

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

either side who would take the least interest in them, and that she wanted to get them into Maryhill Industrial Home, of which she had heard well, and she asked respondent to arrange this for her. He at this time knew nothing about said Home. After this had been spoken of two or three times the respondent stated that he would have no power to do anything unless he were made the children's guardian, and she said she was anxious to have this arranged and would make him guardian.

"The respondent, although the obligation sought to be placed on him was an onerous one, was prepared to accept it, and accordingly he prepared the" will appointing him guardian, "and called with two witnesses and got it signed.

"Up to this time the respondent had no idea that any question of religion was involved. After the document had been signed he was told that the father had been a Catholic. Thereupon he asked Mrs Murray if she was a Protestant. She said emphatically that she was. He further asked her whether she wished the children brought up as Protestants. She replied that she did.

"The respondent got the following information from the mother:—She explained that she had long been in poor health, that her husband had been of drunken habits, that they had lived in a very poor locality in the city known as Church Place (where the petitioner now resides) till a short time prior to his death, that he had fallen into the canal and been drowned while drunk, that the shock to her had been so great as to make her disease worse, and had brought on her final illness. . . .

"When the respondent took charge of the children they were in a most neglected condition. The mother, owing to illness, had not been able to look after them, and she had no one who could do so for her. Their clothes and boots were worn out, and they had practically no underclothing. Sarah, the elder, was subject to periodical attacks of bronchitis, and shortly after the respondent took charge of them she had to be sent to the Sick Children's Hospital owing to an attack of St Vitus dance and some other ailment affecting her neck. She had also a paralytic affection of the left arm." . . .

The respondent also stated that after inquiry as to a suitable guardian he had Mrs Aitken recommended to him, who had since had the care of the children; that she was a most respectable widow, and a member of Woodlands Church; that she had proved to be a thoroughly kind and competent guardian, and the children were much attached to her and were being well trained for children in their position of life by her; that she had now been living at Busby two or three months, and it was intended that the children should reside in the country till they were able to work for themselves; that the effect of the changed conditions had been most marked, and that the children were warmly and comfortably clad and their health well looked after.

"The respondent has all along taken a warm personal interest in the children. He has made no attempt to set them against their father's religion, but Sarah, the elder girl, has now an intelligent understanding of the Protestant religion, and she has from the first expressed her anxiety to be a Protestant. The other child, who is barely four, has of course no mind on this matter, but she is extremely well and happy in her present surroundings."

The respondent admitted—1. That the father was a Catholic. 2. That the mother after the marriage sometimes attended the chapel, but the respondent was informed very irregularly. "From the respondent's conversations with her he is clear that she never could have been anything but a Protestant at heart." 3. That the children had been baptised at the chapel, and that Sarah had been to a Catholic school, but that before the respondent's first visit her mother had sent Sarah to Oakbank Board School, and had also sent her to Woodlands Sabbath School.

The respondent submitted that his view was that he had had a duty cast upon him by the charge given him by the mother, which he was bound to carry out; that he was willing to submit to the judgment of the Court, but considered that until he was otherwise instructed by the Court he could not do otherwise than bring up the children as Protestants.

Argued for the petitioner—The father of the children had admittedly been a Catholic during his whole life, and so long as he lived he had consistently brought up the children as Catholics. The mother was not entitled after her husband's death to alter the religious education of the children. On that matter the wishes of the father, though only inferred from his conduct, were decisive, where, as in this case, the physical and moral welfare of the children would not be changed for the worse—in *re M'Grath (Infants)* [1893], 1 Ch. 143, *per* Lindley, L.J., at pp. 148 and 150; *Reilly v. Quarrier*, July 10, 1895, 22 R. 879, 32 S.L.R. 664; *Alexander v. M'Garrity*, November 10, 1903, 5 F. 654, 40 S.L.R. 446. The Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), secs. 2 and 5, had not changed the law as to respecting the wishes of the father regarding his children's religious education.

Counsel for the respondent was not called on.

LORD PRESIDENT—We have had a very full statement of this case, and we are now in a position to dispose of it. The facts of the case are somewhat melancholy. The father of the children was a Roman Catholic, and the mother was before her marriage a Protestant, but during her marriage she became a Roman Catholic. The parties are at variance as to whether she continued a member of that communion down to her death. The father was drowned in the canal under unfortunate circumstances. He does not appear to have been a model parent, and at his death the children were in an extremely neglected

and unhealthy condition. The mother of the children survived her husband for about three months, and prior to her death she did what she was perfectly entitled to do, viz., on 2nd November 1902 made a will and nominated a guardian in regard to the children. The father had not nominated a guardian to them. The guardian nominated by the mother has evidently bestowed much care and attention to the children, and they are now, as regards health and happiness, in a condition which is in very marked contrast to that in their father's lifetime. It appears that they are now bright, healthy, and happy children, so that whether the guardian has or has not erred in regard to the religious upbringing of the children it is plain that his guardianship otherwise has been of the most beneficial and satisfactory character. It appears, as I have said, that the father had been throughout his life a Catholic, and his wife, the mother of the children, had become a Catholic for a time, but according to the belief of the guardian she ultimately reverted to the Protestant faith, although the petitioner believes that she remained a Catholic down to her death.

With regard to the will and the nomination of a guardian at 2nd November 1902, it was said that when she was giving these instructions—and it may be quite correct—that she did not supply the precise words, but that her wishes were put in form by the guardian. That would not have any adverse weight in my judgment unless it was alleged that what is expressed in the writing was not the genuine wish of the mother. I do not understand that there is any suggestion of this. A woman in her class of life and in her state of health could not be expected to write a will and a nomination of a guardian, and I see no reason to doubt that her genuine wishes are expressed in the document. I do not understand it to be disputed that the guardian was acting very kindly towards these children. The only question is whether he should be controlled in his administration by being directed by this Court to bring up the children as Roman Catholics and not as Protestants. *Prima facie* one of the things that a guardian will nominate, and against the conduct of whose administration there has not been a whisper before us, should be allowed to judge of, in the first instance at all events, is how the children should be educated and in what faith they were to be brought up. I am not in the least suggesting that it might not be a most proper thing for him to have regard to the wishes of one or both parents in a matter of that kind. But in this case, although the wife seems to have for a time been a Roman Catholic, she seems to have again become a Protestant, and after the death of her husband she had what I may call the last word upon the matter. When we are informed as to the state of facts which the guardian found when he entered upon his administration, it seems to me impossible to hold that he was doing anything wrong in continuing, as regards the matter of religious faith, the state of things that he found or believed to exist when he entered upon his office.

The suggestion on the other side is that the guardian's wish is to be set aside, and impliedly that the wish of the mother, who was left as guardian-at-law on the death of the father, should be set aside, and that we are to substitute our judgment as to what is best for the child in that matter for his judgment. I consider that in a case of this kind the governing consideration is the welfare of the child, and the wishes as well of the mother as the father. It seems to me that the guardian was perfectly entitled to consider the wishes of the mother as well as those of the father, and where a guardian possessing the qualifications which we see that this gentleman possesses, having no interest except a benevolent and kindly one, and with a much fuller knowledge of the history of this family than we can have, sees no reason to displace what he had apparently gathered to have been the wishes of the mother, it seems to me that no sufficient ground has been shown for interfering with him in the performance of his duties. For these reasons it appears to me that the prayer of this petition should not be granted.

LORD ADAM—The mother of the children here died on 12th November 1902, and it is now the month of November 1903, and during these twelve months nobody can doubt, as your Lordship has said, that the material welfare of these children has been most properly considered. We had the picture of the state of destitution in which they were left by the father at his death, and we have the condition of them now, and comparing these two descriptions of the past and the present nobody can doubt that the material welfare of the children has been well attended to and well looked after by the respondent. Now, the character in which the respondent has so attended to and looked after these children is that of their tutor and guardian nominated by their mother in her last will, and the manner in which he has attended to these children reflects credit on him. The proposition now is that he has not fulfilled his duty to these children in respect that there was a legal obligation upon him as tutor and guardian of these children to have brought them up in the Catholic religion, and the first part of the prayer of this petition is that we should "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." I agree with what Lord M'Laren said in the course of the discussion, that we do not direct and give instructions to tutors and guardians. I never heard of us instructing a tutor to bring up a child in a particular way and approving of a scheme for that purpose. If a tutor is not doing his duty as he ought to do, the remedy is to remove him. That is the remedy, but the first part of the prayer is altogether out of the question—that we should approve of a scheme for bringing up these children in the Roman Catholic faith. The question really remaining is, Was there any duty upon him in the cir-

cumstances in which he received this appointment to bring up these children in the Roman Catholic faith? What we have got to consider is—here is a man appointed by the mother of these children, who survived her husband for three months. He and all his relations were Catholics. We are told on the other hand that his wife and all her relations were Protestants. Well, he died without giving any instructions as to how these children were to be educated. They were left under the legal guardianship of their mother, and we know how their mother undoubtedly conducted their education. She for some time had apparently, as we heard, adhered to the Catholic religion, which she had adopted in deference to her husband; but after his death she reverted to her own Protestant faith, and accordingly for a month before her death she sent the elder of these children to some Protestant school. She sent that child to a Protestant Sunday School, and otherwise manifested her interest in the Protestant faith. She left this will by which she desires that her children should be brought up in the Maryhill Industrial School, the Maryhill Industrial School being a Protestant institution—that one in particular, or if not that one, then in some other similar institution of a Protestant character. Now, that is the manner in which the respondent, the guardian, comes into possession. He finds the children under the custody of their mother; their natural guardian. He finds them sent to a Protestant Sunday School. He finds that the mother herself has returned to the Protestant faith, and that being the condition of matters, was he not perfectly right in continuing to bring them up in that faith? The question now is, after these children have been a year in the custody of this tutor, who has most eminently looked after their welfare, Are we to remove him? I think that no case has been made out for following such a course. I think that the respondent is doing his duty rightly to the children in the manner that the widow directed that he should do.

LORD M'LAREN—The case comes to us under somewhat different conditions from the generality of applications for the custody of children, because the object here is to obtain a direction from the Court to be enforced upon the guardian of the children as to their religious upbringing. Now, it is not disputed that Mr Maclay was lawfully appointed guardian by the mother of the children, on whom their guardianship had devolved by statute. Whatever may have been done in exceptional cases, the general rule is that the Court will not relieve a guardian of the responsibilities which attach to his office by instructing him what to do, but if he fails in his duty will upon proper application, and upon a case of misconduct being made out, relieve him from the office. There may be cases where guardians, who are admitted to be in all respects well qualified and desirous of doing their duty, have fallen into some error of judgment in regard to the mode of

education, as, for example, where a complaint is made that guardians who are doing their duty in other respects insist upon bringing up a young man who is heir to a great estate by private education instead of sending him to school. But I must say that in the only case of the kind of which I have recollection (*Stuart v. Moore*, 23 D. 51, and in H.L.) the judgment cannot be said to have been a great success, because it only leads to this result, that when once the Court undertakes to instruct a guardian in his duties you will find different courts taking different views as to the performance of these duties, as might happen amongst the guardians themselves. This is certainly not a case as to instructing the guardian in regard to his duties, and that might be a sufficient ground for dismissing this petition. It may, however, be satisfactory to parties if I add that in my opinion Mr Maclay has correctly interpreted the wishes of the mother, to whom he owes his appointment, by having the children brought up as Protestants.

LORD KINNEAR—I concur. I only wish to add that I do not think we have any such case before us as that suggested by the petitioners' counsel in argument of a conflict between the wishes of the father and the wishes of the mother. The father expressed no wish whatever, as far as we know, upon the subject of his children's education after his death, and I cannot find any facts set forth in the petition from which I at least could draw the inference that he had ever given any deliberate consideration to the subject at all. All that I can see set forth in the case is that he died in very unhappy circumstances, and left his children to the uncontrolled guardianship of their mother. I decline therefore to draw any conclusion of deliberate desire on his part that his children should be brought up either as Roman Catholics or Protestants. I think it is likely enough that the father, being a Roman Catholic, might like to have his children brought up as Roman Catholics too, but that is a mere conjecture by no means equivalent to an express desire on his part which should come into conflict with the wishes of the mother. How the question should be determined in the event of any such conflict arising I do not consider, because the question is not before us. The mother had undoubtedly right under the Act of Parliament to appoint a guardian to these children, and the circumstances under which the respondent was appointed made it perfectly clear that when she did appoint him she had clearly in view that he would bring up her children as Protestants and desired that he should do so. I say so because we are not asked to refuse to believe, and there is no reason why we should not believe, the perfectly clear and distinct statement of the respondent. He says that the way in which he became acquainted with these people at all was in consequence of his making a visit in the house of the widow, because the elder child had attended the Sabbath

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