LORD YOUNG—I am of the same opinion. There is no question of patent law raised by the complainer here, or any case of a colourable imitation of his commodity by the respondent, or complaint of anything done to attempt to palm off the respondent's own commodity on the public as the complainer's. I am therefore of opinion—taking my language from that of Lord Selborne in the case of *Singer*, where he observes—"If the defender has a right to make and sell articles similar to the pursuer's he has a right to say so, and to employ the terminology common in his trade if he does this in a fair, distinct, and unequivocal way."

It is admitted, then, that the respondent has the right to make his cement in the manner which he has described in his evidence, but it is said that in a leaflet which he has issued pointing out to intending customers how his cement is to be used, he has employed some of the language which the complainer had used in a pamphlet he issued for a similar purpose. I do not think there is any difference of opinion among us that in doing so he had not infringed the complainer's copyright.

But it is further said that for the same purpose of informing intending purchasers in the use of his cement the respondent has copied, or substantially copied, a small picture of a little bit of brick wall which appeared in the complainer's pamphlet, and that he has published it for the same purpose as the complainer, for illustrating the use of his cement. I am equally clear that in this matter also there has been no invasion of copyright. Anybody who wishes to illustrate his meaning by a bit of brick wall can draw a little piece of brick wall. There is no copyright in such a drawing for the purpose of illustrating something for which a brick wall may be used, nor is there any more originality in the drawing of a brick wall for the purpose of showing how this cement is to be applied than there is in the drawing of a hat in order to show how a band may be attached to it, or than the drawing of a snuff-box, or umbrella, or a tobacco pipe, for the purpose of illustrating how they may be used.

I think that the whole question of copyright is foreign to this subject. This is quite a different case from the cases to which we were referred, where what was complained of was the stealing from registered publications matter which had been obtained at great trouble, and which had cost large sums of money to bring out. There is no such case here. I am therefore of opinion that with regard to the question of this drawing, as well as to the use of the language which is complained of, the copyright of the complainer has not been invaded. It follows therefore that the question of copyright is foreign to the question, not so far as regards the summons, because there the question of copyright is quite clearly raised, but it is foreign to the subject-matter of the action before us. I am therefore of opinion that the interlocutor of the Sheriff-Substitute is right, and ought to be adhered to.

LORD RUTHERFURD CLARK—I am content to put my judgment in this case solely on fact, and to hold that in fact there has been no invasion of the complainer's copyright.

LORD TRAYNER—I think that the respondent was entitled to describe in the most appropriate language he could find, or in the language he thought most proper for his purpose, the mode in which his cement ought to be used, and I think it would be ridiculous to say that because he had used language which was almost similar to that used by another manufacturer of cement in describing the mode in which he thought his cement ought to be used, that there was therefore invasion of copyright.

I have had more difficulty about the question of the sketch, but I cannot hold that even with regard to the alleged copying of this, there is either in quantity or quality such an invasion of the copyright of the complainer that we can interfere. In fact, if I may say so, the whole question appears to me *de minimis*, and I think that the complainer might have been satisfied with the judgment he obtained in the Sheriff Court.

The Court adhered to the Sheriff-Substitute's interlocutor.

Counsel for the Appellant—D.-F. Balfour—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondent—Guthrie Smith—W. Campbell. Agents—Duncan Smith & MacLaren, S.S.C.

Thursday, December 11.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

WILLISON AND OTHERS, PETITIONERS.

Minor and Pupil—Tutor—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap.* 27).

By the 2nd section of the Guardianship of Infants Act 1886 it is provided that on the death of the father of an infant, 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. By section 8 it is provided that in the application of the Act to Scotland the words guardian and infant shall respectively mean tutor and pupil.

Held that on the death of the father it is not competent to appoint the mother to be factor *loco tutoris* to her pupil children, as she is already their tutor by operation of the statute.

This petition was presented by Mrs Alice Mitchell Willison, with the concurrence of

three of her daughters who were in minority.

The petitioners set forth that Mrs Willison's husband Duncan Campbell Willison had died intestate, and without nominating tutors or curators to his children; that he had left five daughters, of whom three were in minority, and concurred in the petition, and two were in pupillarity; that as the said minor and pupil children were entitled to succeed to certain shares of their father's estate, it was necessary that a *curator bonis* and factor *loco tutoris* should be appointed to them respectively, and as the interests of the children were alike, it was expedient that the *curator bonis* appointed to the minors should also undertake the office of factor *loco tutoris* to the pupils.

The petitioners therefore prayed the Court to appoint Mrs Willison to be *curator bonis* to the minor children, and to be factor *loco tutoris* to the pupil children.

The petitioner Mrs Willison thereafter lodged a minute stating that she did not desire the office of guardian of her pupil children conferred upon her by the Guardianship of Infants Act 1886.

Section 2 of that Act provides—"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, where no guardian has been appointed by the father, or jointly with any guardian appointed by the father. If 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."

Section 8 provides—"In the application of this Act to Scotland the word guardian shall mean tutor, and the word infant shall mean pupil."

On 22d November 1890 the Lord Ordinary (STORMONTH DARLING), having heard counsel for the petitioner on her motion for the appointment of *curator bonis* and factor *loco tutoris* to the children of the deceased Duncan Campbell Willison, reported the said motion to the First Division.

"*Note.* — The petitioner Mrs Willison and her three minor daughters concur in asking that Mrs Willison (who is a widow) should be appointed *curator bonis* to the three minor petitioners, and factor *loco tutoris* to her two younger daughters, who are in pupillarity.

"The petition does not refer to the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), but I called the attention of the petitioners to sections 2 and 8 of that statute, which seem to me to raise a serious obstacle to the appointment of Mrs Willison as factor *loco tutoris* to her pupil daughters. The statute in very absolute terms makes her their tutor, and I do not see how I could appoint her to be factor *loco tutoris*, which presupposes that there is no tutor. The petitioner Mrs Willison then lodged a minute stating that she did not desire the office of guardian to her pupil children conferred upon her by the Act. It seems to me that this does not remove the difficulty, seeing that she is willing to act in the substantially identical capacity of factor *loco tutoris*. Had she absolutely declined to act as guardian in any form, it would, I think, have been competent, under section 13 of the statute (taken in connection with section 12 of the same Act, and section 31 of the Pupils Protection Act), to appoint some other person as factor *loco tutoris*, and I have recently made such an appointment in another case, where the interest of the pupils seemed to require it. But I greatly doubt the competency of appointing a factor *loco tutoris* where there is in form no resignation of the office of tutor, and in reality no unwillingness to act.

"It was pressed upon me by counsel for the petitioner that there was great convenience in the course proposed, inasmuch as, if appointed factor *loco tutoris*, Mrs Willison would, under section 11 of the Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. cap. 39), become *ipso facto curator bonis* to the children when they attained minority, instead of having to present two applications to the Court for appointment in that capacity. I do not doubt that there would thereby be some saving of expense, but considerations of that kind will not justify the appointment if my view of the statute be correct. If therefore I had acted on my own judgment, I would have appointed Mrs Willison *curator bonis* to the minor children, and *quoad ultra* refused the prayer of the petition. But as the point is a new one, I have thought it best to report it. The peremptory character of a mother's appointment under the statute is dwelt on in the case of *Macquay* v. *Campbell*, 15 R. 784."

At advising—

LORD PRESIDENT — The difficulty suggested by the Lord Ordinary in this petition arises under the 2nd section of the Guardianship of Infants Act 1886, which provides that "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 where 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."

As regards the last part of the section, we have nothing to do with it here, because there is no application made for the appointment of guardians to act with the mother; but the mother being in law the guardian of the children or their tutor, as the Act explains in section 8, she becomes such tutor or guardian by the operation of the statute. She requires no service or

appointment, nor anything but the application of the Act itself. She may be entitled to renounce her office. She may be placed in circumstances which make it not desirable that she should act as guardian, but by statute she is the guardian of her pupil children.

A minute has been lodged by Mrs Willison in the present application in which she says that she does not desire the office of guardian to her pupil children conferred on her by the Act of 1886. If by that minute she means to renounce the office of guardian, then it may be open to the Court to appoint a factor *loco tutoris* in her place, but as to appointing a person who is by law entitled to be the guardian of her children to the office of factor *loco tutoris*—that is, factor in the place of the guardian—the law cannot do that. The office is already hers, and if she desires to act, let her proceed to act; if she does not desire to act, she can apply to have some one else appointed in her place. There is no other alternative open.

I think, as regards the part of the petition which prays for the appointment of Mrs Willison as *curator bonis* to her minor children, that that is not reported to us by the Lord Ordinary.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court remitted to the Lord Ordinary to refuse the petition in so far as it prayed for the appointment of Mrs Willison as factor *loco tutoris* to her pupil children: *Quoad ultra* remitted to his Lordship to proceed.

Counsel for the Petitioner — Kemp. Agents—Macpherson & Mackay, W.S.

Friday, December 12.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

FORBES AND OTHERS *v.* MITCHELL AND ANOTHER (M'CONDACH'S TRUSTEES).

Succession—Vesting—Conveyance to Trustees—Interposed Liferent—Destination-Over.

A testator directed his trustees to invest a share of his estate, and pay the interest to his daughter in liferent and the principal to her major children as soon after her death as they could conveniently uplift and divide the same. The issue of children dying before receiving payment of their shares were to represent their parents, and the shares of children dying without issue were made divisible among their brothers and sisters.

The liferentrix renounced her liferent, and her major children required the trustees to denude of the trust in their favour. *Held* that their shares did not vest until after their mother's death.

The late Harry M'Condach, by last will and testament, dated 23rd April 1859, left his whole estate to trustees, whom he directed to divide the residue of his estate into three equal parts, to invest one of these in their names, and to pay the interest thereof to his daughter Mrs Forbes, "for her aliment and support." The will then proceeded—"Declaring that if all my said daughter's said children shall have attained majority before my said daughter's death, then that the said principal of said third part, or the balance thereof, shall be uplifted and divided among the said children as aforesaid as soon after my said daughter's death as my trustees or their aforesaids can conveniently uplift and divide the same: Declaring further that if any of my daughter's said children shall die before receiving payment of his or her share respectively, leaving lawful children, then that such children equally between them shall be entitled to their deceased parent's share. . . . But declaring that if any of my said sister's children shall die before receiving his or her share, leaving no lawful children, then that the share of such child or children so dying shall be equally divisible among such child's or children's surviving brothers and sisters and the lawful children as aforesaid of any of them that may have predeceased." The balance of the third part amounted to about £148, and the interest had been regularly paid to Mrs Forbes. In 1890 all the five children of Mrs Forbes, and who were all major and *sui juris*, with the consent and concurrence of their mother brought an action of declarator in the Sheriff Court at Aberdeen against the trustees, David Mitchell and Stodart James Mitchell, advocates in Aberdeen, to have it declared that the pursuers had full right and title to the sum of £148, and to have them ordained to pay it over to the pursuers.

The pursuers averred—"The pursuers' said father and mother are, from old age and infirmity, quite incapable of earning their own livelihood. Their said mother is in ill-health, confined to bed, and requiring medical attendance, and being in straitened circumstances, the income derivable from the balance of residue in defenders' hands is quite inadequate for her support, and the pursuers have been for years back contributing towards her maintenance. The said Mrs Isabella M'Condach or Forbes is anxious to accelerate or anticipate the period of the division of the said balance of residue liferented by her, and with this view has executed in favour of the pursuers a discharge of her right of liferent."

The pursuers pleaded—"(1) The fee of the sum sued for having vested in the pursuers, and their mother having renounced and discharged her right of liferent in the same, the defenders are bound to denude themselves of the trust, and to make payment as prayed for, with costs."

The defenders pleaded—"(1) The right to the said share of said residue liferented by