Wednesday, June 27.

FIRST DIVISION.

CAMPBELL *v.* MAQUAY.

Parent and Child—Guardianship of Infants Act, 1886 (49 *and* 50 *Vict. cap.* 27), *secs.* 2, 6, *and* 13—*Tutor—Second Marriage of Mother.*

The Guardianship of Infants Act, 1886, provides by section 2—"On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, 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."

The widow of a domiciled Scotsman contracted a second marriage, and resided with her husband in Florence. In a question between her and the surviving tutor nominated by the marriage-contract of her first marriage—*held* that under the provisions of the Act she was entitled along with him to the office of tutor to the pupil children of the first marriage, and that her second marriage was no disqualification for the office.

This special case was presented to obtain the judgment of the Court with regard to the guardianship of the pupil children of the late William Macbean Rankine of Dudhope.

By antenuptial contract of marriage in the Scotch form entered into between the deceased William Macbean Rankine and Miss Rosa Elizabeth Maclaine, daughter of the deceased Donald Maclaine, Esq. of Lochbuy, dated 4th July and recorded in the Books of Council and Session at Edinburgh 13th August, both in the year 1874, Mr Rankine, *inter alia*, appointed certain persons to be tutors and curators of the children of his said marriage. Mr Campbell of Kilberry, who was the first party to the special case, was the only surviving and acting tutor nominated by the deceased. William Macbean Rankine and the said Rosa Elizabeth Maclaine, who was the second party to the special case, were married on 8th July 1874, and three children, all of whom survived, were born of the marriage, viz., Violet Campbell Rankine, born 28th April 1876; Walter Lorne Campbell Rankine, born 4th July 1877; and Muriel Campbell Rankine, born 25th September 1878. William Macbean Rankine died at Craig in Argyllshire upon the 31st October 1879, being a domiciled Scotsman at the time of his death. On 5th July 1884 the said Rosa Elizabeth Maclaine or Rankine married Mr William Maquay, a banker, resident in Florence, Italy, and not a domiciled Scotsman, and she thereafter resided there with her husband.

By the Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27), section 2, it is enacted—"On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, 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." The 6th section provides that "... in Scotland either Division of the Court of Session may in their discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed." By the 8th section of the said Act it is provided that "in the application of this Act to Scotland the word guardian shall mean tutor, and the word infant shall mean pupil." By section 13 of the said Act it is provided—"Nothing in this Act contained shall restrict or affect the jurisdiction of the High Court of Justice in England and of the High Court of Justice in Ireland, or of any division of the said Courts, and of the Court of Session in Scotland, to appoint or remove guardians or (in the case of Scotland) tutors or factors *loco tutoris*, or otherwise in respect of infants."

In these circumstances a question had arisen as to the right of the party of the second part to act as tutor to her pupil children, and to be consulted regarding acts of administration affecting their estate. The party of the first part maintained that by the law of Scotland the second party, being a married woman, was not entitled to act as tutor aforesaid notwithstanding the provisions of the statute above referred to. The second party maintained that under the provisions of the said statute she was entitled to act as tutor aforesaid, and that she was not disqualified by her second marriage or otherwise from so acting.

The question stated for the opinion and judgment of the Court was as follows—"Is the party of the second part entitled to the office of tutor to the pupil children of the marriage between her and the deceased William Macbean Rankine, and to perform the duties of the said office?"

Argued for the first party—The second party was disqualified from acting as tutor by her second marriage. The law was settled that a married woman could not act as a tutor. Even if a deed of nomination gave her right to act in spite of a second marriage, the Court would enforce the disqualification—Fraser on Parent and Child, pp. 171, 309; Code V. 35, 1; Craig, ii. 20, 14; Stair, i. 6, 24; Bankton, i. 7, 30, and iv. 45, 126; Ersk. i. 7, 12; *Kerbechil* v. *Kerbechil*, M. 9585; *Stuart* v. *Henderson*, M. 9585. The reason of our ancestors had ascertained that it was injurious for a child to be subject to the control of its stepfather. This was at the root of the present question, and the case was stronger when the stepfather was a foreigner. The statute did not exclude the common law as to termination of the office. The Act was silent as to grounds of removal, and must be held to refer on this point to the common law of each country. Otherwise, there would be no power of removing the mother if she should prove a bad guardian. Section 13 reserved the jurisdiction of the Court, and one direction in which this must be exercised was to declare the forfeiture of her right by this spouse who had married again.

Argued for the second party—The doctrine of exclusion contended for could not be applied now. The basis of all the old decisions was that the mother by her second marriage was *in potestate viri—Langshaw* v. *Muir*, 1629, M. 16,252; *Borland*, 1632, M. 16,259; *M'Callum*, 15 D. 535; *Robb*, December 22, 1814, 18 F.C. 117; *Lord Macdonald*, June 11, 1864, 2 Macph. 1194. It was conclusive of the present question that the statute superseded the common law.

At advising—

Lord President—This case is brought with regard to the guardianship of the children of the late William Macbean Rankine, and his spouse, now Mrs Maquay. They were married in 1874. Mr Rankine died in 1879, and was a domiciled Scotsman at his death. The marriage-contract had nominated tutors to the children, but the only surviving and accepting tutor is the party of the first part. The party of the second part is the widow, who is now married to a gentlemen who is not a domiciled Scotsman. She lives with her husband at Florence. These are the facts of the case as agreed upon by both sides.

Mrs Maquay, as the mother of the pupil children, maintains that she has a right to be regarded as one of the two guardians of the pupils by virtue of the Guardianship of Infants Act, sec. 2. Mr Campbell, on the other hand, maintains that he has a right to be sole guardian, and that Mrs Maquay is by law disqualified. The only question of law is in reference to the supposed disqualification. The first party, Mr Campbell, argues that by the law of Scotland Mrs Maquay is not now entitled to the position she claims, in spite of the terms of the statute and its second section; Mrs Maquay argues that she still possesses her right of acting as tutor, and is not disqualified by her second marriage. This is a pure question of law, and it is not and could not be any appeal to the equitable jurisdiction of the Court. We could not here entertain any question as to the beneficial interest of these children, and we could give no effect to grounds upon which a tutor is removable under sections 6 or 13 of the Act. We are tied down to the question whether the widow is disqualified by her second marriage. The second section of the Act is in these terms—[*His Lordship read the section quoted above*]. Now these words are very strong. This is not a matter in which anyone is entitled to use any discretion. Even the widow is not left in a position to use any discretion. The words are imperative. The only condition is that she shall survive. If she does, then the widow becomes the guardian of the child without any other condition being imposed, and she either occupies that position alone or along with another as in the present case.

Now, it is said that this provision must be read along with the rule of the common law, which makes it a disqualification if the widow enters on a second marriage. The rule so established is quite distinct in the decisions of the 16th and 17th centuries, and it may be said that nothing has been decided since to shake these authorities. But one cannot help seeing that these older decisions are founded not on the principles of the common law or of equity, but upon the authority of the Roman law, and the earliest of these cases—that of *Kerbechil*—is a remarkable illustration of this. It has been argued to us that we ought to disregard these decisions, as the spirit which inspired them is irreconcilable with the state of modern legal opinion. That is rather a dangerous suggestion, and I am not disposed to put my judgment on any such ground. It is clear to my mind that the statute did not take account of any principle of common law which might be opposed to any provision of the Act. We know that there are great differences between Scottish and English law on such subjects as the guardianship of children, the *status* of married women, and the relations of parent and child, and of pupil and tutor. But this section now under consideration applies to the whole United Kingdom, and so instead of attempting to reconcile the common law principles of the various systems it makes a positive rule which passes them all by and takes no cognisance of any of them. No matter what the Scottish or English law may be, "the mother, if surviving, shall be the guardian of such infant." The other sections of the statute illustrate this in some degree. The 6th section makes it competent to apply for the removal of a guardian appointed by the 2nd section, or acting under this section. But the ground for that is a consideration of what is best for the child's welfare. There is no question of disqualification either existing at the time of the father's death or supervening thereon. Then the 13th section saves the jurisdiction of this Court to appoint or remove guardians. It would be very unfortunate if it could be supposed that the Act interfered with this jurisdiction, because there are a great many cases in which the Court exercises a large discretion as to the appointment or removal of the guardian. But this does not interfere with the general intention of the Act in regard to the question now under the consideration of the Court. I propose that we should find in favour of the contention of the second party to the case.

Lord Mure—The only question before us is, whether by section 2 of this Act a mother in the position of the second party is entitled to occupy the position of guardian to her child? I think it is impossible to overcome the express provisions of the statute, which imperatively direct that she shall take this position. We must assume that the mother is to continue to act as the guardian of the child. As to whether there may be machinery provided by the Act for asking for the removal of the mother as guardian of the child, I express no opinion. I think that might be open to some doubt. It is enough in the present case to find that the second party under the provisions of this statute is entitled to act as tutor to her children, and that she is not disqualified by her second marriage from so acting.

Lord Adam—I cannot say that I have ever had any doubt about this case. It appears to me that by the second section of this statute it is clearly provided that a mother must continue to act as the guardian of the child after its father's death. It is said that the mother here has married again, but she is still the mother of the child, and the Act is quite explicit as to her duty in regard to the guardianship of the children. The Act must

have contemplated such circumstances as are present in this case. There must be hundreds and thousands of widows who have married again, and if the Act intended to exclude such from guardianship that would have been done by its provisions.

LORD SHAND was absent on Circuit.

LORD PRESIDENT—I think it desirable that the question which we answer in the affirmative should have this addition, that the second party shall be guardian of the pupil children along with the first party.

Counsel for the First Party—D.-F. Mackintosh —Graham Murray. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for the Second Party—Jameson—Patten. Agent—F. J. Martin, W.S.

Wednesday, June 27.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

MULLIGAN *v.* M'ALPINE.

Reparation—Personal Injuries—Fault—Relevancy:

In an action of damages at the instance of a labourer against his employer in respect of injuries sustained through the explosion of a barrel of gunpowder, the pursuer averred that it was his duty to bore holes in rock for blasting purposes, to fill the holes with powder, and to fire the charge; that on the occasion of the accident a portion of the fuse he was using had been carried by the wind to a small barrel of gunpowder which had been brought from the magazine to the working place; that the system under which the work was carried on was unnecessarily dangerous, as the powder was kept in a magazine at a distance from the work, and was carried in barrels, whereas usually powder-flasks were supplied; and that before the accident complaints had been made by the workmen of the system. *Held* that there was no relevant averment of fault on the part of the defender, and action *dismissed.*

This was an action of damages at the instance of Patrick Mulligan, labourer, against Robert M'Alpine, contractor, Glasgow, concluding for £500 at common law, or otherwise £150 under the Employers Liability Act, 1880. The pursuer averred that he had been for some time in the employment of the defender, his duty being to bore holes in rock for blasting purposes, to fill these holes with gunpowder, and to fire the charge.

In answer to this the defender stated that the pursuer had been in his service for several years, and that he had very long experience in blasting operations.

The pursuer further averred—(Cond. 3) "On or about 22nd November 1887 the pursuer was engaged in these duties at a cutting in or near Rae Street, Saltcoats. He was engaged in firing the charge when a gust of wind carried a portion of the fuse or fire to a keg or small barrel of gunpowder, which had been brought from the magazine or store to the working place, and caused it to explode. The statement in answer is denied." (Ans. 3) "Admitted that the pursuer was about the date mentioned engaged as stated, and that while he was so engaged a barrel of gunpowder exploded. *Quoad ultra* not known and not admitted. The pursuer himself brought the barrel of gunpowder to the place where the accident happened, and he is called on to admit or deny this statement." (Cond. 5) "The said accident, and the pursuer's injuries, were due to the fault of the defender, and of those for whom he is responsible. In particular, the system under which the defender carried on his work was a bad and unnecessarily dangerous one. The powder was kept in a magazine or store, about five minutes' distance from the work, and was carried therefrom to the work in small barrels, holding about twenty-five pounds of powder, and averaging in height 14 inches, and in diameter 10 inches. The practice was to remove the cover or top of the barrel with a pick to get the powder out. The said system is unnecessarily dangerous, and is not the usual system. Usually powder-flasks, with narrow orifices, are supplied, the use of which practically obviates all risk. The defender could have, and ought to have, supplied flasks, and ought not to have allowed the use of barrels. It was the explosion of the powder in one of these barrels that caused the said accident, which was thus a direct consequence of the defender's fault. The statements in answer, so far as inconsistent herewith, are denied. In particular, it is denied that the pursuer kept the key of said store or box, or that it was his duty to take the barrel from the store, and to replace it after the shot had been fired, or to remove it to a distance before firing the shot." (Ans. 5) "Admitted that a barrel of powder exploded, and that the powder used for blasting purposes in the cutting at which the pursuer was working at the time of the accident was (enclosed in a bag) kept in a barrel, which was placed for safe custody in a store or box. Explained that only one barrel of powder was kept at a time in this store or box, and that the barrel was there opened; and explained further, that the said powder was under the sole charge of the pursuer, who kept the key of the said store or box. Explained also that it was the duty of the pursuer to take the barrel of powder from the store or box each time a shot was to be fired, and to place it again in the store or box after the shot had been fired, taking care to remove the barrel to a safe distance from the neighbourhood of the shot before firing the shot. On the occasion of the accident, the pursuer, instead of removing the barrel to a safe distance before firing the shot, kept it within a yard of the hole wherein the powder had been placed. The pursuer is called upon to admit or deny these statements. *Quoad ultra* the averments in this article are denied. Explained that in all parts of the defender's contract barrels were employed for the keeping of the gunpowder used for blasting, and that no inconvenience or accident resulted from this method, which was well known to the pursuer." (Cond. 6) "Before the said accident complaints had been made by some of the defender's work-