Saturday, December 12, 1908.

OUTER HOUSE.

[Lord Mackenzie.

BATHGATE HERITORS *v.* RUSSELL.

Process—Title to Sue—Heritors—Action at instance of Heritors of a Parish, and A B, "Clerk to and as representing said Heritors."

A note of suspension and interdict was presented by the heritors of a parish, and A B, "clerk to and as representing said heritors." *Held* (*per* Lord Mackenzie), on an objection to the complainers' title to sue, that the instance was good.

The Heritors of the Parish of Bathgate, and John Wright, clerk to and as representing them, presented a note of suspension and interdict against William Russell and the Bathgate Corn Exchange Company, of which he was the only known partner. The complainers sought to prevent certain proposed encroachments on the churchyard of which they were proprietors, consequent on a scheme for alteration and improvement of the respondent's property which abutted thereon.

The case having come into the Court of Session on a passed note from the Bill Chamber, the respondents maintained their first plea, viz., no title to sue.

At the discussion in the Procedure Roll the following authorities were referred to:—*Kirk Session of North Berwick* v. *Sime*, November 14, 1839, 2 D. 23; *Magistrates of Edinburgh*, July 18, 1881, 8 R. 982, 18 S.L.R. 706; Mackay's Manual, p. 156; *Lyall* v. *Commissioners of Supply for Lanark*, July 5, 1859, 21 D. 1136; *Boswell* v. *Duke of Portland*, December 9, 1834, 13 S. 148; *Heritors of Kinghorn* v. *Magistrates of Kinghorn*, March 12, 1897, 24 R. 704, 34 S.L.R. 518; *Corporation of Glasgow* v. *M'Ewen*, November 23, 1899, 2 F. (H.L.) 25, 37 S.L.R. 620; *Smith* v. *Heritors of Prestonpans*, January 27, 1903, 5 F. 333, 40 S.L.R. 303; Duncan's Parochial Ecclesiastical Law (Johnston's ed.), pp. 518 and 534.

LORD MACKENZIE—"I have considered the authorities cited, and am of opinion that the instance is good.

"Heritors in regard to such a matter as the present are to be regarded as a *quasi* corporation. The plea to title will therefore be repelled.

"On the merits of the case there must be a proof."

The Lord Ordinary repelled the first plea-in-law for the respondents, and before answer allowed a proof.

The case was subsequently settled.

Counsel for the Complainers—Sandeman. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Respondents—Macphail. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, January 6, 1909.

OUTER HOUSE.

[Lord Skerrington.

HUTCHEON AND OTHERS *v.* ALEXANDER AND OTHERS.

Judicial Factor — Factor loco tutoris — Appointment—Objection to Nominee of Nearest Agnate — Discretion of Court — Neutral Appointment.

Where a petition for the appointment of a factor *loco tutoris* to a pupil boy was presented by certain of his relatives, including the nearest agnate, in which they nominated a certain person as suitable for the office, and the pupil and certain other relatives lodged answers objecting to the person nominated and suggested one of their own number for the office, the Court (Lord Skerrington) *appointed* a neutral professional man to the office.

Sinclair v. *Sutherland*, December 19, 1829, 7 S. 214, and *Jackson* v. *Wright*, June 19, 1835, 13 S. 961, *commented on.*

Judicial Factor—Curator Bonis—Minor—Appointment—Opposition of Minor to Appointment—Power of Court to Appoint in Face of Minor's Opposition.

Question as to the power of the Court to appoint a *curator bonis* to a *minor pubes* who objects.

John Alexander, chemist and druggist, Aberdeen, died on December 1, 1908, intestate and without having named a tutor and curator to his surviving children, viz., Helen May and John, who were respectively in minority and pupilarity. A petition was presented by Edward Hutcheon, a maternal uncle of the children, Robert Mearns, their nearest agnate, and certain other relatives, craving the appointment of John Rattray Flockhart, C.A., as *curator bonis* and factor *loco tutoris* to the children. Answers were lodged thereto by the two children and certain other relatives, in which (1) Helen May Alexander objected to the appointment of a *curator bonis* on the ground that she was a *minor pubes* and therefore entitled to choose curators for herself, and (2) the other respondents objected to the petitioners' nominee and suggested that either Henry Hutcheon or George Duff Boddie, who were respectively brother and brother-in-law of the deceased mother of the children, should be appointed factor *loco tutoris* to the pupil child.

It was argued for the petitioners that the Court, in the absence of any good reason shown to the contrary, ought to appoint to the office the nominee of the nearest agnate — *Sinclair* v. *Sutherland*, December 19, 1829, 7 S. 214; *Jackson* v. *Wright*, June 19, 1835, 13 S. 961; *Simpson*, November 17, 1860, 23 D. 35.

In answer the respondents quoted *Armit*, May 25, 1844, 16 Scot. Jur. 471, and argued further that it was not competent for the Court to appoint a *curator bonis* to a *minor pubes* against his will—*Hutchison*,