I therefore think that the fact of this croft having been sub-divided before the date of the Act does not infer the defender's liability to forfeiture. If the mere continuation of a state of things had been enough to infer this result, then forfeiture and the passing of the Act would have been simultaneous, and that is not my view of the intention of the statute. The real difficulty of the case is, whether the defender has done anything since the date of the Act to infer forfeiture. His agreement with MacIntyre was from year to year, and the defender could end it at any term of Whitsunday. He might have ended it at Whitsunday 1887. Is it to be regarded as a new agreement after the passing of the Act that he did not do so? I do not think the statute meant any such thing. I think it meant to prevent evils in future. This arrangement has existed for ten years, and so in my view the defender has done nothing since the Act in the way of sub-dividing his holding.

Lord Kinnear—I cannot agree with the Sheriff in finding that the piece of ground occupied by MacIntyre is not part of the defender's croft. I think it was a part thereof, and that section 33 does not apply at all to the present case. But disregarding that ground of decision I agree with your Lordships that section 1, sub-section 4, has not been contravened by the defender. It is a prohibitory section, and the crofter is forbidden to do certain things under penalty of forfeiture. The defender has done nothing since the Act passed to infer forfeiture. I think it might be possible to incur forfeiture by the continuance of arrangements which were permissible before the Act, but not after it. But in the present case I do not think that that has happened.

The Court pronounced the following interlocutor:—

> "Refuse the appeal, and adhere to the interlocutor of the Sheriff of 19th October 1887, in so far as regards the first, second, third, and fourth findings in fact: *Quoad ultra* recal the said interlocutor: Find in law that the defender has not sub-divided his croft since the passing of the Crofters Holdings (Scotland) Act 1886 within the meaning of section 1 (4) of the said Act: Therefore of new assoilzie the defender, and decern."

Counsel for the Pursuer—Sol.-Gen. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defender—C. S. Dickson—Salvesen. Agents—Gill & Pringle, W.S.

Saturday, March 17.

FIRST DIVISION.

MACQUAY *v.* CAMPBELL.

Parent and Child—Custody of Child—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap* 27), *secs.* 2, 3, *sub-sec.* 3, *and sec.* 5.

In an application under the Guardianship of Infants Act, 1886, by a mother domiciled abroad for the custody of her two daughters, both in pupillarity, and residing with their uncle and tutor-nominate in Scotland, by whom the application was opposed, *held* that as there was no imputation against the character of the petitioner, and as there was nothing in the circumstances in which she was placed to unfit her for the office of guardian, the petition should be *granted*.

This was an application under the Guardianship of Infants Act, 1886, by Mrs Rosa Elizabeth Maclaine or Rankine or Maquay, widow of the deceased William Macbean Rankine of Dudhope, in the county of Forfar, and wife of William Maquay, banker in Florence, for the custody of the two daughters by her marriage with Mr Rankine, both of whom were in pupillarity, and who were at the date of the application residing with their uncle John Campbell of Kilberry, Argyllshire, the sole surviving tutor nominated by their father in his marriage-contract. Mr Campbell opposed the application, which was made in the following circumstances:—Mr and Mrs Rankine were married on 8th July 1874. By antenuptial contract of marriage, dated 4th July, and recorded 13th August 1874, Mr Rankine appointed tutors and curators to the children of the marriage. At the date of the present application the sole surviving and acting tutor was Mr Campbell. Three children were born of the marriage—Violet Campbell Rankine, born 28th April 1876; Walter Lorne Campbell Rankine, born 4th July 1877; Muriel Campbell Rankine, born 25th September 1878. William Macbean Rankine died on 31st October 1879.

In July 1884 Mrs Rankine married Mr William Maquay, a British subject residing in Florence, a partner in the banking house of Maquay, Hooker, & Co., who carried on business in Florence and elsewhere in Italy. At the date of the petition the children were residing with or under the charge of Mr Campbell of Kilberry, and he refused to allow them to reside with their mother at Florence.

The present petition for the custody of the two girls was presented by Mrs Rosa Rankine or Maquay, in which she averred that owing to Mr Campbell's refusal to allow the children to reside with her she was only able to see them at long intervals; that Kilberry was in a remote district of Argyllshire, where the girls were far from all educational centres, while in Florence they would have every advantage. With regard to the boy, he being at school, all that the petitioner asked in the prayer of the petition was that arrangements should be made for his spending a part of his holidays with her. This part of the petition was not insisted in, as appears from the opinion of the Lord President *infra*.

Mr Campbell in his answers stated that the petitioner was permanently settled in Florence, and that the children were being brought up with his own children, the girls under a resident governess, while the boy was placed at a preparatory school in England along with his own son. The respondent objected in the interest of the girls to their being sent out of the country, and out of the jurisdiction of the Court, and averred that their father had objected to the children being brought up abroad.

The Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27) provides, sec. 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." Section 3, sub-section 3, provides—"In the event of the guardians being unable to agree upon a question affecting the welfare of any infant, any of them may apply to the Court for its direction, and the Court may make such an order or orders regarding the matters in difference as it shall think proper." Section 5 provides—"The Court may, upon the application of the mother of any infant (who may apply without next friend) make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother, and the liability of the father for the same or otherwise as to costs as it may think just."

Argued for the petitioner—The petitioner was entitled to the custody of her two daughters. The Guardianship of Infants Act created the petitioner joint guardian of the children along with the respondent, and it was not suggested that there was any valid reason for her not having the custody of the girls, who were still in pupillarity. No imputation had been or could be made against the petitioner's character. The only allegation was that she was resident in Florence, and outwith the jurisdiction of the Court. This was no reason for refusing the petitioner her legal rights.

Replied for the respondent—The petitioner by her second marriage lost by the common law of Scotland her tutorial powers—Ersk. i. 7, 12. By her second marriage she came under the tutorial powers of her husband, and could not competently be tutor to others. The petitioner desired to remove these children from Scotland against the known wish of their father, and to educate them abroad. Owing to the petitioner's second marriage the statute referred to did not apply. It gave the mother a joint tutorial power along with any tutor-nominate by implication so long only as she continued a widow—*Spiers*, Dec. 23, 1854, 17 D. 289; *Stuart*, March 20, 1861, 23 D. 779.

At advising—

Lord President—I am for granting this application. The 5th section of the Guardianship of Infants Act 1886 provides as follows—[*reads section*]. Now the circumstances in the present case are very simple. The mother of these pupil children has married again, and her husband is a banker in Florence, and she resides there with him. The question which we have to determine is, whether it is most for the interests of these children, and most suitable in the circumstances of the case, that they should reside with their mother or with their uncle at Kilberry? I can only say that I have no doubt that the fitting place for the girls is with their mother. If there had been any imputation upon this lady's character, or anything in the circumstances in which she was placed to render her an unfit guardian of such children—I use the term guardian not in its legal but in its popular sense—then the Court would give great weight to such considerations, but there is nothing of such a kind alleged here. There is not the slightest imputation made against this lady. I think therefore that the proper course is that the girls should live with their mother, while as regards the boy, he stands in a different position, because I understand no application is made with regard to him.

Lord Adam and Lord Kinnear concurred.

Lord Mure and Lord Shand were absent from illness.

The Court granted the prayer of the petition with regard to the custody of the daughters.

Counsel for the Petitioner—Sol.-Gen. Robertson—Jameson. Agent—F. J. Martin, W.S.

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

HOUSE OF LORDS.

Friday, February 24.

(Before the Lord Chancellor (Halsbury), Lord Watson, and Lord Macnaghten.)

COOPER *v.* COOPER AND OTHERS.

(*Ante*, Jan. 9, 1885, 22 S.L.R. 314, and 12 R. 473.)

Minority—Capacity to Contract—Marriage-Contract—Law of Domicile and Place of Contract—Irish Law.

An Irishwoman, aged eighteen, was married in Ireland to a Scotsman in 1846. Prior to her marriage she executed an antenuptial marriage-contract in the Scotch form. After her husband's death in 1882 she brought an action of reduction of the marriage-contract against her husband's trustees and the children of the marriage, in which she averred (1) that she was in minority when she signed it, and (2) that there had been lesion. The first of these grounds of reduction was not maintained in the Court of Session, and the judgment of the Court assoilzieing the defenders from the reductive conclusions of the action proceeded upon a finding that there had been no lesion.

On appeal the appellant maintained that by the law of Ireland, which was the law of her domicile, and also of the place where the contract was entered into, she could not, being in minority, bind herself by the marriage-contract. The respondents in answer contended that the appellant had excluded consideration of this question by not arguing it in the Court of Session; that the question of Irish law was a question of fact in the Court of Session; and that no evidence had been led in support of the appellant's view; further, that the Irish law did not apply, as the marriage-contract was Scotch, the domi-