

scarcely be possible to conceive a larger power of control and disposal of a child than is thus conferred upon him. But no such power is conferred on the fathers and mothers whom he places in the actual charge of the children. They have no power over the children except what is derived from Mr Quarrier, nor have they any responsibility with respect to them except that which they undertake to him. It therefore appears to me that they are not the "parents" of the children within the meaning of the Education Act; and that consequently the Lord Ordinary is right in sustaining the plea of no title to sue.

The second question is, whether this Court has the power and the duty to determine whether a proper amount of accommodation for elementary teaching is provided by the School Board of the parish of Kilmalcolm, in respect that it has not made, and declines to make, provision for receiving and educating the children resident in Mr Quarrier's Homes, or whether the sufficiency of the school accommodation provided falls to be determined by the Scotch Education Department. Seeing, however, that, for the reasons already assigned, it appears to me that the pursuers have no title to sue, and that consequently the action should be dismissed, I think that it is unnecessary to express any opinion upon this second question.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuers and Reclaimers—Clyde, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders and Respondents—Sol.-Gen. Dickson, K.C.—M'Clure. Agents—Cumming & Duff, S.S.C.

Tuesday, March 10.

## FIRST DIVISION.

### ALEXANDER, PETITIONER.

*Minor and Pupil—Custody—Orphans—Paternal Grandfather and Nearest Male Aagnate in Question with Maternal Uncle—Welfare of Children—Religion—Respective Material Advantages of Homes Offered—Grandfather Residing in House of Niece.*

A petition for the custody of two pupil children whose parents were dead was presented by the children's paternal grandfather, who was the nearest male agnate of the children. Answers were lodged by the maternal uncle of the children, with whom the children had resided since the death of their father and for some time prior to that event. The petitioner was a Protestant and the

respondent was a Roman Catholic. The father of the children had originally been a Protestant, but became a Roman Catholic prior to his marriage, his wife being a member of that Church; but some time before his death he again became a Protestant, and was a Protestant at the date of his death. The children had been baptised according to the rites of the Roman Catholic Church. Shortly before his death the father had consulted a Presbyterian minister with a view to having the children removed to a "home," and he made no objection when the minister suggested a certain Protestant orphanage. The petitioner lived with a niece to whom he paid nothing for board or lodging. She was willing to receive the children, and to do all in her power for them. The circumstances of the petitioner's niece and of the respondent respectively were such that the home offered by the petitioner afforded a greater prospect of material wellbeing and better prospects of advancement in life to the children than the home of the respondent. As regards the moral training which the children were likely to receive in the two houses respectively, there was no reason for drawing a distinction.

Having regard to the physical welfare of the children, and in view of the inference, from the latest expression of the father's wishes, that he would have had no objection to the children being brought up as Protestants, the Court granted the prayer of the petition.

John Alexander, miner, residing at Lochend Cottages, Kirkliston, Linlithgowshire, died there on November 7, 1902, leaving two pupil children, Mary Jane and Mary Anne.

John Alexander's wife, Mrs Jane M'Garrity or Alexander, predeceased him on May 31, 1902. After his wife's death John Alexander, with his two children, took up his residence with his brother-in-law, Patrick M'Garrity, miner, and his wife, at Lochend Cottages, Kirkliston, and the children after their father's death continued to reside there.

On December 5, 1902, William Alexander, labourer, Old Town, Broxburn, father of the deceased John Alexander and grandfather of the two children, with the concurrence of their father's sister, and of their father's cousin, the petitioner's niece Mrs William Anderson, presented a petition praying the Court to find him entitled to the custody of the children, and to ordain Patrick M'Garrity to deliver up the children to him.

The petitioner stated—"The deceased John Alexander and his family, including the petitioner, were and are Protestants, and John Alexander was very desirous and intended that his children should be brought up in that faith. . . . The said children are in the custody of Patrick M'Garrity, who is a Roman Catholic. M'Garrity is in poor financial circumstances, and not in a position to properly maintain and educate said children. His weekly wage is about thirty

shillings, and out of this sum he has to maintain himself, his wife, and three of a family. . . . The petitioner resides with his niece Mrs William Anderson in the Old Town, Broxburn, and if he obtains the custody of said children his niece is prepared to offer, and hereby offers, them a comfortable home. She is fifty years of age, has had children of her own, who are all grown up and forisfiliate, and she is in the enjoyment of a good income. Mrs William Anderson is prepared, along with the petitioner, to undertake the care of said children."

Patrick M'Garrity lodged answers to the petition. He stated—"The said John Alexander and his two children for five months previous to his death resided with the respondent. He came to the respondent's house with his said children shortly after his wife's death, and placed them under the care of the respondent and his wife, in whose custody they still are. Since the children have been under the care of the M'Garritys their father was well pleased with the attention bestowed upon them, and made no complaint on the subject to the respondent or his wife." He denied that the deceased John Alexander was a Protestant and was desirous and intended that his children should be brought up in that faith. He averred that the deceased previous to his marriage was received into the Roman Catholic Church and was married according to the rites of that Church; that the children of the marriage were all baptised in the Roman Catholic Church in conformity with the instructions and wishes of their parents; that he himself was a Roman Catholic; that he had a comfortable home, and that he and his wife were much attached to the children; that he was willing to make all provision for their comfort and education. He submitted that the children should be allowed to remain under his care, but that if the Court deemed it expedient to make a change the children should be transferred to a Roman Catholic Home.

The respondent further stated—"The petitioner lives in lodgings with his niece Mrs William Anderson, who occupies a two-roomed house in the Old Town, Broxburn. The petitioner is a very old man, and has been unable to work for a number of years. Said Mrs Anderson's income is in part derived from a public-house tenanted by a son-in-law. The public-house is in the immediate vicinity of Mrs Anderson's house, and on that account, and on account of her relationship to the tenant, her home is not a suitable one."

On January 20, 1903, the Court remitted to Andrew Rutherford, Esq., Sheriff of the Lothians and Peebles, to inquire and report as to the facts and circumstances.

In his report Sheriff Rutherford stated, *inter alia*, as follows:—"John Alexander, miner, son of the petitioner William Alexander, was married on the 24th of July 1890, according to the rites of the Roman Catholic Church, to Jane M'Garrity, sister of the respondent Patrick M'Garrity. John Alexander had been brought up as

a Protestant, but shortly before his marriage he joined the Roman Catholic Church, of which his wife and her relations were members.

"In May 1895 John Alexander was at his own request admitted a member of the Established Church of Scotland by the Rev. Alexander Masson, minister of the parish of Kirkliston, in which Alexander then resided. He took part in the communion service in Mr Masson's church on at least one occasion, and attended divine service there (although not regularly) down to the year 1897 or 1898, when he went to Cambuslang in Lanarkshire. Sometime before he left Kirkliston Alexander expressed to Mr Masson his desire that his wife should become a Protestant, and requested him to speak to her on the subject; but Mr Masson had no opportunity of doing so before she went to Cambuslang.

"In May 1902, while Alexander was at Cambuslang, his wife died. They had five children, three of whom died in infancy. They were all five baptised according to the rites of the Roman Catholic Church, but one of them, Mary Anne, not until some days after her father's death.

"After his wife's death, Alexander returned to Kirkliston, and with the two surviving children, Mary Jane and Mary Anne, took up his residence with his brother-in-law the respondent Patrick M'Garrity, to whom he paid for board and lodging sixteen shillings per week.

"On the 5th of November 1902 Alexander called upon the Rev. Mr Masson, to whom he stated that he desired his children to be placed in a "Home," as he did not think that they were quite so well cared for as he wished them to be, and Mr Masson said that he would inquire if they could be received into the Robertson Orphan Home at South Queensferry, which is supported by the Church of Scotland. Mr Masson, however, did not do so, as Alexander died two days afterwards, on the 7th of November 1902, in consequence of an accident which he met with at his work. He left no property of any value, and died intestate without naming guardians for his children.

"Shortly after John Alexander's death, and before the present petition was presented to the Court, M'Garrity caused the girl Mary Anne to be baptised by a Roman Catholic clergyman, in accordance, as he stated, with the father's instructions to that effect given before his death.

"The elder of the two girls, Mary Jane Alexander, appeared to be a healthy intelligent child. She is well grown and well nourished, and was decently although rather poorly clothed, but not worse clad than many miners' children are. She stated that she and her sister are happy, and have been kindly treated by the respondent and his wife. She also said that she liked the petitioner her grandfather, who had been kind to her. Both the girls are attending the Lochend Board School near Ratho railway station.

"The respondent Patrick M'Garrity is a miner, thirty-seven years of age, earning

at present 32s. per week of wages. He occupies a house near Kirkliston containing two rooms, for which he pays a rent of 3s. 2d. per week. He has now five children of his own.

"In April 1902 one of M'Garrity's children was suffering from diphtheria, in consequence of which Mr Adamson, sanitary inspector for the parishes of Ratho and Kirkliston, called at the house, which he said that he found in a very dirty condition. After causing the house to be disinfected he gave orders to Mrs M'Garrity to have it properly cleaned, but on the 9th of May he found that had been only partially done. On the 14th and 20th of November last Mr Adamson again visited the house, but found that it was still in a very dirty and insanitary condition, which he accounted for by the fact that M'Garrity's wife, who is not a strong woman, had not been able to do the necessary cleaning in addition to her other work.

"Mrs M'Garrity is twenty-six years of age, and her four eldest children are aged eight, five, three, and two years respectively. She gave birth to her fifth and youngest child on the 10th inst., the day before the inquiry was held, so that she was unable to be present.

"The respondent and his wife are both Roman Catholics, and he stated to the Sheriff that the sole ground on which he refused to part with the custody of the children, and opposed the present application to the Court, is that he does not wish them to be brought up as Protestants. He also stated that he is attached to the children, and is willing to do the best that he can for them.

"The respondent has been for many years in the employment of Young's Paraffin Light and Mineral Oil Company, Limited, and he appears, from certificates from his employers, which were produced, to be a steady, sober, and respectable man.

"The petitioner is in the seventy-second year of his age. For several years past he has resided at Broxburn, in the house of his niece Mrs Anderson, to whom he has paid nothing for board and lodging.

"Mrs Anderson is fifty-four years of age and the mother of three grown-up children. The house which she occupies is her own, and contains kitchen, scullery, and three bedrooms; the inmates being herself and her husband, the petitioner, her granddaughter, who is fourteen years of age, and a servant.

"Mrs Anderson is proprietrix of another house in Broxburn, which is occupied, rent free, by her son-in-law John Haston. She has also other house property which yields a nett rental of between £30 and £40 per annum; and she carries on the business of a public-house, from which she draws £30 to £35 per month. The petitioner and Mrs Anderson are both adherents of the Church of Scotland, and they are desirous that the two pupil children should be brought up as Protestants.

"There is a board school within a few minutes' walk of the house in which the petitioner and Mrs Anderson reside.

"Mrs Anderson, who appeared to be a very respectable woman, stated that she is anxious to do everything in her power to promote the welfare of the children."

At the date of the petition the children were respectively eight and three years of age.

Argued for the petitioner—The petitioner was the nearest male agnate of the children, and therefore their tutor-at-law and entitled to direct their education. The father of the children was a Protestant, and the facts stated by the reporter showed that, though at his marriage he became a Roman Catholic, he again became a Protestant and desired to have his children educated in that faith. In these circumstances the fact that the children had been baptised in the Roman Catholic Church was no reason for refusing to grant the custody of the children to the petitioner, their natural guardian—*Morrison v. Quarrier*, June 9, 1894, 21 R. 889, 31 S.L.R. 884; *Reilly v. Quarrier*, July 10, 1895, 22 R. 879, 32 S.L.R. 664. In cases of this kind the interest of the children was the paramount consideration, and on the facts before the Court there could be no question that the home of the petitioner offered better prospects of comfort and health to the children than could be offered in the home of the respondent.

Argued for the respondent—The important consideration in this case was that of the religion in which the children were to be brought up, and on that question the predominating fact was that the children had been baptised and trained in the Roman Catholic Church. The father's religious convictions had fluctuated; his actions showed that he meant the children to be brought up as Roman Catholics. The father's wish in that matter should receive effect. The fact that the petitioner was tutor-at-law to the children did not entitle him to the custody. The tendency of recent decisions and statutes (*e.g.*, the Guardianship of Infants Act 1882) was to have regard to the wishes of the mother as to the personal custody of pupil children, and the mother in this case was a devout Roman Catholic during her whole life. The question of physical comfort was admittedly an element to be considered, but in this case the advantage or disadvantage of the homes offered by the petitioner and respondent respectively left little to choose on that ground. The children had been well cared for by the respondent, and his home had been deliberately chosen for them by their father before his death. If the Court thought it expedient the respondent was willing to arrange for the children being brought up in a Roman Catholic Home. In any event, the petition should only be granted on the petitioner coming under an obligation secured by caution to bring up the children in proper comfort.

LORD PRESIDENT—This is a petition at the instance of the paternal grandfather of two pupil children, both of whose parents are dead. The petitioner is the nearest male agnate of the children, and answers have been put in by the maternal uncle of

the children. The attitude of the relations of the children on both sides of the house is highly creditable.

In a case of this kind the main and governing consideration is the welfare of the children, but undoubtedly a person in the position of the petitioner, as nearest male agnate, is in a strong position.

John Alexander, the father of the children, died on November 7th 1902 predeceased by his wife. He had originally been a Protestant, but he became a Roman Catholic prior to his marriage, his wife being a member of that communion, but he again became a Protestant at the time of his death.

The petitioner is a Protestant, and M'Garrity, the maternal uncle of the children, who has lodged answers, and his wife, are Roman Catholics. The element of religion thus enters into the question who should have the custody of the children.

The petitioner resides with his niece, who is in a comfortable position. She is fifty-four years of age, has had children of her own, who are now grown up and foris-familiated, and she offers to the two children in question a comfortable home. If the children are sent there they will be under the same roof with their paternal grandfather, and will have a higher degree of comfort and better opportunities of advancement in life than the respondent could provide for them.

The house of the respondent is a crowded one. It consists of two rooms, and he has a wife and five children living with him in it. His house, too, is not very sanitary. One of his children had diphtheria a year ago, and the sanitary inspector found the house in a dirty condition, and in spite of orders given by the inspector that the house should be thoroughly cleaned its condition had not much improved as late as November of last year. This is attributed to the fact that his wife is not a strong woman and is unable to do the necessary cleaning. M'Garrity earns 32s. a-week, and he and his wife are respectable and kindly people. But if the question is between the sort of house which they occupy and the comforts which the children would enjoy in the house of the petitioner's niece, there is no question that the latter holds out better prospects of health and prosperity for the children than the former.

Mr Campbell maintained that the predominant element in deciding the matter is the question of the religion in which the children are to be brought up. As already stated, the father of the children was originally a Protestant, and although he became a Roman Catholic, he subsequently returned to and died in the Protestant faith. Under these circumstances it is natural that these children should be brought up in that faith.

In the whole circumstances it appears to me that it would be best in the interest of the children that the custody of them should be granted to the petitioner.

LORD ADAM—The question here is, what is best for the welfare of the children? In

determining that we must consider not only material welfare but also the element of religious faith.

Now, so far as material considerations are concerned there is no doubt that the children will be better with the petitioner Alexander. The house of M'Garrity, the respondent, is small and insanitary. He has five children and his wife is not strong.

That being so, is there any reason in respect of the wishes of the father as to the religious faith in which the children are to be brought up, why we should refuse to the petitioner the custody of the children? If I were satisfied on the evidence that it was the wish of the father that his children should be brought up in the Roman Catholic faith, it would be a determining element. But I am not satisfied that such was his wish. Mr Alexander was brought up as a Protestant, but on his marriage in 1890 to his wife, who was a Roman Catholic, he joined the Roman Catholic Church, and continued to profess that faith until 1895. He again became a Protestant, was admitted a member of the Established Church, took part in the communion in that church, and he died a Protestant. His children were baptised in the Roman Catholic Church. This is not matter of surprise during the life of his Catholic spouse, but it does not follow that if he had been left to his own impulses they would have been baptised in that church. In 1897 he spoke to the clergyman of the Established Church as to his desire that his wife should be converted to Protestantism. Some days before his death he came to the minister of the Established Church and asked him to arrange that the children should be sent to a Protestant "Home." This is the last thing we know as to the father's wishes in the matter of the religious faith in which his children were to be brought up. Accordingly, it is not made out to my satisfaction that the ultimate wish of the father was that his children should be Roman Catholics.

I see no ground for exacting caution from the petitioner, or for putting him under any formal obligation as a condition of granting the petition.

LORD M'LAREN—The first consideration in a question of this kind is the material and moral welfare of the children, although the form of the religious faith in which the children are to be trained may also be important, especially when the wishes of the parent have to be considered. In this case the petitioner and the respondent are each prepared to do the best for the children. When we consider the circumstances of the petitioner and respondent respectively, there is no doubt on which side the material benefit to the children will lie. As regards the moral training which the children are likely to receive in the two houses respectively, we have no reason for drawing a distinction. In regard to the matter of religious faith, we have to consider whether anything in the conduct of the father of these children would lead us to believe that he would have objected to the children being brought up in the Protestant

faith. At his marriage he went over to the Roman Catholic Church to please his wife. Some years after the marriage he returned to the Protestant Church. The children continued during their mother's lifetime and, as I understand after her death, to attend the Roman Catholic Church, but this was because they were living with their mother's relatives, who were Roman Catholics. We know on unimpeachable testimony that the father of the children attended the Established Church; called on the minister desiring him to make an effort to convert his wife to Protestantism; and that a few days before his death he expressed his willingness to have his children sent to a Protestant "Home." I think it must be taken that according to the latest expression of the father's wishes it would not be an objection that his children were to be brought up as Protestants.

In the Guardianship of Infants Act the points on which stress is laid are the welfare of the child, the character and conduct of the parties, and the wishes of the mother as well as of the father. Here the father was the surviving parent. In the whole circumstances I think that the custody of these children should be entrusted to the petitioner.

**LORD KINNEAR**—The main consideration is the interest of these children. On the Sheriff's report I do not think it doubtful that the petitioner will be able to provide for the children a more comfortable and also a more wholesome home, and to give them a better start in life, than the respondent with all his goodwill can provide. Other things being equal I should attach some importance to the position of the petitioner as the nearest agnate of the children. As such he has a legal right to the office of tutor-at-law. Mr Campbell says that the tutor-at-law has not the custody of the pupil's person. I do not think the presumption on which that doctrine of our older law was founded has any kind of application to such a case as the present. But it is common ground between the parties that the main question in dispute is whether the children are to be brought up as Protestants or as Roman Catholics; and by the law to which Mr Campbell refers the tutor-at-law has the absolute direction of the child's education. I do not doubt, however, that if it were clear that the father of the children was a convinced Roman Catholic, and had desired his children to be brought up in the Roman Catholic Church, the Court would give due consideration to his wishes. But I see no evidence in this case that the father had any intention to bring up his children as Roman Catholics. The evidence is all the other way. We are informed that the father, although he had joined the Roman Catholic Church at his marriage, had returned to his own Communion, had attended the parish church, and desired the parish minister to speak to his wife with a view to her conversion to Protestantism. It appears also that only two days before his death the father consulted the minister of the Established

Church with a view to providing a more suitable home for his children, and that he made no objection to the minister's suggestion that they should be sent to a Protestant Home. Now, all this shows no intention to bring up his children as Roman Catholics. On that evidence I should come to the conclusion that the father would prefer, or at all events would have no objection to, his children being brought up in the Protestant faith. I therefore come to the conclusion that it would be for the children's advantage to put them under the care of their grandfather, and that there is no sufficient reason for refusing to do so to be found in the evidence as to the father's religious faith.

As regards the proposal that a specific obligation should be put on the petitioner and secured by caution, I think that, as we are informed by the Sheriff that the petitioner and his niece are respectable persons and anxious to do their best for the children, it is unnecessary for the Court to take that unusual course.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Crabb Watt—Morton. Agent—W. A. Farquharson, S.S.C.

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

Saturday, March 7.

## SECOND DIVISION.

[Sheriff Court of Lanarkshire, at Glasgow.]

### MULHOLLAND v. GLASGOW HARBOUR TUNNEL COMPANY.

*Reparation—Negligence—Duty to Public—Public Hoist—Averments of Defective Apparatus and Failure to Provide Skilled Management—Specification of Cause of Accident.*

In an action of damages for personal injury against the owners of a public hoist, the pursuer averred that there was a space between the foot of the door of the cage and the floor of it which was not fenced or protected otherwise than by a loose piece of flexible and worn-out canvas cloth, that while he was ascending in the hoist it gave a violent jerk upwards, causing him to lose his balance, and flinging him through the said canvas cloth against the framework in which the cage moved, and that the accident was caused through the fault of the defenders in "not providing necessary and sufficiently strong sides and doors to the said hoist or cage, in allowing said lowering and raising apparatus to remain in a defective and unsafe condition, causing it to rise in irregular and unexpected jerks instead of ascending in a regular and graduated manner,