Lord Deas—A decree of disjunction and erection was pronounced on 9th December 1846, by which certain lands were erected into a new parish, to be called the parish of Lochgilphead; and on looking at that decreet there is plainly room for question whether the farms in dispute do or do not belong to the parish in question. I agree in thinking that the 9th section of the statute puts that at the disposal of the Board of Education; when you come near the end of the section you must read it thus—"any question or dispute regarding the area of any parish or" the area of any "burgh." This is a question relating to the area of a parish, depending on the effect to be given to that decreet of disjunction. The question put to the Board was, "Whether the farms of Daill and Craiglass, according to the terms of the decreet, form part of the parish of Lochgilphead *quoad sacra*." That is the question they had to consider; it was their duty to apply their minds to the terms of the decreet, to hear parties concerned, and to consider whether they should interpret it themselves or send it to the Sheriff. They did not hear parties, and did not consider whether they should send it to the Sheriff, and consequently they do not give a properly framed answer at all; their answer looks as if they thought they had an arbitrary power to add to one parish and take away from another. I am of opinion therefore that, as the case stands, there is no finality in their deliverance, for they have not done the thing they were asked to do. If they had themselves considered the terms of the decreet and heard parties, or taken the more proper course of sending the case to the Sheriff, that determination would have been final.

Lord Mure concurred.

Lord Shand—I agree that under the 9th section of the Act such a matter as this falls to be determined by the Board of Education, and if the Board themselves decide it or send parties to the Sheriff, that determination, having the limited effect of determining the bounds of the parish for the purposes of this Act, is final.

I think it is rather a narrow view of the question to say that the matter is not dealt with in the deliverance of the Board of Education. I prefer to put my judgment on the ground that they did not hear the parties interested. They should either have called some one who had an interest on the opposite side, or waited till some one should have an interest to appear on the other side.

The Court pronounced this interlocutor:—

"Find and declare that the question or dispute, Whether in terms of the decreet of disjunction and erection, dated 9th December 1846, the farms of Daill and Craiglass form part of the parish of Lochgilphead or of the parish of South Knapdale, is by sec. 9 of the Act 35 and 36 Vict. chap. 62, and for the purposes of that Act, competent only to the Board of Education, or to the Sheriff of the county, as therein provided: But find that the determination of this question by the Board of Education, by their minute of 13th April 1873, having been made and issued without hearing the party of the second part, or giving opportunity for any party representing the parish of South Knapdale being heard on the said question, is not valid or final, and that the said question or dispute still remains to be determined by the said Board of Education or the Sheriff, in terms of sec. 9 of the said Act: Therefore the Court answer the first question in the negative, and for want of jurisdiction decline to answer the second and third questions."

Counsel for First Parties—Darling. Agents—Tods, Murray & Jamieson, W.S.

Counsel for Second Parties—Kinnear. Agents—Mackenzie & Kermack, W.S.

Wednesday, January 31.

FIRST DIVISION.

PETITION—LILLEY.

Parent and Child—Custody of Children—Husband and Wife.

Held that where neither parent is personally disqualified for the custody of a child, the right of the father must prevail.

Husband and Wife—Expenses.

In a petition by a father for the custody of his child, which was granted, the petitioner *found* liable in expenses.

This was a petition presented by the Rev. J. P. Lilley for the custody of his infant child. He was married to the respondent in July 1875, and on returning home from a visit to his father in March 1876 found that his wife had left his house. She was delivered of a female child on 19th May 1876, in her sister's house, and since that date had remained there with the child. Answers were lodged by the respondent, narrating the causes of her leaving her husband's house, and stating that the child though healthy was not robust, and required all the care a mother could give it. She offered the petitioner free access to the child as he might propose or the Court fix. The petitioner made the same offer to her if the Court should grant his petition.

When the case first came before the Court, as it appeared that the child had not been baptised, their Lordships postponed consideration of the petition for a week that this might be done, as parties' counsel should arrange.

Argued for the petitioner—Without going into the merits of the dispute between the parties or touching on the allegations made against the petitioner, this question may be dealt with as one of legal right. It is necessary before a father can be deprived of the custody of his child that some danger to life, health, or morals should be shown to be a likely consequence of its being given into his care, and there can be no such danger apprehended here.

Authorities—*Lang* v. *Lang*, January 30, 1869, 7 Macph, 446 (Lord Neaves' opinion); *Nicolson* v. *Nicolson*, July 20, 1869, 7 Macph. 1118; *Steuart* v. *Steuart*, June 3, 1870, 8 Macph. 821; *Curtis*, May 7, 1859, 5 Jurist (n.s.) 1148, 28 L. J., Ch. 459.

Argued for the respondent—The circumstances here, without considering the allegations made against the petitioner, take this case out of the ordinary rule. The child has never been in the father's house; it is of a very tender age, and a girl. The Court in such a case must determine the matter according to the child's interest. In

Lang's case the parents had been separated, and the children were aged 7 and 5. *Nicolson's* was quite a unique case. In *Steuart's* case there was a family of eight children all living with the father, and the child whose custody was asked by him was 4 years old. In *Symington's* case (H. of L., March 18, 1875, 2 Rettie 41), the Lord Chancellor lays it down that in such a question the Court must attend to the interest of the children above all.

At advising—

LORD PRESIDENT—The question is, Whether in the circumstances of this case the father or the mother is entitled to the custody of their only child? The child is 8 months old, and has been weaned. It was not born in the father's house, the mother having left his house while in an advanced stage of pregnancy, and gone to live with her sisters, where she still remains. The case would not be substantially different if the child had been born in the father's house and the mother had recently left the house taking the child with her. Neither the father nor the mother are personally disqualified to have the custody of the child. There are no other considerations of a special nature affecting the question.

In these circumstances, the Court is of opinion that, in accordance with previous cases, the right of the father must prevail. We shall therefore make an order substantially in terms of the prayer of the petition. But before the order is signed some arrangement must be made to secure that the mother shall have proper and reasonable access to the child.

The Solicitor-General, for the petitioner, proposed that the child should be sent to the mother's house in Arbroath once a-week, from eleven till six, and that the mother should have an opportunity of visiting it at the father's house at anytime.

BALFOUR, for the respondent, stated that he had no authority to say that that arrangement would be satisfactory, and therefore left it in the hands of the Court.

The respondent moved for expenses. In *Nicolson's* case, quoted above, the husband was found liable in expenses, and that is the rule in all such questions between husband and wife. That the respondent here is possessed of considerable private estate is immaterial, for the question is eminently personal.

The Court pronounced the following interlocutor:—

"Find that the petitioner is entitled to the custody of the child of the marriage between him and the respondent: Therefore decern and ordain the respondent forthwith to deliver up the said child to the petitioner, or anyone having his authority to receive delivery, but reserving to the respondent right of access to the said child as follows, *videlicet*:—The petitioner to send the child to the respondent's residence in Arbroath on a visit to her once a-week, on any day she may select, to remain with the respondent from eleven a.m. to six p.m.; the respondent to be also entitled, but without any attendant, to visit the said child in the petitioner's house, without the petitioner being present, at any time she may desire: *Quoad ultra* continue the cause, that either party may here after move the Court in the event of any change of circumstances: Find the petitioner liable to the respondent in the expenses hitherto incurred, and remit to the Auditor to tax the account thereof, and report."

Counsel for Petitioner—Solicitor-General (Macdonald)—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Respondent—Lord Advocate (Watson)—Balfour—H. Johnston. Agents—Leburn & Henderson, S.S.C.

Wednesday, January 31.

SECOND DIVISION.

HAY'S TRUSTEES *v.* YOUNG.

Interdict—Trespass.

Where a person entered upon the lands of another, and executed certain operations thereon, in good faith, and believing that he had the authority of the proprietors, and where there was no apprehension of the recurrence of the offence, the Court refused an application for interdict at the instance of the proprietors.

This was an appeal against an interlocutor pronounced by Sheriff Pattison in a petition presented on 1st February 1876 by the Trustees on the Dunse estates, as proprietors of the Lands of Berrywell, against George Young, farmer and plumber, Blackadder, Westside. The petitioners prayed for interdict against the respondent "from unlawfully entering and trespassing upon said lands of Peelrig, and of Berrywell, or on any part of the said lands and estate of Dunse Castle, or in any other way interfereing with or disturbing the petitioners or their tenants in the possession of the same." From the statements of the parties it appeared that during 1875 an action between Mr Milne Home of Wedderburn and the Police Commissioners of Dunse was pending in regard to the pollution of certain streams by the Dunse sewage, and several persons, including Young, went upon the lands of Berrywell, unchallenged, for the purposes of examining the streams, and particularly the Berrywell Burn. On 24th December 1875 the respondent wrote as follows to Buchanan, the overseer at Dunse Castle:— "*Dunse, Friday morning.* Mr Buchanan,—Dear Sir, I saw Mr Hannan yesterday in Edinburgh, and am going to wire him just now. Evidence was given by Mr Homes, engineer, of the flow of water in the sewage run, which is about double Mr Hannan's measurement. He told me you had been with him. Could you come down and go with me? I want to check the flow at several places to-day (this afternoon) and try for a drain at Berrywell. Say, per bearer, if you can come, and as early as possible, and bring anything with you. Yours truly, GEORGE YOUNG." Buchanan accordingly went, and getting one of the Dunse Castle labourers, was joined by Young at Berrywell, and they proceeded to dig in the plantations there and near