Whether he would succeed is another matter as to which we say nothing. I am afraid that unless the heir of entail proposes to pay the debts due to the charging creditor or the trustee, there is no answer to an application for disentail under this statute, because I do not think I ever saw a statute in which so little discretion is left to the Court. The imperative "shall" runs through the whole tenor of the section. If the debt exists and the necessary procedure is followed it is difficult to see that there can be any answer to the application for disentail. I therefore agree that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR—I am of the same opinion. The only question we decide is whether the condition of the statute which gives the trustee power to apply for a disentail has been satisfied. I am satisfied that he is in a position to follow out the procedure for obtaining a disentail. I do not think the granting of the application prejudices in any way the right of the bankrupt to prevent the sale of any estate beyond what may be necessary for payment of his debts. The right of a creditor is quite clearly defined by the 30th section of the 1848 Act (11 and 12 Vict. cap. 36) to exclude the possibility of selling land in manifest excess of what is necessary or proper in order to payment and extinction of the debt, principal and interest, and whole expenses appertaining thereto. The statute provided for suspending any sale in manifest excess of that amount in order to secure that only the necessary amount of land was being sold. And therefore I do not think the heir in possession is prejudiced in any way.

LORD PEARSON — I am of the same opinion.

The Court adhered.

Counsel for the Petitioner (Respondent) — Dean of Faculty (Campbell, K.C.) — Horne. Agents — Simpson & Lawson, W.S.

Counsel for Respondent (Reclaimer) — M. P. Fraser. Agents—Bruce & Black, W.S.

Saturday, February 9.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

JONES *v.* TAIT (SOMERVELL'S TRUSTEE).

Process—Parent and Child—Title to Sue—Private International Law—Lex fori—Mother of Illegitimate Child, both Domiciled in England, Suing on its behalf—"Next Friend"—Relevancy of Averring English Rules of Procedure.

The mother of an illegitimate son, the domicile of both being in England, raised "as his tutrix and administratrix-in-law" an action in which she neither averred that an English Court had given her such an appointment nor that by English law she, as a matter of status, possessed such a character. In the Inner House pursuer asked leave to amend the record to the effect that in England by certain Rules of Supreme Court she could competently sue on her son's behalf as "next friend."

Held—aff. Lord Ordinary (Salvesen)—that the pursuer had no title to sue, and that such an amendment, being merely as to procedure in a foreign court, would be irrelevant.

Process — Reclaiming Note — Printing — Failure of Reclaimer to Print the Lord Ordinary's Opinion.

Opinion per Lord Stormonth Darling that failure of a reclaimer to print the opinion of the Lord Ordinary is sufficient ground for refusing the reclaiming note.

Amy Elizabeth Jones, otherwise Somervell, residing at Spittal, Berwick-on-Tweed, "as tutrix and administratrix-at-law, and on behalf, of her son James Somers Jones, otherwise Somervell," brought an action of reduction of "a pretended bond," "a pretended instrument of disentail," and "a pretended decree obtained from the Lord Ordinary officiating on the Bills." The action was defended by John Scott Tait, Chartered Accountant, trustee on the sequestrated estates of James Somervell of Sorn.

The averments of parties regarding the pursuer's title to sue were as follows:—"(Cond. 1) The pursuer is the mother and tutrix and administratrix-at-law and guardian of James Somers Jones, otherwise Somervell, who is a pupil, and resides with her at Spittal, near Berwick. Admitted that said James Somers Jones, otherwise Somervell, is not the legitimate son of the pursuer. *Quoad ultra* the statements in answer are denied. (*Ans.* 1) Denied that the pursuer is tutrix and administratrix-at-law or guardian of the said James Somers Jones. *Quoad ultra* not known and not admitted. Explained that the said James Somers Jones is not a legitimate son of the pursuer. The pursuer is a domiciled Englishwoman. She has not been appointed tutrix and administratrix of the said James Somers Jones, and she is not by the law of England his tutrix and administratrix. Neither does she hold that position by the law of Scotland."

The defender pleaded, *inter alia*:—(1) The pursuer has no title to sue, in respect that she is not tutrix and administratrix of her said son, and is not entitled to sue on his behalf."

On 1st December 1906 the Lord Ordinary (SALVESEN) sustained the first plea-in-law for the defender John Scott Tait, dismissed the action, and decerned.

Opinion.—"The pursuer here sues in the character of 'tutrix and administratrix-at-law and on behalf of her son' James Somers Jones, who is a pupil. The child is admittedly however illegitimate, and at

common law therefore she does not hold the position of tutrix to her son. The pursuer's counsel admitted that both she and her son are domiciled in England, but there is no averment that she holds any appointment as tutrix and administratrix of her son from an English Court, or that the law there confers upon her that character apart from appointment. In these circumstances the defender pleads that she has no title to sue an action on her son's behalf.

"The pursuer's condescendence does not contain any statement as to the law of England, nor does she aver that that law differs from the law of Scotland. It was explained to me, however, at the debate that if a proof were allowed on this preliminary point, the pursuer would be able to establish that, as the 'next friend' of her pupil child, she could competently sue on his behalf in England, and her counsel desired it to be inferred that, assuming he established this, the result would be that she would have a good title in Scotland. If such a case were to be made, it should have formed the subject of substantive statement of facts, for English law is a matter of fact to be ascertained by proof, and there are no facts stated on record which I could remit to probation. Apart from this I should regard such an averment, if made, as irrelevant. English rules of procedure are of no effect in a Scotch Court, which must act according to its own rules. The law of Scotland does not recognise the right of any person to sue as the 'next friend' of a pupil, but if an action is brought in a pupil's name because he possesses no guardians, the Court will appoint a tutor *ad litem* to him. As the objection is a purely technical one, I suggested at the debate that the defender might consent to having the action sisted until the pursuer obtained an appointment as administratrix from an English Court, but as this would have the effect not of completing an inchoate title but of conferring a title where none previously existed, it could not be done without the defender's consent. As the defender declined—no doubt for good reasons—to consent to such a course I have no alternative but to dismiss the action, although the result, I am afraid, will simply be to multiply procedure."

The pursuer reclaimed. She failed to print the opinion of the Lord Ordinary or append it to the reclaiming note.

At the debate on the reclaiming note counsel for the pursuer admitted that on the averments as they then stood the interlocutor of the Lord Ordinary was not open to challenge, but he asked leave at the Bar to make a specific averment that according to the law of England the pursuer was guardian of her child and entitled to sue on his behalf.

Argued for the pursuer and reclaimer—Pursuer and her son both being domiciled in England the question of her title to sue fell to be determined by the law of that country. The mother of an illegitimate child in England was entitled to sue on its behalf as "next friend" (Rules of Supreme Court, 1883, Order XVI, Rule 16). She was prepared to amend the record to that effect. Such amendment if allowed would be relevant, and she was entitled to proof thereof.

Argued for the defender and respondent—The proposed amendment was irrelevant. The Lord Ordinary had already indicated that an amendment in these terms would, if made, be irrelevant. It was an averment of a rule of practice in the English Courts which could receive no effect in Scotland. It might have been different if the pursuer could aver that as a matter of status she had a right by the law of England to sue on behalf of her illegitimate child, but that was not what she was prepared to aver.

LORD STORMONTH DARLING—If we had before us a proposal to amend the record in any essential particular by adding averments raising a point which was not before the Lord Ordinary, I should have been prepared, according to the usual practice, to give the reclaimer an opportunity of doing so. At the same time I think that the reclaimer should have been ready to lay before the Court in writing a specific statement of his amendment if he proposed to make a different case from that on which the Lord Ordinary has expressed his opinion. But the only averment which the reclaimer now proposes to add would, he admits, be in no essential respect different from the one regarding which the Lord Ordinary has said that, if it had been made before him, he would have considered it irrelevant. I agree with the Lord Ordinary, and for the reasons stated by him. Every Court has its own rules of practice, and it is no part of our rules that the mother of an illegitimate child should be entitled to sue on its behalf as "next friend." I accordingly think that the judgment of the Lord Ordinary is right and should be adhered to.

I should only like to add that I think it would have been competent for us to have taken the same course on the sole ground that the reclaimer has failed to print the opinion of the Lord Ordinary.

LORD LOW—I am of the same opinion. Mr Fraser has been perfectly candid, and has admitted that, as the record stands, the judgment of the Lord Ordinary cannot be challenged. If it is to be altered, it must be upon new averments, and I think the reclaimer should have been ready with the averments which he proposed to add. He has asked for an opportunity of stating his amendment in writing, but he has indicated verbally what it would be, and it is just the averment which the Lord Ordinary considered and held to be irrelevant. I am of opinion with the Lord Ordinary that such an amendment would be quite irrelevant, and as the reclaimer has suggested no other, I think the judgment of the Lord Ordinary should be affirmed and the action dismissed.

LORD ARDWALL—I am of the same opinion. If Mr Fraser had indicated that

he was going to make an averment regarding English law to the effect that this pursuer was entitled to act as tutrix and administratrix-in-law to her illegitimate son, and that as matter of status she had the legal capacity to represent him, the case would have been different, but so far as we can see there is no proposal to aver English law to that effect, and I think it almost certain that no such law exists. The only amendment really proposed is to plead in this Court the rules of the Court of Chancery, and that is quite irrelevant. I am in favour of affirming the Lord Ordinary's interlocutor.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—M. P. Fraser. Agents—Bruce & Black, W.S.

Counsel for Defender (Respondent)—Dean of Faculty (Campbell, K.C.)—Horne. Agents—R. R. Simpson & Lawson, W.S.

HOUSE OF LORDS.

Wednesday, March 13.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord Robertson, and Lord Atkinson.)

HAMILTON AND OTHERS *v.* NISBET.

(*Ante*, July 19, 1905, 42 S.L.R. 781, and 7 F. 1034; *vide* also *Caledonian Railway Company* v. *Glasgow Corporation*, *infra*.)

Burgh—Police—Street—Building Regulations — "Width" of Street — Glasgow Building Regulations Act 1900 (63 *and* 64 *Vict. cap. cl*), *secs.* 20 *and* 21.

The Glasgow Building Regulations Act 1900 confers in certain events power (section 20) on the Master of Works, and on appeal from him (section 21) on the Dean of Guild, to fix the "width" of a street.

Held (*aff.* judgment of the Court of Session) that the only width which the Master of Works, or, on appeal, the Dean of Guild, was empowered to fix was the actually existing width of the street.

This case is reported *ante ut supra*, and was heard with the immediately following case of the *Caledonian Railway Company* v. *Glasgow Corporation*.

Nisbet, the respondent in the Court of Session, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—This is an appeal from the decision of the Lords of the First Division, along with Lords Kyllachy, Low, and Stormonth Darling, and it depends upon the construction of the Glasgow Building Regulations Act 1900. Another case, that of the *Caledonian Railway Company* v. *The Corporation of Glasgow* (*infra*, following case) raised similar questions, and was in effect heard and considered by your Lordships at the same time. It seems to me that the opinions delivered in these two cases by the Lord President cover the whole ground so exhaustively and so clearly, that I need do no more than express my entire concurrence in them and in the conclusions to which they lead. I therefore respectfully advise your Lordships to dismiss this appeal with costs.

LORD MACNAGHTEN—I agree entirely.

LORD ROBERTSON—I concur.

LORD ATKINSON—I agree.

Appeal dismissed with costs.

Counsel for the Respondents (Appellants in the Court of Session)—Clyde, K.C.—Hunter, K.C. Agents—Kerr & Barrie, Maclay, Murray, & Spens, James Hutcheson & Sons, Glasgow—Auld & Macdonald, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

Counsel for the Appellant (Respondent in the Court of Session)—The Lord Advocate (Shaw, K.C.)—The Dean of Faculty (Campbell, K.C.)—M. P. Fraser. Agents—Campbell & Smith, S.S.C., Edinburgh—Martin & Leslie, Westminster.

Wednesday, March 13.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord Robertson, and Lord Atkinson.)

CALEDONIAN RAILWAY COMPANY *v.* GLASGOW CORPORATION.

(*Ante* July 19, 1905, 42 S.L.R. 773, and 7 F. 1020; *vide* also *Nisbet* v. *Hamilton*, *supra*.)

Process — Statutory Remedy — Action of Reduction Pending Statutory Appeal to Sheriff—Finality of Sheriff's Decision—Competency of Action of Reduction—Glasgow Building Regulations Act 1900 (63 *and* 64 *Vict. cap. cl*), *sec.* 9 (2) (*c*).

The Glasgow Building Regulations Act 1900 provides for the preparation of a register of streets in which is to be set forth the "width" of the street, and section 9 (2) (*c*) enacts—"Any proprietor who may be aggrieved by any entry in the register or omission therefrom . . . may within the said period of two months appeal to the Sheriff against the same. The Sheriff shall after the expiry of the said period of two months deal with any such appeal in a summary manner, and may order any entry in the register . . . to be deleted or altered . . . and his decision shall be final."

A proprietor deeming himself aggrieved inasmuch as the "width" of the street opposite his property entered in the register was not the actually existing width of the street, brought