tutoris* appointed, and the expense entailed would make a serious inroad on the compensation awarded. Of course the principle relates generally to the vindication of the rights of pupils without tutors, and it is not limited to the enforcement of claims under the Workmen's Compensation Act. But that Act definitely recognises the claim of illegitimate children, and I venture to suggest that a method of giving effect to the rights conferred by the Act might be found through clause 6 of Schedule II, which provides that 'rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person.' It does not seem unreasonable to hold that a pupil may be a 'party' in the sense of this clause, although it has no legal *persona*."

Argued for the appellant—If any specialty arose out of the fact that the present was a claim for workmen's compensation the specialty was in favour of the appellant. Failure of the parties to agree was a condition-precident to an arbitration—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1 (3)—but the fact that a pupil could not make an agreement was no bar to an arbitration by him. In every case in which a pupil claimed there necessarily was a failure to agree. On the other hand the Act clearly contemplated payments being made to persons under disabilities—First Schedule, sections 5 and 7. No rules of Court, *i.e.*, Acts of Sederunt, had been made under section 6 of that schedule. It was the regular practice, at least in the Sheriff Court at Edinburgh, to administer sums so paid into Court. Further, under the Act a pupil had a statutory right to compensation, of which nothing in the common law could deprive him. At common law the question was not one of logic or principle, but rather one of practice and convenience. Practice was clearly established to the effect that a pupil could bring an ordinary action to the notice of the Court and carry it on to the stage of liti-contestation, at which stage or before it a curator *ad litem* was appointed—Ersk. Inst., i, 7, 13; Bell's Prin., sec. 2067; Fraser, P. & C. (3rd ed.), p. 208; Mackay's Manual, pp. 147 and 148; Dove Wilson, Sheriff Court Practice (4th ed.), p. 97. Practice had been

affirmed by decision—*Johnston v. Johnston*, 1740, M. 16,346; *Macneil v. Macneil*, 1798, M. 16,384; *Sinclair v. Stark*, 1828, 6 S. 336, per Lord Balgray at p. 338; *Young*, 1828, 7 S. 220; *Keith v. Ardier*, 1836, 15 S. 116; *Earl of Craven v. Lord Elibank's Trustees*, 1854, 16 D. 811. *Swan's Trustees v. Swan*, 1912 S.C. 273, 49 S.L.R. 222, showed the corresponding practice in the case of a lunatic. *Mackenzie's Trustees v. Mackenzie*, 1908 S.C. 995, 45 S.L.R. 785, was a case of a minor defender. *Macdonald's Trustee v. Medhurst*, 1915 S.C. 879, 52 S.L.R. 698, was distinguished, for the question arose in a special case, which could only proceed upon a contract as to the admitted facts. Further, a pupil was not a total nonentity in law. He might be guilty of contributory negligence—*Cass v. Edinburgh Tramways Company*, 1909 S.C. 1068, 46 S.L.R. 734—and of crime—*Ersk.*, iv, 4, 6. In England a next friend might be appointed after a suit had been initiated—*In re Brocklebank*, 1877, 6 Ch. D. 358. The argument for the respondent ignored the difference between a pupil without tutors and a pupil having tutors, in which case the tutor must sue, which was the reason for the decision in *Carrigan v. Cleland*, 1907, 15 S.L.T. 543. The arbitrator should have appointed a curator *ad litem* and allowed the action to proceed.

Argued for the respondent—The question in the case was not academic, for if a pupil sued and obtained decree, he having no *locus standi*, the defender might be sued again. Further, a reckless or malicious person might bring the action in the pupil's name, and even if a curator *ad litem* was appointed there would be no recourse for expenses, as the curator was not liable. Under the Act of 1906 it was necessary that a question should have arisen before arbitration was competent—C.A.S., 1913, L. xiii, 2; Act of 1906, section 1 (3). With a pupil there never could be an agreement. The position was analogous to that of a special case in which a preliminary agreement was necessary. That differentiated a case under the Act of 1906 from the common law, and in such a case the law as laid down in special cases, such as *Macdonald's case*, per Lord Johnston, and in *Park v. Park*, 1876, 3 R. 850, 13 S.L.R. 550, should be applied. The Act of 1906 did not contemplate proceedings by pupils. Section 6 of the Second Schedule was limited to persons properly in court. In any event it was doubtful if section 6 applied to Scotland, for representation in Court was provided for by C.A.S., 1913, L. xiii, 1. Sections 5 and 7 of the First Schedule were not in point, and in any event they applied to majors. Apart from the Act of 1906 the appellant had stated no argument on the second question of law. Upon the first question of law the text writers, e.g., Mackay's Manual, were in favour of the appellant, but the authorities on which they relied did not support the proposition they laid down, and in any event the practice had arisen from a failure to keep in view the difference between pupils and minors. *Johnston's case* was possibly an action by the pupil against his father, or where the father had an adverse interest. *Macneil's*

case was a question between the pupil and his father. In *Hamilton*, 1861, 24 D. 31, the father having an adverse interest made the application for a curator *ad litem*, and the question of competency was not debated. In *Sinclair's case* and *Calderhead's Trustees v. Fyfe*, 1832, 10 S. 582, the opinions were *obiter*, and in the former there was no proper contradictor. A pupil had no *locus standi* by himself, and could not come into Court merely to apply for the appointment of a curator *ad litem*—*Knolls*, 1610, M. 8968; *Carrigan's case*. His position was strictly analogous to that of an insane person. Practice had crystallised in the case of an insane person. An action could not be raised in his name and a curator *ad litem* appointed when the action came into Court—*Reid v. Duff*, 1839, 1 D. 400, disapproving of Darling, Practice of the Court of Session, p. 96; *Mackenzie*, 1845, 7 D. 283; *Anderson's Trustees v. Skinner*, 1871, 8 S.L.R. 325; *Calver v. Howard*, 1894, 22 R. 1, 32 S.L.R. 3; *Swan's case*. *Bogie v. Bogie*, 1840, 3 D. 309, was a very special case. Further, the application for a curator *ad litem* was to the *nobile officium*, and it was doubtful if the Sheriff could make such an appointment. The Sheriff could, however, appoint a factor *loco tutoris*. Such an appointment would be necessary at some time in the present case, and it was the proper course—*Anderson v. Muirhead*, 1884, 11 R. 870, 21 S.L.R. 597—just as it was in the case of an insane person. *Brocklebank's case* did not apply in Scotland. *Ersk. Inst.* was not in point. Bell's Prin. was not the original text.

At advising—

LORD PRESIDENT—This Stated Case raises a pure question of practice and procedure, and that is so even although it relates to a claim made under the Workmen's Compensation Act.

The illegitimate pupil child of a woman who is alleged to have died in consequence of injuries received by an accident arising out of and in the course of her employment presents a claim for compensation under the Act. The question is, how is that claim to be brought before the Court, the statutory arbitrator. I answer in the words of the most recent writer on Court of Session Practice, Maclaren, Court of Session Practice, p. 169—"Where there is no legal guardian the action is brought in the name of the pupil, and the Judge, after the case is brought into Court, will appoint a curator *ad litem*, with whose concurrence the action proceeds." This procedure has the sanction of immemorial practice reinforced by the highest authority. And although it may seem to be inconsistent with strict legal principle, the procedure is not, in my opinion, now open to reconsideration. I do not share the views on this subject expressed by Lord Johnston in *Macdonald's Trustee v. Medhurst* (1915 S.C. 879, 52 S.L.R. 698) that in approving the practice to which I have referred the Court condoned an irregularity amounting to incompetency and turned a blind eye to the facts. Nor do I think the proper procedure would be to resort to the appointment of a factor *loco*

tutoris. The procedure uniformly followed has worked well in actual experience, and no good reason for disturbing it has ever been suggested. Neither text-writers nor judges have ever expressed any doubt or difficulty about the propriety of the established practice. Erskine (i. 7, 13) and Fraser (Parent and Child, 2nd ed. p. 152 *et seq.*) state the practice without any suggestion of doubt as to its propriety, although these learned writers are quite alive to the fact that a pupil has no *persona standi*. To the same effect Darling (pp. 88 and 89), MacLaurin (p. 96), Shand (p. 140), and Mackay (Manual of Practice, p. 148) in their text-books on Practice lay down the rule explicitly and without qualification. As far back as 1740 we find the practice in full observance. Thus in *Johnston v. Johnston* (1740 M. 16,346) "it was observed as a nullity in an inhibition that it was raised in a pupil's name on a dependence before his tutor *ad litem* was appointed, which the Lords repelled as being no more a nullity in the inhibition than it was in the process itself, which is regularly enough brought first into Court in the pupil's name and the tutor *ad litem* thereafter appointed." The practice again received the sanction of the Court in 1798 in the case of *Macneil v. Macneil*, 1798, M. 16,384. There was no speciality in these two old cases. In 1828 we find what I cannot but regard as the most authoritative statement of the law and practice in the case of *Sinclair* (1828, 6 S. 338), where Lord Balgray said in an opinion concurred in by nine other judges—"A pupil or minor may be either pursuer or defender. If he is a pursuer, and either his guardians do not concur or he has none at all, then the defender is entitled to object *in limine* to the procedure till the guardians concur or a curator *ad litem* is appointed, and which must be done by the judge, and if the fact appears *in judicio* it is perhaps *pars judicis* to apply the remedy." It may be said that this statement of the law and practice of Scotland was *obiter*, but it was a very deliberate opinion of very eminent judges, and was in perfect harmony with prior and subsequent practice. In the same year, however, the point was decided in the case of *J. & M. Young* (1828, 7 S. 220), where the Court refused a petition in name of a pupil to have a curator *ad litem* appointed in an action about to be raised, on the ground that the correct course to follow was to raise the summons first, and then after the summons had come into Court to apply for the appointment of a curator *ad litem*. Eight years later we find a full statement of the law in an opinion of Lord Corehouse (Ordinary), in the case of *Keith v. Archer*, 1836, 15 S. 116. "It is true," says his Lordship, "that a pupil, by himself has no *persona standi in judicio*, but as soon as his tutor or administrator concurs in the action the defect of his nonage is supplied, because there is a pursuer insisting who has a *persona standi*. In practice this concurrence, even when given subsequently to the raising of the action, operates *retro*, and validates the pursuit. Thus, if a pupil has no

tutor or administrator an action nevertheless may be brought in his own name, and after it comes into Court a tutor *ad litem* may be appointed, with whose concurrence the action proceeds, and it is no objection that the summons was raised and executed in the pupil's name alone and before any tutor *ad litem* was appointed." On reclaiming note to the First Division of the Court no doubt was expressed regarding the soundness of this opinion. Speaking of a summons raised at the instance of a pupil alone Lord Balgray observed—"Such a summons is made valid if a tutor *ad litem* be appointed by the judge when it comes before him." Finally in 1861 in the case of *Hamilton* (1861, 21 D. 31) the House of Lords allowed a pupil of five months old to be sisted as a party in an action of multiplicity, and remitted the cause to the Court of Session with directions to appoint a tutor *ad litem* to the pupil. The Court made the appointment. This, then, being the state of the authorities, I entertain no doubt that the action before us ought to be allowed to proceed although raised at the instance of a pupil alone, and that the judge ought to appoint a curator *ad litem* to the pupil. I gather from the note of the learned arbitrator that this is the course which he would have followed had he acted upon his own view of the proper procedure, but in deference to the opinion of Lord Johnston in the case of *Macdonald's Trustees v. Medhurst* he deemed it right to refuse to allow the action to proceed. On the general question raised I do not, as I said at the outset, share Lord Johnston's doubt. The general question was not argued in that case, and consequently his Lordship had not before him the body of authority to which I have adverted, which places the matter, as I think, entirely outside the region of controversy. I express no opinion on the question here raised in so far as it relates to special cases, where, no doubt, other considerations arise. But even as regards them I am not to be held as a dissentient from what I understand to be the existing practice. As the topic may, however, yet arise for discussion in this Court, I desire once again expressly to reserve my opinion upon it. On the question now before us it seems to me impossible, even were it desirable, to go back upon the practice which has prevailed from time immemorial.

Accordingly I propose that we should answer the first question of law now before us in the affirmative, and the second in the negative.

LORD MACKENZIE—The first question put by the learned arbiter is—"Was it competent for me to make the instance valid by appointing a tutor *ad litem* to the pupil pursuer?" In my opinion this question should be answered in the affirmative. I do not consider it necessary to go at any length into the matter, for it is clearly stated in the text writers that such a course is competent when a pupil is pursuer, and the authorities cited support the statements in the text. Thus in Mackay's Manual, published in 1893, at p. 148, it is stated—"When

the pupil has no legal guardian the action is brought in the pupil's name and the tutor *ad litem* appointed after it is in Court, with whose concurrence the action proceeds. Such tutor *ad litem* will only be appointed for a particular action, not for actions in general, and only after the action is in Court, and while it is in dependence." The cases which support this are *Johnston v. Johnston* (1740 M. 16,346), *Macneil v. Macneil* (1798 M. 16,384), *Sinclair v. Stark* (1828, 6 S. 336), *Keith v. Archer* (1836, 15 S. 116), in which Lord Corehouse said—"Thus, if a pupil has no tutor or administrator an action nevertheless may be brought in his own name, and after it comes into Court a tutor *ad litem* may be appointed, with whose concurrence the action proceeds, and it is no objection that the summons was raised and executed in the pupil's name alone and before any tutor *ad litem* was appointed"; *Young* (1828, 7 S. 220), in which the Court refused a petition in name of a minor and an infant to have a curator *ad litem* appointed in an action about to be raised, in respect of there being no action actually in dependence, Lord Glenlee saying—"I doubt greatly whether there is any risk. The summons may be validated by the after appointment of a curator *ad litem*. They should raise their summons first and then apply for the appointment"; *Ferguson's Trustees v. Hamilton*, 1861, 23 D. 1290, 1861, 24 D. 31. The practice is stated to be as above laid down in Darling's Practice, published in 1833 pp. 88-89, and in Shand's Practice, published in 1848, p. 140.

In Fraser on Parent and Child, (3rd ed.) 1906, p. 203, the matter is dealt with at length, and the practice is laid down in the original text to the same effect, more particularly at p. 1154, and the high authority of Ersk. Inst., i, 7, 13, is to the same effect. The appointment of a tutor or curator *ad litem* is a matter for the discretion of the Court. In certain cases it may obviously be more appropriate that a factor *loco tutoris* should be appointed. As to the competency of the appointment I do not entertain doubt after listening to Mr Keith's able argument, and to his comments on the case of *Macdonald's Trustees v. Medhurst*, 1915 S.C. 879, 52 S.L.R. 697. The provisions of the Workmen's Compensation Act do not in my opinion create any speciality.

LORD SKERRINGTON—As one who has been familiar with the practice of the Scottish Courts for the last forty years, I was surprised—and I still am surprised—to hear it doubted that according to our practice an action may be raised in name of a pupil who has no guardian, and that, after the case has been brought into Court, the defect in the instance may be validated by the appointment of a curator *ad litem*. The question is really one of fact—what has been the practice in a matter of frequent though not of daily occurrence, namely, the necessity of instituting an action on behalf of a pupil who has no legal guardian? The text-books and the institutional writers point to the course which I have described.

I am not impressed by the circumstance

that many of the decisions referred to by the text-writers did not directly decide the point but rather assumed it. A rule either of law or of practice may be so familiar and well settled as to make a direct decision unlikely because unnecessary. It has been objected that the practice is not logical. This objection, however true, is irrelevant to the question whether the practice exists. Lastly, we are not concerned with the suggestion that the practice might be abused to the prejudice either of the pupil or of the third party with whom he litigates. Such abuse is not probable, but if it occurred means could be found to restrain it. It seems to be forgotten that the first duty of a curator *ad litem* is to consider whether the action, however well founded on its merits, ought in the interests of the ward to be proceeded with or whether it might not better be brought anew after his majority. Upon such a question a curator *ad litem* may commit an error of judgment, but so also may an ordinary guardian.

The only other question is whether there is any distinction as regards this matter between an ordinary action and an application to a Sheriff as arbitrator under the Workmen's Compensation Act asking him to adjudicate upon a claim at the instance of a pupil as the dependant of a deceased workman. I have not been able to discover any such distinction. The dependant does not require to select an arbiter, but in the absence of an agreement to the contrary has no other course open to him except to apply to the Sheriff. The first question ought, therefore, to be answered in the affirmative and the second in the negative.

LORD CULLEN—The practice which the appellant invokes is one of very long standing, and the citations given to us show that it is duly sanctioned by authority which we are bound to follow. It may be that the practice is in some respects illogical, and also that it might have been more satisfactory had it been more affected by defined conditions or regulations than it is, but such considerations are not *hujus loci*.

The Court found in answer to the first question of law that the Sheriff-Substitute as arbitrator should appoint a tutor *ad litem* to the appellant, and answered the second question of law in the negative.

Counsel for the Appellant—Fraser, K.C. —Aitchison. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Respondent—Watt, K.C. —Keith. Agents—Alex. Morison & Company, W.S.