Saturday, December 12, 1908.

OUTER HOUSE.

[Lord Mackenzie.

BATHGATE HERITORS *v.* RUSSELL.

Process—Title to Sue—Heritors—Action at instance of Heritors of a Parish, and A B, "Clerk to and as representing said Heritors."

A note of suspension and interdict was presented by the heritors of a parish, and A B, "clerk to and as representing said heritors." *Held* (*per* Lord Mackenzie), on an objection to the complainers' title to sue, that the instance was good.

The Heritors of the Parish of Bathgate, and John Wright, clerk to and as representing them, presented a note of suspension and interdict against William Russell and the Bathgate Corn Exchange Company, of which he was the only known partner. The complainers sought to prevent certain proposed encroachments on the churchyard of which they were proprietors, consequent on a scheme for alteration and improvement of the respondent's property which abutted thereon.

The case having come into the Court of Session on a passed note from the Bill Chamber, the respondents maintained their first plea, viz., no title to sue.

At the discussion in the Procedure Roll the following authorities were referred to:—*Kirk Session of North Berwick* v. *Sime*, November 14, 1839, 2 D. 23; *Magistrates of Edinburgh*, July 18, 1881, 8 R. 982, 18 S.L.R. 706; Mackay's Manual, p. 156; *Lyall* v. *Commissioners of Supply for Lanark*, July 5, 1859, 21 D. 1136; *Boswell* v. *Duke of Portland*, December 9, 1834, 13 S. 148; *Heritors of Kinghorn* v. *Magistrates of Kinghorn*, March 12, 1897, 24 R. 704, 34 S.L.R. 518; *Corporation of Glasgow* v. *M'Ewen*, November 23, 1899, 2 F. (H.L.) 25, 37 S.L.R. 620; *Smith* v. *Heritors of Prestonpans*, January 27, 1903, 5 F. 333, 40 S.L.R. 303; Duncan's Parochial Ecclesiastical Law (Johnston's ed.), pp. 518 and 534.

LORD MACKENZIE—"I have considered the authorities cited, and am of opinion that the instance is good.

"Heritors in regard to such a matter as the present are to be regarded as a *quasi* corporation. The plea to title will therefore be repelled.

"On the merits of the case there must be a proof."

The Lord Ordinary repelled the first plea-in-law for the respondents, and before answer allowed a proof.

The case was subsequently settled.

Counsel for the Complainers—Sandeman. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Respondents—Macphail. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, January 6, 1909.

OUTER HOUSE.

[Lord Skerrington.

HUTCHEON AND OTHERS *v.* ALEXANDER AND OTHERS.

Judicial Factor — Factor loco tutoris — Appointment—Objection to Nominee of Nearest Agnate — Discretion of Court — Neutral Appointment.

Where a petition for the appointment of a factor *loco tutoris* to a pupil boy was presented by certain of his relatives, including the nearest agnate, in which they nominated a certain person as suitable for the office, and the pupil and certain other relatives lodged answers objecting to the person nominated and suggested one of their own number for the office, the Court (Lord Skerrington) *appointed* a neutral professional man to the office.

Sinclair v. *Sutherland*, December 19, 1829, 7 S. 214, and *Jackson* v. *Wright*, June 19, 1835, 13 S. 961, *commented on.*

Judicial Factor—Curator Bonis—Minor—Appointment—Opposition of Minor to Appointment—Power of Court to Appoint in Face of Minor's Opposition.

Question as to the power of the Court to appoint a *curator bonis* to a *minor pubes* who objects.

John Alexander, chemist and druggist, Aberdeen, died on December 1, 1908, intestate and without having named a tutor and curator to his surviving children, viz., Helen May and John, who were respectively in minority and pupilarity. A petition was presented by Edward Hutcheon, a maternal uncle of the children, Robert Mearns, their nearest agnate, and certain other relatives, craving the appointment of John Rattray Flockhart, C.A., as *curator bonis* and factor *loco tutoris* to the children. Answers were lodged thereto by the two children and certain other relatives, in which (1) Helen May Alexander objected to the appointment of a *curator bonis* on the ground that she was a *minor pubes* and therefore entitled to choose curators for herself, and (2) the other respondents objected to the petitioners' nominee and suggested that either Henry Hutcheon or George Duff Boddie, who were respectively brother and brother-in-law of the deceased mother of the children, should be appointed factor *loco tutoris* to the pupil child.

It was argued for the petitioners that the Court, in the absence of any good reason shown to the contrary, ought to appoint to the office the nominee of the nearest agnate — *Sinclair* v. *Sutherland*, December 19, 1829, 7 S. 214; *Jackson* v. *Wright*, June 19, 1835, 13 S. 961; *Simpson*, November 17, 1860, 23 D. 35.

In answer the respondents quoted *Armit*, May 25, 1844, 16 Scot. Jur. 471, and argued further that it was not competent for the Court to appoint a *curator bonis* to a *minor pubes* against his will—*Hutchison*,

July 12, 1881, 18 S.L.R. 725; *Macdonald*, April 30, 1895, 4 S.L.T. 4.

LORD SKERRINGTON—"I refrain from expressing any opinion on the general question as to the power of the Court to appoint a *curator bonis* to a *minor pubes* in the face of opposition on the part of the minor. In certain circumstances it might be proper to appoint a curator *ad litem* to confer with the minor, and upon his report I should be disposed, if I thought the case an urgent one, to report the matter to the Inner House. On the other hand, it seems to me that there would require to be exceptional circumstances to justify such a step and in the present case I do not think there are any such circumstances.

"With regard to the person who should be appointed as factor *loco tutoris* to the pupil boy, I cannot say that I attach much importance to the case of *Sinclair*, 7 S. 214, or to the case of *Jackson*, 13 S. 961, quoted by the petitioner's counsel as laying down any rule to the effect that the Court ought to appoint the person nominated by the nearest agnate. The case of *Jackson* suffers somewhat severely from the criticism of the Lord Justice-Clerk in the case of *Armit*, 1844, 16 S.J. 471. As regards *Sinclair's* case, the Court did no more than express a preference for the course recommended by the relations of the father rather than for that recommended by the relations of the mother.

"In the whole circumstances I am of opinion that the right course in the present case is for me to appoint a neutral professional man of my own selection as factor *loco tutoris*.

"I shall give Mr Wilson an opportunity of communicating with those instructing him so as to enable them, if so advised, to lodge in process a letter from the minor *pubes* consenting to the appointment of the same gentleman as *curator bonis*."

The Lord Ordinary appointed Walter A. Reid, F.F.A., Aberdeen, to be factor *loco tutoris* to John Alexander, with the usual powers, and *quoad ultra* refused the petition.

Counsel for the Petitioners — A. M. Mackay. Agent—D. Hill Murray, S.S.C.

Counsel for the Respondents — D. M. Wilson. Agents—Kinmont & Maxwell, W.S.

Wednesday, July 17, 1907.

FIRST DIVISION.

[Lord President and a Jury.

TULLY *v.* NORTH BRITISH RAILWAY COMPANY.

[Reference is made to the cases of *Mitchell* and *Strachan* v. *Caledonian Railway Company*, reported *ante*, p. 517, in which the case now reported was referred to by the Lord President.]

Process—Jury Trial—Withdrawal of Case from the Jury—Contributory Negligence.

Circumstances in which, in the opinion of the Lord President, a case which had gone to jury trial should have been withdrawn out of the hands of the jury.

Reparation — Negligence — Contributory Negligence—New Trial.

In an action for damages at common law for the death of a husband, brought against a railway company, the evidence showed that the deceased was killed while crossing a siding at the coal pit where he was employed; that in order to get to the other side he was creeping under the buffers of some stationary waggons lying on the siding when they were struck and set in motion by the rear waggon of a train of waggons which was being shunted backwards into the siding; that had he looked before beginning to cross he would have seen the approaching train which must have then been quite near. It was maintained that no proper lookout had been kept by the railway servants, that if such reasonable care had been taken the accident would not have occurred, and consequently that the deceased's conduct could not be considered "contributory negligence."

Held that the deceased's conduct constituted "contributory negligence," and that a verdict which had been obtained must be set aside and a new trial granted.

Radley v. *London and North-Western Railway Company* (1876), L.R., 1 A.C. 754, *distinguished*.

On 11th December 1906 Mrs M. Blackie or Tully, Dalkeith, brought an action against the North British Railway Company for £750 damages in respect of the death of her husband through the alleged fault of the defenders.

The pursuer averred—"(Cond. 1) The pursuer is the widow of the late James Tully, who at the time of his death, as hereinafter condescended on, was a dross waggon trimmer in the employment of the Lothian Coal Company (Limited) at the pit-head of their Lady Victoria Pit, Newbattle Colliery, Newtongrange. The said Lady Victoria Pit is situated on the east side of the defenders' main line of railway between the stations of Dalhousie and Gorebridge. (Cond. 2) For the purpose of dealing with the traffic from the said pit