Saturday, June 9.

FIRST DIVISION.

MORRISON *v.* QUARRIER.

Custody of Children—Petition of Brother—Relevancy—Appointment of Curator ad litem to Make further Inquiries.

The eldest brother of two twin children, a boy and girl aged twelve, who being unable to support them had left them in a charitable institution, presented a petition to have them restored to his custody, on the ground that they were not being brought up as Roman Catholics as they had hitherto been. He averred that he had made arrangements for having them educated and maintained in a Roman Catholic institution, or was willing to retain them under his own care or under that of a relative, who had signified her desire to have them, but he gave no further information about the institution or the relative referred to.

The Court (*abs.* the Lord President) *appointed* a *curator ad litem* to inquire into all the facts of the case, and to report—*diss.* Lord M'Laren, who thought the petition should be dismissed as irrelevant.

James Morrison, brushmaker, Dundee, aged thirty-six, was the eldest brother of twin children, a boy and a girl, born on 7th March 1882. On the death of their father, predeceased by their mother, these children resided with their brother for some months, but he having a family of his own and being unable longer to support them, applied for their admission into Mr William Quarrier's Homes at Bridge of Weir. Upon 24th January 1894 he himself took them to Mr Quarrier and then signed the following form of agreement:—"I, James Morrison, make application to have my brother and sister Alexander and Margaret (twins), aged eleven and eleven years, received into the above-named Homes, with the view of being emigrated to Canada, under the care of William Quarrier or his agents, or to be kept at home, or otherwise disposed of as Mr Quarrier thinks best, in proof whereof I affix my signature.—JAMES MORRISON. J. JAMIESON, *witness*." The children, however, were not taken to the Homes until 26th February, and on 18th May 1894 Morrison presented a petition craving the Court to interdict Mr Quarrier from removing the children outwith the jurisdiction of the Court, and on resuming consideration of the petition with or without answers, to ordain Mr Quarrier to deliver up the children to him.

In his petition Morrison averred that he had given up the children under fear of a prosecution threatened by the school board officer at Dundee. He also averred—"The said children are not being retained in the Roman Catholic faith, in which they were baptised and brought up, and the petitioner is anxious, for that and other reasons, to have them removed from the custody of Mr William Quarrier and restored to himself. The petitioner has made arrangements to have them educated and maintained in a Roman Catholic institution, and he is willing, should your Lordships require it, to retain them under his own care or under the care of a relative, who has signified her desire to have them. The said children desire to be restored to the petitioner's care, but the said William Quarrier refuses to hand said children over to the petitioner, although repeatedly requested to do so."

The Court granted interdict as craved, and appointed answers to be lodged. In these answers the respondent, *inter alia*, averred—"On 26th February the petitioner presented himself with the two children. He explained that he and all the other relatives of the children were now quite satisfied to leave them in the respondent's Homes, and they were left accordingly. No new document was then signed by the petitioner, the respondent having still preserved the printed form which the petitioner signed on 24th January. On or about 9th April the petitioner saw the children at Bridge of Weir, and took no objection to their treatment, or on any other score. When admitted, the children had evidently been much neglected. They had all the appearance of being under-fed, and although twelve years of age, they were only in the second standard. In the last week of April the respondent had a call from Mr Lillie, writer, Glasgow, who had been instructed by the Roman Catholic Society of St Vincent de Paul to endeavour to recover the children from the respondent. The respondent then for the first time heard it alleged that the children were Roman Catholics. He explained to Mr Lillie that he thought it inexpedient in the children's interest to return them to the petitioner, but offered to deliver them to anyone who would make suitable arrangements for their maintenance and education. Subsequently the respondent was informed by letter from Mr Lillie's firm, dated 3rd May 1894, that a Mr and Mrs James Brown, 82 Main Street, Bridgeton, Glasgow, were willing to adopt both children. The respondent at once made inquiries, and found that Mrs Brown was an invalid, that she wished the girl Margaret Morrison to act as her attendant and servant, that she did not wish the boy Alexander Morrison, but was willing to take him if she could not otherwise get the girl. The respondent concluded that it was not Mrs Brown's intention to educate either of the children, and that it would not be for the interests of the children to allow Mr and Mrs Brown to adopt them. He reported this to Messrs Forbes, Robertson, & Lillie, writers, by letter dated 15th May, and he has heard nothing more on the subject until the service of the present petition. The respondent was never informed that any arrangements had been made for the maintenance of the children in a Roman Catholic institution or anywhere else. The respondent believes and avers that the petitioner is

unable to support the children in question, that while they were in his custody he did not in fact attend to their support and education, and that it is not for the interests of the children that they should be returned to him. The girl is no longer in pupillarity, and has already, in connection with Mr and Mrs Brown's proposal, stated her preference for remaining in the Homes. The respondent does not at present, and never did, contemplate emigrating the children to Canada. The respondent therefore submits that unless the interests of the children require it, there is no occasion for interfering with the arrangements made on their behalf. Further, he submits that the present petitioner, one of the brothers of the children in question, has no title to present the present application, and in any case he is, in the circumstances narrated, now barred from so doing. Lastly, the respondent believes and avers that the true *dominus litis* in this application is not the petitioner, but the Society of St Vincent de Paul, which should be sisted as a party to this application accordingly."

Argued for the petitioner—Mr Quarrier had no right to retain the custody of the children against the wishes of the petitioner, who was their natural guardian. The mere fact that they were at present with him gave Mr Quarrier no right whatever to their custody. They should be brought up in the form of religion in which they had been baptised, and which was that of their father—*Brand* v. *Shaws*, December 22, 1888, 16 R. 315.

Argued for the respondent—The petitioner as their brother had no right to the custody of these children, or to prescribe the form of religion in which they were to be brought up. The sole consideration for the Court was the wellbeing of the children—*Sutherland* v. *Taylor*, December 22, 1887, 15 R. 224; *Markey* v. *Colston*, July 14, 1888, 15 R. 921; *Smith* v. *Smith's Trustees*, December 13, 1890, 18 R. 241; *Flannigan*, June 21, 1892, 19 R. 909; *Mackenzie* v. *Keillor*, July 6, 1892, 19 R. 963. There was no suggestion that the children were not being well cared for in Mr Quarrier's homes. The question of religion alone—and that was the only question here—had nothing to do with the matter. That was recognised in the English Courts in the case of *M'Grath*, L.R. 1892, 2 Ch. 496, and L.R. 1893, 1 Ch. 143, where it was said that the Court judicially administering the law could not hold one religion better than another, and that only a father had any right to dictate the form of religion in which his children were to be brought up. The girl being over ten years of age was entitled to choose her own place of residence. If the Court had any difficulty in refusing the petition at this stage a *curator ad litem* might be appointed to inquire fully into all the surrounding circumstances, ascertain additional facts, and report. This was done in the case of *Flannigan, supra.*

At advising—

LORD ADAM—This is a petition presented by James Morrison to have restored to him the custody of two children, twins, a boy and a girl who are just over twelve years of age, the girl therefore beyond the years of pupillarity while the boy is not. The position of matters, as I understand it, is this. The petitioner is their eldest brother who since the death of their father has taken care of them. He has no legal right to any control over them, but he has very properly brought them up, and when he could no longer do so he handed them over to Mr Quarrier, who keeps homes for children who are not otherwise provided for. These children were left with him by their brother in the month of February. I cannot say that I altogether like the form which Mr Quarrier requires those who leave children with him to sign—[*His Lordship read the form given above*]. By that form it might be supposed that absolute power was given to Mr Quarrier to do with the children as he chose. However that may be, the petitioner, by whom these children were left with Mr Quarrier, now sees reason for changing his mind, and wishes to remove them. What he says in this petition is that the children, as the children of Roman Catholic parents, were baptised into that faith, and that he has made arrangements for having them educated and brought up in a Roman Catholic institution or retained under the care of a relative. He also says that the children wish to be removed and restored to his care. Now, that statement ought to have been much more specific, for we are furnished with no information as to Mrs Brown, the relative who is said to be willing to take them, or as to the Roman Catholic institution to which it is proposed to send them.

The question now before us and with which we have to deal is, what are we to order with regard to the custody of these children? As to the title of the brother to present this petition I have no doubt. He is their nearest male relative and has a perfectly good title to present it. But I am equally clear that he has no legal right of control over the children or right to demand their custody.

Our duty is to do what will be best for the children in the circumstances, and that is the view on which I propose to deal with this petition. Of Mr Quarrier's Homes I know nothing, of Mrs Brown I know nothing, of the Roman Catholic Institution referred to I know nothing. It is in these circumstances that I have to deal with this petition, and I think our first duty is to inform ourselves of all the circumstances surrounding the case, and the course I think we should follow is that which was adopted in the case of *Flannigan*. I am of opinion that we should appoint some person to be curator *ad litem* to these children, and to inform us in the interests of these wards what he deems advisable, and what are the whole facts of the case. The mere fact that these children are found at this moment in Mr Quarrier's Homes does not give him any right to bring them up. Taking into account the wishes of their brother and of

their family on the one hand, and of Mr Quarrier on the other, I should in the ordinary case be inclined to give weight to those of their own family. It is also desirable if possible that their own wishes should be known. But as to their wishes I know nothing. The children are of an age to have wishes, and on the one side it is said they wish to return to their brother, while on the other side the very opposite is alleged. How are we to decide? I do not say we are to yield to the children's own wishes if they do not seem really to be for their best interests, but we should know them, and in the whole circumstances I propose that we appoint a curator *ad litem*.

LORD M'LAREN—Under ordinary circumstances I should not have thought it necessary to make a formal dissent from the course proposed by your Lordship in the chair, as the appointment of a curator *ad litem* leaves the merits of the case open for subsequent consideration. But there seems to me to be an important point of principle involved here, and as I am of opinion that no relevant statement has been made justifying the interference of the Court, I think it would not be fair if I were to withhold my opinion that this petition should be dismissed *de plano*.

This Court does not possess any general right of supervision or any duty with regard to the upbringing and education of all the poor children in the country. It is only when application is made to us on proper grounds that we can and ought to interfere. It is in fact necessary that a *prima facie* case for our interference should be made out. Now, without looking at the answers, although we commonly do look at the answers to such a petition as this, especially where they are not contradicted, I am perfectly clear in my own mind that the present petitioner has no right to the claim which he makes for the custody of these children and their removal from Mr Quarrier's Homes. If he had said that they were being ill-used there, the matter would have been quite different, and however impecunious the petitioner may be himself, and unable to bring them up in his own house, I should have thought there was a case for inquiry, because we might order their removal to the poorhouse. If again a petitioner came forward as a relative—and I do not know that a brother or a sister is in a worse position for presenting such a petition than an uncle or other near relative would be—and offered to maintain them in his own house, I should be most favourable to granting such an application. Here however we have nothing of that sort. The petitioner alleges nothing against these Homes, and cannot offer these children a home himself, but he wishes their removal from where they are well cared for to some unknown institution merely because it is Roman Catholic and these Homes are not. No other reason is given for their removal than that the petitioner is himself a Roman Catholic, and the children have hitherto been brought up as Roman Catholics but are now in a Protestant institution. I do not think we should entertain the doctrine for a moment that a brother is entitled to have his brothers or sisters removed from an institution because he does not approve of the form of religion there taught. I agree with the observations made in the High Court of Justice on this subject, to which we were referred, that as between a charity and a relative willing to maintain the child, or as between one relative and another, the opinions of the parents or of the family may be an element, but the religious element alone should not be allowed to determine the question. Here we have nothing but the religious element, and that is not in my opinion a good ground for our interfering except when it is put forward by a parent. I have no knowledge of Mr Quarrier's Homes, but that is not necessary, because nothing is here said against them.

My opinion is that we should dismiss this petition as irrelevant, and that it is unnecessary to take the steps of appointing a curator.

LORD KINNEAR—I agree with your Lordship in the chair that in order to enable the Court to determine whether these children should be left where they are, or removed, a curator should be appointed.

I agree with your Lordship and with Lord M'Laren that the statements of the petitioner are vague and indefinite, but there are statements made upon which I am not prepared to throw out the petition without further inquiry. The petitioner, although not the tutor-at-law of these children, is their natural guardian in a popular sense, for he is their brother and aged thirty-six, while they are only children of twelve. It was the duty of their brother to look after them, and he says he did so, and that in course of doing so he handed them over to Mr Quarrier, from whom he now wishes them back. The petitioner is not entitled to demand the custody of these children as a matter of right, but Mr Quarrier has just as little right to it. The petitioner says, "I made a mistake in handing over these children, and I wish them restored to me." He says he wishes them removed from Mr Quarrier because they are not being educated in the faith in which they were brought up by their father until he died, and because, as he avers, the children themselves wish to be removed. These are the only two specific grounds he gives, but I think they justify inquiry, especially the last one. Other things being equal, I think weight should be given to the wishes of the children themselves. Both grounds may reasonably be taken into consideration, although neither may be conclusive of the question if strong reasons can be shown the other way. The petitioner says he has made arrangements for their being taken into a Roman Catholic institution or into the house of a relative. I agree with Lord M'Laren that his statements on this matter are very vague, but I think they are sufficient to lead us to appoint a curator. It will be his duty to ascertain for himself and to report to us all the facts necessary

for the determining of this question. We do not know the facts, and until we know them cannot exercise the discretion which we are called upon to exercise.

The LORD PRESIDENT was absent.

The Court appointed Mr B. P. Lee, advocate, curator *ad litem* to the children, and continued the cause.

Counsel for Petitioner—Young—Gunn. Agent—John Mackay, S.S.C.

Counsel for Respondent—Ure—Clyde. Agents—Dove & Lockhart, S.S.C.

Friday, June 8.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WADDELL *v.* ROXBURGH.

Reparation — Slander — Issue — Innuendo —Taking Unfair Advantage to Secure Contract—Verbal Injury.

A newspaper, commenting on the manner in which a contract for printing the register of voters of a burgh had been secured, said—"This contract was secured by the lowest offerer in a mean and contemptible manner. We attach no blame to any of the burgh officials, but to the unfair advantage taken by the successful offerer to secure the contract."

The party who had secured the contract brought an action against the publisher of the newspaper, averring that the meaning of the statement was that he had obtained the contract by dishonest and improper means, and further, that the statement had been made with the design and the result of injuring him.

The Court *held* that the pursuer was not entitled to an issue of verbal injury, but *allowed* an issue of slander.

Observations on the case of *Paterson* v. *Welch*, May 31, 1893, 20 R. 744.

This was an action of damages at the instance of John Waddell, printer and publisher in Alloa, against Andrew Roxburgh, printer, publisher, and editor of *The Alloa Weekly News and District Reporter*.

The pursuer averred that in November 1893 the Tillicoultry Burgh Commissioners invited tenders for the printing of the register of voters for that burgh for a period of five years. The pursuer's tender was the lowest and was accepted. For some time previously the defender had borne a groundless ill-will against the pursuer. This he had shown in several instances (which were specified)—"(Cond. 4) In his said newspaper, *The Alloa Weekly News and District Reporter* of Wednesday 20th December 1893, the defender inserted an article headed 'Burgh Commissioners,' and in a note to that article he stated—'This contract was secured by the lowest offerer in a mean and contemptible manner. We attach no blame to any of the burgh officials, but to the unfair advantage taken by the successful offerer to secure the contract.—ED.'—meaning thereby that the pursuer had obtained the said contract by dishonest or fraudulent and improper means. The statements and representations contained in said note were made and published by the defender falsely and maliciously to gratify his spite and ill-will against the pursuer, and with the special design and object of injuring the pursuer in his trade as well as in his feelings and reputation, and of exposing him to public contempt. (Cond. 5) The pursuer was the lowest and successful offerer in the contract above referred to, and the said statements by the defender are of and concerning the pursuer, and are false, malicious, and slanderous. The statements referred to have been read by a large number of people in and around the district where the pursuer carries on his profession, and among others by his constituents and friends, with the result that he has been injured in his feelings and reputation as well as in his trade and business as a printer and publisher."

The defender pleaded—"(1) No relevant case."

The pursuer proposed the following alternative issues for trial of the cause—"(1) Whether the said statement was of and concerning the pursuer, and falsely and calumniously represented that the pursuer had obtained the said contract by dishonest and improper means, to the loss, injury, and damage of the pursuer. (2) Whether the said statement was of and concerning the pursuer, and whether the said statement was false, and was made and published by the defender with the design of injuring the pursuer, to his loss, injury, and damage?"

On 13th March 1894 the Lord Ordinary (KINCAIRNEY) disallowed the issues and assoilzied the defender.

"*Opinion.*—This is an action of damages for defamation by the printer and publisher of an Alloa newspaper against the printer, publisher, and editor of another newspaper, also published in Alloa. The words complained of published in the defender's newspaper are these—'This contract was secured by the lowest offerer in a mean and contemptible manner. We attach no blame to any of the burgh officials, but to the unfair advantage taken by the successful offerer to secure the contract.' The contract referred to was a contract for printing the register of voters for Tillicoultry, and the paragraph is said to refer to the pursuer. Two alternative issues have been tabled by the pursuer, the one appropriate to an action for slander, the other to an action for verbal injury.

"The first issue is, whether the paragraph referred to represented that the pursuer had obtained the contract by dishonest and improper means. The question debated was, whether the paragraph complained of could reasonably be innuendoed as involving a charge of dishonesty. I have answered that question in the negative, although not