convicted of a crime under a statute, and I cannot hold that section 9 of the Act referred to introduces such a novelty.

It is true that under a subsequent Act—the Criminal Procedure Act 1887—it is made possible to convict a man of an attempt to commit a crime where the completed crime is charged. Section 61 provides that "attempt to commit any indictable crime shall itself be an indictable crime, and under an indictment which charges a completed crime the person accused may be lawfully convicted of an attempt to commit such crime." And the latter half of the same section provides that "under an indictment which charges a crime which imports personal injury inflicted by the person accused, resulting in death or serious injury to the person, the person accused may be lawfully convicted of the assault or other injurious act, and may also be lawfully convicted of the aggravation that such assault or other injurious act was committed with intent to commit such crime." That is quite different from a provision that a panel charged with a crime at common law might be convicted of an offence under a statute without that statute being libelled, and it is evidently not the intention of the Legislature to introduce such an innovation by that section. That this is so is very clear from section 62 of that Act, which provides that "where any act set forth in an indictment as contrary to any Act of Parliament, is also criminal at common law, or where the facts proved under such an indictment do not amount to a contravention of the statute, but do amount to a crime at common law, it shall be lawful to convict of the common law crime." Now, the effect of that section is to allow a prisoner charged with a statutory offence to be convicted in certain cases of a crime at common law, but it does not make the converse case possible, viz., that a panel charged with a crime at common law should be convicted of an offence under a statute. It has, as I have already said, always been necessary in Scottish practice for a prosecutor who proposes to charge under a statute to specify that statute, and the Acts to which I have referred do not, I think, change that rule. Consequently, as the panel here is not charged with any offence under the Statute of 1885 (48 and 49 Vict. cap. 69), he cannot have the benefit of section 20 of that Act.

The Court refused the motion.

Counsel for the Lord Advocate—Duncan Robertson—A. O. M. Mackenzie. Agent—Procurator-Fiscal of Renfrewshire.

Counsel for the Panel—Comrie Thomson—James Reid. Agent—W. Bartlemore.

COURT OF SESSION.

Saturday, December 22.

FIRST DIVISION.

BRAND, PETITIONER.

(*Ante*, vol. xxv., p. 332.)

Parent and Child — Bastard — Nomination of Guardian by the Mother — Competency — Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap.* 27), *secs.* 2 *and* 3.

Although the mother of a pupil bastard has no power to appoint by will a guardian to him, the Court gave effect to her wishes where she had by will made such an appointment, being satisfied that the nominee was in a position to attend to the child's welfare.

The mother of a bastard who had been placed by her under the care of charitable persons of the Protestant faith, having become a Roman Catholic, made a will appointing a person of the latter faith her executor and the tutor of the bastard, and expressing a desire that the latter should be brought up a Roman Catholic.

The Court being satisfied with the scheme proposed by the executor for the custody and education of the bastard, gave him the custody thereof, notwithstanding the opposition of those in whose care the child had been placed by the mother.

James Brand, contractor, Glasgow, presented this petition for the custody of John Ingram Hammel, who was born in April 1882, and was the illegitimate son of Ann Hammel, who died at the Convent of the Good Shepherd, Dalbeth, near Glasgow, in October 1886. While residing at the Convent Ann Hammel executed a settlement dated 31st August 1886, by which she bequeathed her whole means to Mr Brand in trust for her son. The deed further provided as follows:—"I hereby nominate, constitute, and appoint the said James Brand to be my sole executor, and to be tutor, curator, and guardian to my said son; and being a Roman Catholic myself, it is my desire that my said son be brought up in that faith." The testator left no property.

The petitioner averred that Ann Hammel died domiciled in Scotland, and that he accepted the office conferred upon him.

In May 1883, to allow Ann Hammel to enter service, the child was taken care of temporarily by the respondents Mrs Flora Shaw and Miss Flora Shaw, wife and daughter of Charles Shaw, solicitor, Wellington House, Ayr. In 1885 Ann Hammel, in consequence of bad health, and by the aid of the respondents, was received into the Convent, and feeling her strength failing she desired to make arrangements for her child, and applied to the respondents to have him returned. This request was not complied with, and Ann Hammel accordingly instituted legal proceedings in the Sheriff Court at Ayr to compel the respondents to restore the custody of the child, but before these proceedings were completed she died, and the petitioner was sisted as pursuer in the action.

With reference to the proceedings in this action the petitioner averred that "after protracted proceedings in the Sheriff Court it was ultimately decided by the Sheriff on 29th September 1887 that the action was incompetent, and should be dismissed. This interlocutor having been appealed by the present petitioner to your Lordships the same was on 24th February 1888 recalled, and it was found 'that the compearing pursuer Brand has no title to sue.' This judgment was pronounced, as the petitioner understands, and according to the terms of the opinions as reported in 15 R. 449, on the ground that the mother's title to sue the conjoined actions was personal to her and intransmissible, in the sense that no one could take up and continue these actions after her death, and that the petitioner, in order to carry out the mother's wishes, must proceed by petition at his own instance."

The petitioner further stated that he was not aware where the child was beyond the circumstance that it was under the custody of the respondents. He had made arrangements for the due education and upbringing of the child in accordance with its mother's last wishes, and he was prepared to submit to the Court, if necessary, a scheme for its care and custody.

It was further contended that the petitioner was entitled to have the child restored and delivered to him. He founded on the right of the mother at common law to the custody of the child, and on her consequent power to entrust him with the care of the child after her death. He also founded on the Guardianship of Infants Act 1886 (49 and 50 Vict. c. 27), and the power thereby conferred on the mother of any pupil to appoint by deed or will a guardian, or in Scotland a tutor, to such pupil after her death. In any event, and if there should be no technical title either by statute or at common law, the petitioner submitted that the Court in regulating the custody of this child would have regard to the wishes of the deceased mother as expressed in her said settlement.

Answers were lodged for Mrs Shaw and Miss Flora Shaw, who averred that when the child was given into their custody in 1883 the arrangement was understood by all parties to be a permanent one; that the child was at first sent to a home in Kent, and thereafter to Aberlour Orphanage, where it at present was, and that the entire expense of its maintenance was defrayed by the respondent Miss Shaw. They further averred that Ann Hammel when she entered the Convent was a Protestant, and that her change of religion, the legal proceedings taken by her, and the testament executed by her, were all due to the influence to which she was subjected in the Convent. Before the date of the legal proceedings Ann Hammel had never applied either verbally or in writing to have her child removed from the respondents' custody and transferred to Roman Catholic supervision.

Argued for the petitioner—Although there might be no abstract right at common law either to the father or mother of an illegitimate child to nominate a guardian, yet the authorities showed that in the case of the father the Court would (if no good cause was shown against it) give effect to his expressed testamentary will—*Johnstone*, M. 16,374; *Whitson* v. *Speid*, May 28, 1825, 4 Sh. 42; Statutes 1555, cap. 5, and 1672, cap. 2. Though a bastard has no legal father, yet the Court has always given him the advantage of any benefit which could be derived from these statutes—*Wilson*, March 10, 1819, F.C.; *Kyle, Petitioner*, June 15, 1861, 23 D. 1104; Stair, i. 6, 6; Ersk. i. 7, 2; Bell's Prin. sec. 2071. But the Guardianship of Infants Act 1886 materially altered the common law, and considerably extended the mother's rights, and under sec. 3, sub-sec. 1, a nomination such as the present became competent—*Macpherson* v. *Leishman*, June 4, 1887, 14 R. 780. This Act applied equally to illegitimate as well as to legitimate children. The interests of the child, which was a paramount element in determining a case like the present, would be equally well attended to whichever party prevailed, and if the Court desired some determining consideration they found it in the express wish of the mother, especially as both parties here derived their title from her—*in re Agar-Ellis*, 10 L.R., Ch. Div. 49.

Argued for the respondents—It could not be disputed that if the mother had been alive she could at once have recovered the child, but she could make no provision to regulate its custody after her death—Stair, i. 6, 6. In the cases cited there had been money left by the testator, in addition to nomination of tutor, and that made a material difference. As far as the discretion of the Court went no change of custody should be made; the proposed change would not be for the better; the advantage of the child was the governing consideration of the Court, and it was to be kept in mind that the mother had given the custody of this child to the present respondents. Anything done thereafter by her was under undue influence. With regard to the Statute of 1886, it only dealt with legitimate children, and so did not apply in the present case.

The prior proceedings, so far as they bear upon the present question, and are not narrated above, are referred to in the opinion of the Lord President, in which also are quoted the material sections of the Guardianship of Infants Act 1886.

At advising—

Lord President—In dealing with this case it is impossible not to recognise the charitable manner in which the respondents interfered for the protection of this poor woman, who is now dead—to protect her from the consequences of her own misconduct. But while that is undoubtedly so, the question before us is not very much concerned with considerations of that kind. It is quite conceded on both sides that whatever is to be done in providing for the education of this child could be quite well done by either of the parties before your Lordships. Both are unexceptionable and equally trustworthy. But there is one part of the case which involves a question of law, and it is quite necessary that we should dispose of it before we proceed to the other considerations. Now, Ann Hammel when she was in Dalbeth Convent raised an action against the respondents for the purpose of obtaining posssession of her child, which had been taken charge of by the respondents, and at the same time that she raised that action she executed a will, in which she appointed Mr Brand, the petitioner, to be her executor, and also to be the curator of her illegitimate child. That action had proceeded a certain length in the Sheriff

Court when Ann Hammel died, and then Mr Brand proposed to sist himself as pursuer in place of the deceased under the title which he said he obtained by virtue of the will to which I have referred, and the judgment which was pronounced when he proposed to sist himself as a party was that he had no title to sue. That was on the ground, as the petitioner himself sets forth, that the mother's title to sue was personal to her, and intransmissible in the sense that no one could conduct and continue that action after her death, and that the petitioner, in order to carry out the mother's last wishes, must proceed by petition at his own instance—I do not think that the last part of the sentence formed any part of the judgment, but it may be perhaps matter of inference—and accordingly he presents this petition now, and instead of basing it entirely on the expressed wishes of the deceased Ann Hammel, he asserts his right under the will to the office of guardian, and that he supports by a reference to the Guardianship of Infants Act 1886. Now, it appears to me that the Act referred to gives no title whatever either to the mother of an illegitimate child, or to anyone on her behalf, in her child which she had not possessed at common law. In short, I am of opinion that the Act does not apply to the mother of an illegitimate child. The 2nd section provides that on the death of the father of an infant "the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother." And the 3rd section provides that the mother may "appoint any person or persons to be guardian or guardians of such infant, after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly." The 2nd sub-section of that section provides that the mother may by her "will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the Court after her death, if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians" appointed by the mother. Now, it seems to me that throughout these enactments it is presumed that there is a father of the child—a father whom the law recognises, and who has independently of this statute certain legal rights of guardianship, and that it applies to any case in which there is a father having such legal rights—in short, it applies to the case of a mother, and gives certain rights to the mother in competition with the rights of the father of a child and those of a tutor-at-law. But in the case where there is no father that the law can recognise, and no tutor-at-law, the statute can have no application. Independently of the statute no mother has any right—either the mother of a legitimate child or of an illegitimate child—and therefore the only rights given by statute to the mother are in the case of the mother of a legitimate child.

Having cleared that legal difficulty we come now to consider the case on its merits. The history of this mother is told, I think, very clearly and candidly by the respondents in their defences to the action in the Sheriff Court, and I shall refer to two or three of the statements there for the purpose of endeavouring to explain what are the considerations to be kept in view in this matter. After Mrs and Miss Shaw had taken charge of this unfortunate woman and her child, and had provided a situation in service for the mother, it appears that she again lapsed into criminal courses, and she was found to be in prison in Ayr. But the respondents go on to say in the sixth article of their statement of facts in the Sheriff Court—"As the petitioner was very penitent, and was wishful to be sent on her release from prison to some place where, as she could not take care of herself, she would be looked after by others, Mrs Shaw obtained her admission to a Roman Catholic Institution at Dalbeth called the Convent of the Good Shepherd." It seems therefore that the residence of Ann Hammel in this Convent was brought about by the interposition of the respondents themselves. They recommended her to go there, and provided for her admission. It was arranged, they say, "that pursuer was to remain there till Mrs Shaw removed her. The pursuer has since remained in this institution. Under the influence of the religious sisterhood who manage this institution the pursuer some time ago, it is believed, embraced the Roman Catholic faith." Then, in the seventh article of their statements they say that "during the time that the pursuer has resided at Dalbeth Mrs Shaw has occasionally visited her, and received letters from her, and neither verbally nor in writing did the pursuer prior to the said action being raised against Mrs Shaw ever express a wish for the custody of the child, or that the boy should be taken from the defender. On the last occasion Mrs Shaw saw the pursuer prior to said action (which would be in or about June 1886) the pursuer stated that she was desirous of leaving the institution. On the recommendation of the Sisters Mrs Shaw urged the pursuer to remain for sometime longer, and Mrs Shaw promised to remove her when she was fitter to be taken away." And then in article 8 they say that some letters received by Mrs Shaw were "not believed to be in accordance with the real desire of the pursuer, or sent with her authority, or at least as a weak-minded woman she is entirely under the influence and direction of the nuns. The pursuer has never, since its delivery to the defender, taken any interest in her child, and the defender believes and avers that the present proceedings have been raised without her authority and consent, and that if left to herself, and freed from the influence of her present surroundings, she will totally disclaim them." Then they add—"The pursuer has been visited by Mrs Shaw since the raising of the action against the latter, but as the interview permitted was in the presence of nuns it is believed that the real wishes of the pursuer could not be ascertained. The pursuer stated that the child, if returned to her, was to be placed under the guardianship of a Roman Catholic gentleman."

Now, I think the effect of these averments is this, that when Mrs Shaw and her daughter recom-

mended that Ann Hammel should be taken into this Convent at Dalbeth they must have been very well aware that in such a position she would be subject to a good deal of religious influence, and they admit that under the urgency of that influence she had professed the Roman Catholic faith, and had before she died, and in pursuance of that profession, executed the will by which Mr Brand was attempted to be made the legal guardian of her child. Now, in these circumstances it does not appear to be of much relevancy for the respondents to say that she was under the pressure of very strong influence in changing her religious profession. I do not doubt that is so in point of fact. I do not think anybody can doubt that is so. In all such changes it is a matter to be assumed that a good deal of it is due to influence. One is supposed to understand that every minister of religion, and probably every Christian layman, is bound to use his influence to persuade those who come in contact with him to embrace what he believes to be the true faith, and if the profession of a particular creed is to be construed as a mere sham and pretence, and not the real impression of the person's wish or belief because influence was used, I am afraid we should require, in every case of the kind, to make inquiries of the most troublesome and difficult kind. But the Court have no such duty laid upon them. They must accept the facts as they find them, and what we find in this case is that this woman Ann Hammel, before her death and during her residence in this Convent, professed the Roman Catholic faith, and expressed her desire and wish in her will that her child should be brought up in accordance with Roman Catholic principles. The Dean of Faculty, on behalf of the petitioner, put the case very well, I think, thus—He said all other considerations may be equal, the child may be in perfectly safe hands if left either to the petitioner or in this Convent, the well-being of the child, its material prosperity, its health and morals will be equally well attended to in the hands of whichsoever party it may fall under, but there is one consideration which ought to weigh, and that is the expressed wish of the parent. Now, the mother of the child is undoubtedly the proper custodier of that child, especially when it is of tender years, and probably if Ann Hammel had not died she would have succeeded in the action she raised in the Sheriff Court. I do not see very well how she could have failed to obtain an order in that action for delivery of the child. It may have been very ungrateful in her to take that course, but we have nothing to do with that. She had a legal right to do so, and although she had no legal right to appoint a guardian to the child, and cannot do so with effect, still the connection between her and the child, both natural and legal, is such that I cannot help thinking that her expressed wish on this subject ought to receive effect unless there is some strong reason to the contrary. Therefore I am, generally speaking, for granting the prayer of this petition; but I understood the petitioner's counsel to say—and to say very properly—that the child in reality is a ward of this Court, and that they will be prepared to present a scheme for the maintenance and education of the child to be approved of by the Court, and if that course is followed, I think we can settle this matter without further discussion

Lord Mure—I am of the same opinion as expressed by your Lordship on all these points.

Lord Shand—When one is made aware, as the Court has been, of the circumstances of this case, he must be satisfied that it was very important for Ann Hammel, the mother, and for the child itself, that they found such friends as Mrs and Miss Shaw, for undoubtedly both the mother and child have received great kindness at the hands of these parties, and it is clear that the child has been fully maintained and cared for by them during the last five years. It is natural, and only natural, that in such circumstances a certain lively interest, and indeed attachment, must to some extent have arisen between these ladies and the child, but while that is so, it is the case that where the custody of a child is taken from the parents, or from some natural guardian, it can only be subject to this, that a time may arise when that parent or guardian may assert his right, to which there may be no answer. In this case we have it clearly shown that there is no material question arising as to the interest of the child with regard to moral or physical advantages. It cannot be said, on the one hand, that if the child were left in the custody of Mr and Mrs Shaw it would lose great advantages, nor can it be said, on the other hand, that if the child be delivered up, as the petitioner asks it shall be, it will suffer disadvantage. In the one case its education will go on in Aberlour Orphanage; in the other case it will go on in some similar home under the charge of the petitioner, but it will be educated in a different religious belief. I assume of course in saying so that the petitioner now offers to have a scheme prepared and approved of by the Court, and is ready to assure the Court that that scheme will be so satisfactory in point of character, and with reference to the duration of the education that will be given, as to make it clear that the child will not suffer from being taken out of the care of those who have been so kind to it. That being so, I have come to the conclusion that there is no doubt or difficulty in this case.

I think the only other element in the case is the mother's recorded expression of what she desired. We find that in the settlement that was executed on 31st August 1886 it is stated by the deceased that, being a Roman Catholic "myself, it is my desire that my said son be brought up in that faith," and she nominates and appoints Mr Brand, who is known to be of that religious belief, to be the curator of the child. Reference has been made to the proceedings and statements in the action in the Sheriff Court. Of course they go to confirm what has been stated, and so far I regard them as satisfactory, but for myself I am bound to say that if there had been nothing of the kind in the case, my view would have been precisely in the terms of that settlement. I agree that of course we must see that the settlement in that matter really records the wish of the person who directs. I also agree with what your Lordship in the chair has said with reference to the influence that may have induced a change of the mother's religious belief. It is true this Court is entitled to inquire in a question of property as to whether a person has been in a weak and facile state of mind, and when he executes a settlement whether undue influence has been used to deprive that person of property. There there is

some intelligible issue, but it appears to me it would be out of the question for this Court to direct inquiry with reference to what is or is not probable in reference to a question of change of religious belief. I venture for myself to say that where there was a change of faith, although it might be considered sudden, that would make no difference on my opinion. I agree, further, in thinking that the Guardianship of Infants Act in its provisions relates entirely to the guardianship of legitimate children, but nevertheless the statute is not in my opinion to be altogether laid aside in considering this case. The provisions of the statute are an advance in determining the propriety and expediency of giving the mother a larger power of guardianship of infant children than the law formerly allowed even in a question with the father or his representatives. The reasons of the provisions apply with even greater force in the case of the mother of an illegitimate child, because the law recognises no competing right in the case of a putative father as in the case of the parent of a legitimate child, and while the Court ought not and cannot by judgment alter the existing law as the Legislature has made it, it nevertheless in questions such as the present will administer it within temperate limits so as to adapt it to modern views. These considerations, combined with the fact that it has been held in the case of *Macpherson*, which was cited in the course of the argument, that the mother of an illegitimate child during her life has an absolute right to the custody of that child, are in my opinion sufficient to show that the Court in this case ought to give effect to the application made by the petitioner. The mother has a legal right to the custody of her child apart from the right of the mother of a legitimate child to appoint a guardian to it. The result is, that effect is to be given to the direction she has left, and I am content to put my judgment on that ground alone, and accordingly I concur in thinking that the application should be granted.

Lord Adam—I think this case comes to a very narrow point. I agree with your Lordship that the petitioner has a right to demand custody of this child, that nobody else has a right to demand custody of it, and that the plan which the Court proposes to adopt is the best in the circumstances. Now, there is no question here about the moral or material welfare of the child. It is admitted on both sides that these interests will be as well attended to by the one side as by the other. That being so, it appears to me that the two conflicting elements of the case are these. On the one side there is the fact that the respondents have now, and have had for a considerable time, the care and custody of this child, and I cannot say that that is not a circumstance which would weigh a good deal on my mind unless a stronger case were made out on the other side for the custody of the child. But the countervailing circumstance on the other side is the desire of the mother. Now, I myself have no doubt that we have the deliberate desire of the mother expressed in her settlement as it is called. I have as little doubt that that was written under influence, but I do not think it was written under what in any sense can be called undue influence. I think that a person in the circumstances in which this woman was, becoming an inmate of a Roman Catholic Convent and associating with and being under the care of Roman Catholics, was subjected to an influence which resulted in a change of religion. I am very far from thinking it did not. Having become a Roman Catholic apparently shortly before the raising of the action in the Sheriff Court, it was a very natural desire for her to express that her child should be brought up in her own faith, and in the custody of those who agreed with her in that faith. Therefore I have come to the conclusion that the desire which this mother expressed was her desire, and not brought about by undue influence in any sense. That being so, the question in my mind is, is that expressed desire to weigh against the fact that this child has been in the hands of the respondents for a considerable time, and has been well taken care of? I think the expressed desire of the mother is a matter of such weight that it ought to be given effect to in this case. I have therefore come to the same result as your Lordships have arrived at.

The following scheme was submitted by the petitioner:—"The petitioner having in view the present age of the boy John Ingram Hammel, and the manner in which he has hitherto been brought up, proposes the following scheme for his further education and upbringing—The petitioner's proposal is, that the boy should be sent for a year or two to a junior school where he will be under the charge of ladies, and be properly prepared for his ultimate admission to a school for older boys. After being at the latter school until the age of 13 the petitioner proposes to assist the boy into and through an apprenticeship of four to five years' duration in some trade or business whereby he may be able to support himself. The petitioner has inquired and considered as to the junior and senior school respectively most suitable for carrying out this scheme for the boy's education, with the following results:—The junior school which the petitioner has in view in the first place is the boarding school for little boys attached to St Elizabeth's House, Bullingham, Hereford, under care of Sisters of Charity. The terms for this school are from £16 to £18 per annum. The school for older boys to which it is proposed that the child should be sent after his preparation at the said junior school is St Francis' Home, Shefford, Bedfordshire. This school is under the direction of the Very Reverend Canon Collis, and the ordinary terms are £25 per annum for each boy."

The Court, on the petitioner appending a note to the scheme undertaking to find caution, allowed extract to proceed on caution being found.

Counsel for the Petitioner—D.-F. Mackintosh, Q.C.—Vary Campbell—W. Campbell. Agent—W. B. Glen, S.S.C.

Counsel for the Respondents—Sir C. Pearson—Maconochie. Agents—J. & F. Anderson, W.S.