was to keep the floor clean by sweeping away the sugar which fell on it, but he had no specific instructions from the manager, and there is a conflict of evidence as to whether his duties did not tie him constantly to the immediate neighbourhood of the hopper, so long at least as the machinery was in motion. Some of the witnesses say that his duties were entirely limited to that. On the other hand, there are witnesses who say that his duties were of a more extensive character, that it was his duty to sweep away sugar wherever it might happen to be. But, as I have said, in the view which I take of the case it is not very material to determine the exact scope of his duties.

The first question depends on the provision of the Factory and Workshops Act, which is in the following terms—"All dangerous parts of the machinery and every part of the mill-gearing shall either be securely fenced or be in such a position or of such a construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced." That is the provision of the Act by which the Legislature has interfered for the purpose of protecting "every person employed in the factory." Now, it cannot be disputed that this shaft was part of the mill-gearing, and it certainly was not fenced. Therefore the question comes to be, whether it was in such a position or of such construction as to be equally safe as it would have been if it had been securely fenced? The argument of the defenders was, that as no person employed in the factory had any duty which would take him near the shaft while it was in motion, it must be taken to have been as securely fenced as it would have been had it been entirely fenced. I left it to the jury to say whether on the evidence it was to be taken to be as equally safe as if it had been securely fenced. And there is no doubt that the jury must have come to the conclusion that it was not, because they have returned a verdict for the pursuer.

Then it was contended by the defenders that the protection given by the Act did not extend to persons who, although they were employed in the factory, were not at the time of the accident engaged in the performance of any duty towards their employers. I told the jury that that was not the law. I told them that the protection of the Act extended to every person employed in the factory, and that it was not necessary that at the time of the accident he should be actually engaged in the performance of his duty. Workmen may get into danger although they are not actually employed in the execution of their work at the time, and I am not aware that there is anything in the Factory Acts which should exclude them from the statutory protection. If, then, that is the sound view of the law, what is the result? The result is that the owners of this factory are in fault for not having this shaft securely fenced, and are *prima facie* liable in damages for the consequences of that fault, for I cannot adopt the view that their liability is limited to the penalty imposed by the statute for the neglect of its provisions. I think that the neglect of the statutory provisions creates a *prima facie* case of fault against the factory owners which will render them liable in damages to their employees who may have been injured through that fault.

There remains, therefore, the question of contributory negligence. I told the jury that this was not a question of law but a question of fact. I told them that the question was whether in the whole circumstances as disclosed by the evidence this shaft was so manifestly dangerous to a boy of fifteen as to make him so much in fault in going near it, as he did, that he could not recover. Now, on that question of fact the jury must have come to the conclusion that the boy was not thus in fault, and it is not disputed that there was evidence on both sides of this question. I am unable therefore to see any reason for disturbing the conclusion at which the jury arrived, and on the whole matter I think the verdict should stand.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court discharged the rule, refused to grant a new trial, and of consent applied the verdict.

Counsel for the Pursuer—Comrie Thomson—M'Lennan. Agents—Miller & Murray, S.S.C.

Counsel for the Defenders—Ure. Agent—Hugh Patten, W.S.

Tuesday, June 20.

FIRST DIVISION.

FENWICK, PETITIONER.

Custody of Child—Appointment of Tutor by the Mother — Tutor Domiciled in Canada—Guardianship of Infants Act 1886.

A domiciled Scotsman having failed to appoint a tutor to his pupil son, his widow, on the day of her death, nominated by will a Canadian lady to be the boy's guardian. This lady, founding upon her rights as sole tutor under the Guardianship of Infants Act 1886, presented a petition to the Court of Session for custody of the child. She had previously declined to give the father's trustees, who had then the charge of the boy, and who possessed the fullest control in reference to the persons to whom the money left for his maintenance was to be paid, any information as to her own position and means.

The petition was refused *in hoc statu*, on the ground that in the interests of the child the Court would not give him up to a person whose ordinary residence was out of their jurisdiction, and of

whom, however trustworthy, they knew practically nothing.

Question by Lord M'Laren whether the appointment was not invalid on the ground of death-bed.

Walter Hannah, Surveyor to the Board of Trade in Glasgow, died at Helensburgh in 1889, leaving a trust-disposition and settlement dated 28th July 1887 by which he conveyed his whole means and estate to trustees for behoof of his wife in liferent and the children of the marriage in fee, the shares to vest in the case of sons upon their obtaining majority, "providing and declaring that in the event of my wife predeceasing the said period of vesting of said residue or shares of residue in my child or my children respectively, my trustees shall lay out and expend in maintaining, clothing, and educating my child or children, or otherwise for his or her or their behoof and benefit, as may appear best to my trustees, the whole or such part as my trustees may deem proper of the yearly income that may be realised by them from the share of said residue and remainder of my means and estate destined to the said child or children respectively; declaring further, that my trustees shall have the fullest control in reference to the party to whom the said annual proceeds or part thereof are to be paid for application as aforesaid, and the manner in which the application thereof is to be made."

The truster made no appointment of tutors for his children.

He was survived by one son born in 1888, and by his wife Mrs Jane Skirving or Hannah, who after her husband's death went to Toronto, Canada, where she died upon 1st October 1891, leaving a will of that date containing the following clause—"I hereby appoint Miss M. Fenwick of No. 33 Beaconsfield Avenue, Toronto to be the guardian of my said son Walter John."

At the request of the trustees of Mr Hannah, who represented that her appointment as guardian was invalid, Miss Fenwick brought the boy to this country in 1892, and he was placed by the trustees with a Mrs Macnab, a widow lady.

In May 1893 Miss Fenwick presented a petition to the First Division praying to have him delivered up to her on the ground that she was by his mother's appointment his tutor. She referred to the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), which by sec. 3, sub-sec. 1, provides —"The mother of any infant may by deed or will 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." Section 8 of the Act provides—"In the application of this Act to Scotland the word guardian shall mean tutor, and the word infant shall mean pupil."

The answers for the trustees contained the following statements—"The respondents deny the validity of the petitioner's appointment as guardian to the child. The deceased Mrs Hannah died domiciled in Scotland, and it was incompetent for her to appoint the petitioner, who is a domiciled Canadian, to be guardian to her child whose domicile is in Scotland. Even were the nomination a valid one, it would not entitle the petitioner to the custody of the child in view of the provisions of the settlement of the deceased Walter Hannah, which vest the respondents with the fullest control over the residence of the child. The respondents were, however, willing, if they could do so consistently with their duty under the said settlement, to give effect to the wishes of his mother by placing the child with the petitioner. Under the care of Mrs MacNab the child is being maintained and brought up to the respondents' entire satisfaction at a cost of about £80 per annum. The respondents accordingly offered by letter, by their agents Messrs A. and G. Young, writers, Glasgow, to the petitioner's agents, Messrs Newlands and Warner, writers, Glasgow, dated 24th February 1893, to allow the petitioner to have the custody, subject to the adjustment of details, if the petitioner would accept the same terms as to allowance as Mrs MacNab, on condition (1) that she would undertake not to remove the child beyond the jurisdiction of the Scottish Courts; and (2) that as she had no home of her own in Scotland, she would furnish them with information as to her financial position, and satisfy them that it was such as would afford them reasonable assurance and guarantee that the money would be expended for the sole benefit of the boy. The petitioner, however, through her said agents, declined to give the respondents any information as to her means, and expressed herself as unable to undertake the care of the child at a less payment than £150 per annum. The respondents believe and aver that the petitioner is unable to undertake the care of the child except upon the condition that she herself is supported, at all events to some extent, by the money to be paid for the child's maintenance and upbringing."

Argued for the petitioner—1. A domiciled Canadian was not an alien, and was not disqualified for the office of tutor to a Scotch child either at common law or under the Guardianship of Infants Act. She was in a similar position to that of a person resident in England—Bell's Prin., sec. 2073, and cases there cited. *Hadden*, February 27, 1822, 1 S. 397, referred to by More in his notes to Stair, p. 35, was special. Here the petitioner's position was strengthened by the fact that she was a tutor-nominate, not a tutor-at-law. Section 2078, relied on by the respondents, referred to tutors-at-law. 2. She was sole tutor under the Guardianship of Infants Act, the Court having no power to conjoin another with a mother's nominee. Accordingly she alone was entitled to the custody of this child.

Argued for the respondents—1. The nomination of a domiciled Canadian was invalid. Even at common law it was held at least desirable that a tutor should be resident in Scotland—Bell's Prin., sec. 2078. By section 12 of the Guardianship of Infants Act

tutors to Scotch children appointed under the Act came under the Pupils Protection Act, and were subject to the control of the Accountant of Court. Accordingly, no person could be appointed tutor who was not subject to the jurisdiction of the Scottish Courts, and whom the Court would not have appointed. [LORD M'LAREN—Is the appointment not invalid on the ground of deathbed?] 2. The petitioner had not an absolute right to the custody of this child. The trustees had under his father's trust-settlement large powers of controlling his residence and upbringing. Besides, the welfare of the child must be looked to, and he was not to be given up to a person about whom, however trustworthy, the trustees knew nothing, and who refused to furnish further information as to her means and position.

At advising—

LORD PRESIDENT—I think the position taken by the petitioner here is too absolute. She founds upon the fact that she was appointed tutor to this child, and she comes into Court and asks us to take him out of the hands he now is and deliver him to her, on the footing that she is to take him with her to Canada.

Now, our first duty is to watch over the interests of the child, and this lady somewhat pointedly declines to give any particulars as to her own position, although it is important we should know how she can provide for this child's comfort and future in life. I do not think that the Court would be justified in giving this lady the full rights of sole tutor to the extent of handing her over this child to take to Canada to be brought up there, if we knew that there was no means for its support except what may be provided from this trust.

Now, I turn to the position of the trustees. They say, apart from any question of their legal rights under the statute, and looking at the matter entirely from the child's point of view, they are empowered under the trust-deed to expend whatever they may think right out of the trust for the child's maintenance and education, but that they have the fullest control as to the person or persons to whom they pay such money, and as to the manner in which it is to be applied. These trustees are clearly within the line of their duty when they say to this lady, "Tell us something about yourself, how you propose to bring up this child, and how you intend to spend the money." She is not conciliatory in her reply, but points to the deed and says she is entitled to take the child on her own terms. I think the trustees are right in demanding fuller information, and that we should be wrong in ordering them to give up the child at this stage. Their being satisfied that the child is being properly looked after and their payment of money hang together, and were they to refuse to pay the income to this lady, we should, by giving her the custody of the child, be sending it out of our jurisdiction without visible means of support, and in charge of a lady about whom we know nothing. If she is more frank in giving information, she may come back to the Court, only we must watch over the interests of the child.

I am for refusing the prayer of the petition *in hoc statu*.

LORD ADAM—The petitioner comes here founding upon an absolute right to the sole custody of this child. She says, "I come without giving you any information about myself, but you are bound to give me up this child." I am not inclined to take that view of her right. We have to consider what is best in the interests of the child itself, and not the petitioner's abstract claims. The child is at present in the custody of the trustees of its father, who gave them very full powers as to the disposal of the income of his estate in maintaining and educating the child, and as to whom the money might be paid. The only thing the father failed to do was to nominate a tutor to his child. It is not said that it is not in the interests of the child it should remain where it now is, and the proposal of the petitioner is that we should send this child out of our jurisdiction in charge of a person who is no doubt perfectly respectable, but who has not shown she has sixpence to expend upon this child. I am not prepared to take that view, and I agree with your Lordship we should refuse the prayer of this petition *in hoc statu*.

LORD M'LAREN—I concur. I would only add that I think it is not quite clear that the petitioner has been validly appointed tutor here. A father can only make such an appointment *in legitima potestate*, and it is not likely that the Legislature meant to give larger power to a mother or to free her from restrictions in making the nomination. The appointment, however, would need to be reduced, and therefore that question is not before us.

Further, although a father has an unqualified right in his lifetime of regulating the custody of his pupil child, I have always understood that a tutor, when he asks to be confirmed, must show what he can do for the child's maintenance and upbringing.

LORD KINNEAR was absent.

The Court refused the prayer of the petition *in hoc statu*.

Counsel for the Petitioner—Guthrie—Cullen. Agents—Young & Roxburgh, W.S.

Counsel for the Respondents—H. Johnston—Younger. Agents—Webster, Will, & Ritchie, S.S.C.