

The Court answered the first alternative of the first and second questions of law in the negative, and the second alternative of the said first and second questions in the affirmative, the first alternative of the third, fourth, fifth, and sixth questions of law in the affirmative, and the second alternative of the said third, fourth, fifth, and sixth questions in the negative.

Counsel for the First Parties—Graham Stewart, K.C.—R. C. Henderson. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Second Party—Constable, K.C.—Cowan. Agent—R. C. Gray, S.S.C.

Wednesday, January 26.

SECOND DIVISION.

(SINGLE BILLS.)

DOW (DOW'S TUTOR), PETITIONER.

Process—Minor and Pupil—Nobile Officium—Petition by Tutor-Nominate for Authority to Sell—Presentation in Inner House—Competency—Court of Session Act 1857 (20 and 21 Vict. cap. 56), sec. 4 (5)—Pupils Protection Act 1849 (12 and 13 Vict. cap. 51)—Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), sec. 12.

The Guardianship of Infants Act 1886 enacts that tutors-nominate shall be subject to the provisions of the Pupils Protection Act 1849. The Court of Session Act 1857 enacts that all petitions under the Pupils Protection Act 1849 shall be presented to the Junior Lord Ordinary.

Held that a petition by a tutor-nominate for authority to sell must be presented to the Junior Lord Ordinary, and not to the Inner House.

The Court of Session Act 1857 (20 and 21 Vict. cap. 56), section 4, enacts—"All summary petitions and applications to the Lords of Council and Session, which are not incident to actions or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just; and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz. . . . (5) All petitions, applications, and reports, under the Act of the twelfth and thirteenth Victoria, chapter 51, entitled an Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity in Scotland."

The Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), section 12, enacts—"In Scotland tutors, being administrators-in-law, tutors-nominate, and guardians appointed or acting in terms of this Act,

who shall by virtue of their office administer the estate of any pupil, shall be deemed to be tutors within the meaning of an Act passed in the twelfth and thirteenth years of the reign of Her Majesty, intituled an Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity in Scotland, and shall be subject to the provisions thereof. . . ."

On 23rd October 1909 John Graham Dow, tutor-nominate to Walter Dow, acting under the general disposition and settlement of the deceased Walter Dow junior (father of the above-mentioned Walter Dow), presented a petition to the Second Division of the Court of Session for authority to sell certain heritable subjects belonging to the ward.

On 19th November 1909 the Court remitted to Mr Charles Young, W.S., to inquire into the regularity of the proceedings, and to report.

The reporter reported on the procedure as follows—"The reporter has doubt as to the competency of the procedure followed in this petition. It has been presented to your Lordships presumably under the *nobile officium* of the Court, but it would appear that the proper course would have been to go to the Junior Lord Ordinary on a report by the Accountant of Court, in terms of the Pupils Protection Act of 1849, the Court of Session Act 1857, and the Guardianship of Infants Act of 1886. In this connection the reporter would refer your Lordships to the case of *Souter*, 1890, 18 R. 86, 28 S.L.R. 89, where the Judges of your Lordships' Division, after consultation with the Judges of the First Division, dismissed a petition for the removal of a *curator bonis* and appointment of a new *curator bonis* as incompetent in the Inner House. . . . In view of the Court of Session Act and the above case it appears to the reporter that the present petition should have been presented to the Junior Lord Ordinary.

"The reporter would, however, ask your Lordships to consider, along with the case of *Souter*, the case of *Logan*, 1897, 25 R. 51."

In the Single Bills counsel for the petitioner founded on the case of *Logan*, November 9, 1897, 25 R. 51, 35 S.L.R. 51, and two unreported cases, and argued that the competency of presenting such petitions in the Inner House was supported by the practice in regard to them.

LORD ARDWALL—This case involves a small point of procedure, but one which it is well should be settled. We are told that in the case of *Logan* a similar petition was dealt with by the First Division. But in that case the question of competency was not raised, and it is therefore not an authority on the point now before us. It is also said that the practice is to present such petitions as this to the Inner House. I can only say that any ideas regarding practice which may be entertained in the profession or among the Clerks of Court cannot prevail against the

provisions of Acts of Parliament. I think that in terms of the Pupils Protection Act 1849, sec. 1, the Guardianship of Infants Act 1886, sec. 12, and the Court of Session Act 1857, sec. 4 (5), this is clearly one of the petitions which should be brought in the first instance before the Junior Lord Ordinary and not before a Division of the Court.

LORD DUNDAS—I agree. I think the statutes are quite explicit to the effect that as matter of procedure such a petition as this must in the first instance be presented to the Junior Lord Ordinary. I am not satisfied from anything I have heard that there has been any practice to the contrary, but if there has, then it was a wrong practice, and ought to be put a stop to. In *Logan's* case I gather from the report that the Court's attention was not drawn to this question of procedure.

LORD JUSTICE-CLERK—Upon the question before us, which is one of procedure only, I think the statutes must apply according to their plain words.

The Court remitted the process along with the report by Mr Young to the Junior Lord Ordinary to proceed.

Counsel for the Petitioner—**MacRobert**—
Agents—**Carmichael & Miller, W.S.**

Thursday, January 27.

SECOND DIVISION.

[Sheriff Court at Hamilton.]

WARD v. ABRAHAM AND OTHERS.

Reparation — Negligence — Joint - Delinquency—Playing Cricket in Unsuitable Place.

A father brought an action concluding for damages against four defenders, a man and three little boys, jointly and severally, or severally, in respect of personal injury caused to his pupil child. The pursuer averred that his child, while sitting in his back green, had been struck by a cricket ball which had been hit from a neighbouring back-green belonging to the major defender; that at the time of the accident the defenders were engaged in playing in the major defender's back-green, and that the ball was hit by one of them, whose name was unknown to the pursuer. The pursuer also averred that the defenders knew or should have known that it was "a highly dangerous and unlawful thing to play a game of cricket in a small enclosed place, such as was being done here," and that they took no precautions to warn the neighbours that there was danger of the cricket ball being hit into such a position as might cause them injury.

Held that as it was not illegal to play cricket in a back-green, and there were

no averments to show that it was being played in an illegal way, the pursuer's averments were irrelevant, and the action must be dismissed.

Query if there would have been any joint liability supposing the game had been carried on in an illegal way?

John Ward, 26 Glasgow Road, Silverbanks, Cambuslang, as tutor of his pupil child **Mary Ward**, brought an action of damages in the Sheriff Court at Hamilton against **Arthur Abraham**, 2 Ardoch Gardens, Cambuslang; **Charles Thomas**, 5 Ardoch Gardens, Cambuslang; **Gilbert Cunningham**, 2 Ardoch Gardens, Cambuslang; and **Charles Robinson**, Rowanlee, Buchanan Drive, Cambuslang. The pursuer craved decree against the defenders jointly and severally, or severally, for the sum of £300.

The pursuer averred—" (Cond. 1) . . . The defenders the said **Charles Thomas**, aged 12, **Gilbert Cunningham**, aged 12, and **Charles Robinson**, aged 11 . . . are pupils. . . . (Cond. 2) The pursuer's house is part of a row of tenements, the back of which looks into the back of the house where the said **A. Abraham** resides. There is a back-green behind the pursuer's house for the use of the tenants in the tenement, and there is a similar green behind the house where the said **A. Abraham** resides. The respective tenants have the use of these greens, which are primarily for the purpose of a drying green and not a playground. The green in connection with pursuer's house is separated from the green in connection with the said **A. Abraham's** house by a stone wall 5½ feet high and a lane about 11 feet in width. . . . (Cond. 3) On the evening of 2nd July 1908, between the hours of seven and eight o'clock, pursuer's wife was in the back-green behind her dwelling-house with the said **Mary Ward**. . . . Whilst there a cricket ball came unexpectedly and without warning from the defender **A. Abraham's** back-green and hit the pursuer's said daughter **Mary** on the back of the head, injuring her very seriously. . . . (Cond. 4) At the time of said accident and for sometime prior thereto the said **Charles Thomas**, **Gilbert Cunningham**, **Charles Robinson**, and **A. Abraham** had been engaged playing cricket in said back-green. The stumps were placed close up against the back wall of the building in which the said **A. Abraham** resided, and one of the four defenders was possessed of the bat, whilst another bowled to him, the other two in the meanwhile being engaged in fielding and consequently taking an active part in the game. It is believed and averred that the four took turns in batting, bowling, and fielding, and it was whilst in the course of said game that one of the four, whose name is presently unknown to the pursuer, hit the ball after it was bowled to him which caught the pursuer's said child as previously mentioned. . . . (Cond. 5) The pursuer's said child was injured through the fault of the defenders **Charles Thomas**, **Gilbert Cunningham**, **Charles Robinson**, and **A. Abraham** jointly and severally, or severally. They knew or ought to have known, in particular the said **A. Abraham**,