did not pass it under that name with reference to the enjoyment of it by Fowlis during his tenancy.

I am of opinion, therefore, that the interlocutor of the Court of Session ought to be reversed, and that of the Lord Ordinary to be affirmed.

Lord Advocate.—Your Lordships will observe, that the Lord Ordinary decided the case without any proof of the facts at all. And it was after considering the proofs, that the Inner House pronounced the two judgments which I understand your Lordships now to reverse. What I would suggest is, that the second and third interlocutors should be reversed, and that a remit should be made to the Court of Session to decide in the terms of the Lord Ordinary's judgment. So that there would then be a judgment by your Lordships upon the facts as well as upon the titles.

Mr. Anderson.—With respect to costs incurred subsequently to the Lord Ordinary's interlocutor, these, I apprehend, will be given to us, and also the usual order to have the costs we have paid returned to us.

LORD CHANCELLOR.—That will be of course. I do not see any difficulty in reversing the interlocutors of the First Division of the Court of Session, and affirming that of the Lord Ordinary.

Lord Advocate.—What I took the liberty of suggesting is, that it will not be a judgment upon the facts. Your Lordships' affirmation of the Lord Ordinary's interlocutor will be the affirmation of a judgment proceeding without evidence of the facts. What I suggest is, that there should be a remit to the Court of Session to decide in the terms of the interlocutor of the Lord Ordinary, but upon proof of facts.

LORD CHELMSFORD.—You said, that the question of minority was not inquired into. I do not think, that would assist you much.

Lord Advocate.—The allegation of minority was an allegation by the pursuer. If they had not made out the allegation, in all probability the plea of prescription might have prevailed. It was necessary to inquire into that before giving judgment.

Mr. Anderson.—They denied the minority, and we proved it.

LORD WENSLEYDALE.—If the minority was established, there was not forty years' enjoyment before 1831.

Mr. Anderson.—We succeeded on our proof upon that point as well as upon the other.

Interlocutors of Inner House reversed; interlocutor of Lord Ordinary affirmed; and cause remitted with directions as to costs.

For Appellant, Loch and Maclaurin, Solicitors, Westminster; H. G. and H. G. Dickson, W.S., Edinburgh.—*For Respondent*, Connell and Hope, Solicitors, Westminster; Alex. Stevenson, W.S., Edinburgh.

MAY 17, 1861.

Major Gen. STUART, *Appellant*, *v.* Lady ELIZ. MOORE and Lieut. Col. JAMES F. D. C. STUART, M.P., Tutor at Law of the Marquis of Bute, *Respondents*.

Guardian and Ward—Jurisdiction—Court of Session—English Court of Chancery—Tutor at Law—Pupil—*A and B having been appointed guardians in England to (the Marquis of Bute) a pupil, by the Court of Chancery, one of them, A, alleging that his co-guardian, B, had clandestinely carried off the pupil to Scotland, applied to the Court of Session to compel B, in pursuance of orders of the Vice Chancellor, to give up the person of the pupil to him in England—the domicile of the pupil and other particulars being made matter of question between the parties. The Scotch tutor at law of the pupil having appeared on service of A's application, he objected to the pupil being transferred to England and made a ward of Chancery.*

HELD (reversing judgment), *That the Court of Session ought to have given directions to obtemper and carry out the order of the Vice Chancellor.*

In matters of guardianship of children the benefit of the child is the main point to be kept in view.

Where the Courts of England as well as Scotland have each jurisdiction in regulating the guardianship of a child, the orders of the Court first exercising jurisdiction should be followed and assisted by the other Court.[1]

---

[1] See previous reports 22 D. 1504; 23 D. 51, 446, 595; 32 Sc. Jur. 696; 33 Sc. Jur. 24, 287. S. C. 4 Macq. Ap. 2: 33 Sc. Jur. 445.

Major General Charles Stuart, a guardian appointed by the Court of Chancery in England to the Marquis of Bute, a pupil, and Lady Adelaide Keith Murray, the nearest cognate in Scotland of the Marquis, presented this application, to obtain the custody of the pupil, in the following circumstances, as set forth in the petition :—

The Marquis of Bute was born on 12th September 1847. On the death of his father in 1848, Lord James Stuart, nearest agnate of the pupil, was served tutor at law to him, and took the management of his estates in Scotland. On 10th May 1848 the Marchioness of Bute, the pupil's mother, was, on an application presented to the Court of Chancery in England, appointed guardian to the Marquis. Lord James Stuart predeceased the Marchioness of Bute, the pupil's mother; and she died on 28th December 1859, leaving a will, in which she recommended, that Major General Stuart, Lady Elizabeth Moore, and Sir Hastings Gilbert, should be appointed guardians to her son, the Marquis. Accordingly, on an application presented in name of Lady Elizabeth Moore and the pupil, Lady Elizabeth and General Stuart were appointed by the Court of Chancery in England guardians to the Marquis during his minority, or till the further orders of Court. Sir Hastings Gilbert, being resident abroad, was not conjoined in the appointment.

The petition set forth, that Lady Elizabeth Moore and General Stuart had agreed, that Lady Elizabeth should take charge temporarily of the Marquis; but that so soon as arrangements could be made, he was to be given over to General Stuart who should superintend his education; that in May last the Vice Chancellor had approved of a scheme for the education, maintenance, and residence of the Marquis; but that before this scheme had been approved of, and while the respective proposals of parties were under the consideration of the Court, Lady Elizabeth Moore had clandestinely left London (on 16th April last) with the Marquis, and had gone to Scotland, and now declined to cede the custody.

The scheme of the Vice Chancellor, as set forth in a copy of a certificate of the Vice Chancellor's clerk, was, *inter alia*, as follows:—"The infant Marquis, together with a tutor, is to reside with his guardian, the said Charles Stuart, or where the said Charles Stuart shall consider proper, till the end of the month of August 1860, and he is then to be sent to a proper private school; and on his attaining the age of fourteen years he is to be sent with a private tutor to Eton or Harrow, as his guardian, the said Charles Stuart, and Lady Elizabeth Ann Moore, may determine.

"The scheme of the said Lady Elizabeth Ann Moore for the education of the said infant Marquis is, that the said infant Marquis should, together with his tutor, reside with her at Mount Stuart, in the island of Bute, pursuing his studies under his said tutor until the proper period shall arrive for his being placed at the public school of Eton, and that he should then be accompanied by and under the charge of his said private tutor. It is not fit and proper that such scheme should be adopted."

It was stated in the scheme, that the nett annual proceeds of the estates of the Marquis in England amounted to £76,000, and of his estates in Scotland to £17,000. The scheme fixed £7000 a year for his maintenance and education. The scheme also set forth, that the relations of the Marquis on the father's side were his first cousins, Lieutenant Colonel James Dudley Stuart, Herbert Windsor Stuart, Esq., of Westminster, and Mary Anne Francis Stuart, residing in Brighton; and the relatives on the mother's side, as his aunts, Lady Adelaide Keith Murray (petitioner), and Lady Selina Constance Henry, wife of Charles John Henry, Esq., residing in Cheltenham.

After the scheme was thus approved of by the Vice Chancellor, General Stuart proceeded to Edinburgh, in order to receive the Marquis into his charge; but Lady Elizabeth Moore having refused to give him up, the petition set forth, that an application was made to the LORD CHANCELLOR, in name of the Marquis and of the Earl of Harrowby as next friend, praying that Lady Elizabeth should be ordered to deliver the Marquis to General Stuart, in conformity with the scheme; that the application and the Vice Chancellor's order thereon, that Lady Elizabeth Moore should attend in Court, were intimated to her Ladyship at Granton Hotel, near Edinburgh, but that she made no appearance, and that an order was pronounced by the Vice Chancellor on 6th July last, in conformity with the prayer of the petition.

This order, as appeared from what was alleged to be an official copy, was as follows:—"This Court doth order, that the scheme approved of by the Judge, as in the petition mentioned, for the education, maintenance, establishment, and residence of the said infant petitioner, the Most Honourable John Patrick Crichton Stuart, Marquis of Bute and Earl of Dumfries, pursuant to the order dated the 20th April 1860, be confirmed: And it is ordered, that Lady Elizabeth Ann Moore, in the petition named, do, on or before the 13th day of July instant, deliver the said infant petitioner, the Most Honourable John Patrick Crichton Stuart, Marquis of Bute and Earl of Dumfries, to Charles Stuart, in the petition named one of the guardians of the said infant petitioner, to the intent, that the said infant petitioner may reside with the said Charles Stuart, or where the said Charles Stuart shall consider proper, in conformity with the said scheme: And it is ordered, that the said Lady Elizabeth Ann Moore be discharged from being a guardian of the person of the said infant petitioner, the Most Honourable John Patrick Stuart, Marquis of

Bute and Earl of Dumfries: And it is ordered, that the said Charles Stuart be continued as the guardian of the person of the said infant petitioner, the Most Honourable John Patrick Stuart, Marquis of Bute and Earl of Dumfries, pursuant to the order of the 8th day of February 1860: And it is ordered, that the said Charles Stuart be authorized to take such necessary steps, if any, according to the law of Scotland, for having the said infant petitioner, the Most Honourable John Patrick Stuart, Marquis of Bute and Earl of Dumfries, delivered up to him: And it appearing by the said affidavit of the said John Clayton, that the said Lady Elizabeth Moore is now residing in Edinburgh in Scotland, it is ordered, that service on the said Lady Elizabeth Moore, in Scotland aforesaid, of a copy of this order, be deemed good service of this order."

The Vice Chancellor's order having been intimated to Lady Elizabeth Moore, she refused to comply with it, or to deliver up the Marquis to the custody of General Stuart, who personally waited on her at Granton Hotel, for the purpose of receiving him. It was further stated in the petition, that the respondent was not one of the next of kin of the Marquis; and it was maintained, that, as by the order of the Vice Chancellor she was discharged of her guardianship, she had no title of any sort to the custody. It was stated, that the only next of kin of the Marquis resident in Scotland was the petitioner, Lady Adelaide Keith Murray, and that Colonel James Dudley Stuart, (the oldest son of Lord James Stuart,) who, on the decease of Lord James, had been served tutor at law to the Marquis, approved of the Marquis being put under the charge of the petitioner, General Stuart.

The prayer of the petition was—"May it therefore please your Lordships to appoint the present petition to be served upon the said Lady Elizabeth Moore, and to appoint her to lodge answers thereto within three days if so advised; and thereafter, upon considering the present petition, with or without answers, to ordain the said Lady Elizabeth Moore forthwith to deliver the said infant Marquis of Bute to the petitioner, the said Charles Stuart, in conformity with the said order of the Court of Chancery; and, if necessary, to grant warrant to the petitioner, the said Charles Stuart, or to such other person or persons as your Lordships may appoint for that purpose, to remove the said infant Marquis of Bute from the custody of the said Lady Elizabeth Moore, and take or deliver him into the charge of the petitioner, the said Charles Stuart; or to grant such other orders or warrants as to your Lordships shall seem proper: Or in the event of your Lordships not disposing of the present petition before the rising of the Court, to remit the same to the Lord Ordinary on the Bills, with power to grant the order and warrant before prayed for; or such other orders or warrants in the premises as to your Lordships shall appear to be proper."

The petition was presented on 13th July, and on Saturday the 14th July it was moved in the Single Bills, when the Court appointed it to be served on the respondent, and allowed her to lodge answers on Wednesday the 18th, "in order to the application being disposed of before the rising of the Court."

The respondent lodged a note craving prorogation of the term for lodging answers, but the Court, on the representation of the petitioners, that the matter required urgent despatch, ordered the cause to be debated on the 19th, without answers.

The Court of Session on 20th July 1860, appointed Lady Moore to answer the petition, and appointed the petition to be served on the tutor at law, and superseded consideration till November 1860. The Court on 23rd Nov. 1860 approved of the pupil being kept at school in Scotland under the custody of the Earl of Galloway, who was not to suffer the pupil to be removed beyond the jurisdiction of the Court.

On 7th Feb. 1861 *the Court of Session refused to appoint a tutor ad litem*, and interdicted all parties from removing the pupil beyond the jurisdiction of the Court.

General Stuart appealed against the judgments of the Second Division of the Court of 20th July, of the Lord Ordinary, 5th and 6th November 1860, and of the Second Division, of the 21st and 23rd November 1860, and of 7th February 1861, maintaining in his *printed case*, that they should be reversed for the following reasons:—1. Because the true interest and real benefit of the infant Marquis had been overlooked in the Court of Session. 2. Because the custody of the Great Seal attached on the 10th May 1848, and nothing had occurred since to displace it. 3. Because in this case the Great Seal had authority in Scotland, the education of the infant Marquis involving public considerations. 4. Because the infant Marquis, if left in Scotland, would be without protection from the age of 14 till that of 21. 5. Because the points relied upon in the Court of Session were immaterial. 6. Because the inquiries ordered by the Court of Session would have produced no result.

The tutor at law, Colonel Stuart, maintained in his *printed case*—1. That, as the orders appealed from were interlocutory, and also unanimous judgments of the Court of Session, appeal against them was incompetent. 2. That even if the appeal were competent, the interlocutors appealed were well founded, and were necessary, in the circumstances, for the due administration of justice in the cause.

He also maintained—1. That the appellant not being aggrieved by the interlocutors appealed from, as none of these deprived him of any right, of which otherwise he would be in the

exercise, or subjected him to any restraint from which otherwise he would be free, he had no interest and no title to present the present appeals. 2. Even if the title of the appellant was to be sustained, the interlocutors appealed from ought not to be recalled, as these were within the competency of the Court, and were called for by, or were right and expedient in, the circumstances in which they were pronounced.

Lady Moore, besides objecting, that the judgments were interlocutory, etc., and therefore incompetent, maintained in her case—2. That the first judgment appealed from was pronounced on the application of the appellant, and in terms of the prayer of the petition presented by him. 3. That the judgments second and third appealed from were acted upon by the appellant, and that the judgment third appealed from was pronounced upon his motion.

On the merits she maintained—1. That the judgments appealed from were well founded in law. 2. That the Court of Session could not dispose of the petition upon its merits, until the averments upon which it was founded were established by proof. 3. That the disposal of the person of the pupil, as a domiciled Scotsman, and the regulation of his education, lay with the Court of Session; and because that Court was bound to see his rights as a domiciled Scotsman preserved, and was neither bound nor entitled to order him to be delivered to the appellant, in order, that he might be placed under the jurisdiction of a foreign Court. 4. That, even supposing, that the pupil was not domiciled in Scotland, and that the appellant had been duly appointed his guardian in England, the appellant had no authority over the pupil while resident in Scotland; and the Court of Session was bound and entitled to take upon itself the care and protection of the pupil, and not to suffer him to be removed beyond its jurisdiction, except on being satisfied, that it was for his benefit.

The following was the *judgment of the Court of Chancery*, (which was also appealed against,) dated 9th Feb. 1861.

"VICE CHANCELLOR STUART.—What this Court has now to dispose of is an application on behalf of the plaintiff, a ward of this Court, to restrain proceedings in the Court of Session in Scotland touching his guardianship. Before deciding the question, my wish was to read attentively the evidence of the nature of those proceedings which are sought to be stayed. Having now read the papers, there remains on my mind no doubt as to the propriety of granting the injunction.

"By ordering the defendant, Colonel Crichton Stuart, to desist from the proceedings till the further order of this Court, it seems to me, that the interests of the infant plaintiff will be benefited, and the Court of Session in Scotland will be, I hope, relieved from a great embarrassment.

"In this, as in all cases relating to the care of the person and estate of an infant who is a ward of this Court, what is principally to be considered is the benefit of the infant. Wherever it appears to the satisfaction of the Court, that those interests will be advanced by any proceeding in this or in any other Court, foreign or domestic, it is the duty of the Court to direct, and, as far as it can, to assist in such proceeding.

"The litigation in Scotland has originated in the order of this Court on the 6th of July last. By that order this Court, with a view to the benefit of the infant, directed the lady who was removed from the guardianship to deliver the infant into the care and custody of the guardian appointed by this Court, and the guardian was authorized to take all necessary steps, according to the law of Scotland, for having the infant plaintiff delivered up to him.

"When this order was pronounced it was not contemplated or intended, that the steps which it authorized to be taken in Scotland should be a contentious litigation. There was no previous proceeding in the Scotch Court with which it could conflict. If it were not from what appears to have been done in the unfortunate litigation now proceeding in Scotland, I should have thought it a matter of course, that, in a summary way, on an affidavit verifying the order, (if indeed any evidence was necessary where the authenticity of the order was admitted by the person against whom it was made,) the Scotch Court would at once have pronounced a decree conformable to the order of this Court, and would have entirely adopted that order, so as that it should immediately be enforced by execution according to the law of Scotland.

"The unexpected result has been a contentious and expensive litigation, from which it is impossible to see any possible benefit to the infant, who is, no doubt, expected to be saddled with the heavy expenses which it must occasion.

"The Court of Session, by refusing its aid to enforce the order of this Court, permitted the infant to continue in the custody of the lady who was for the best reasons removed by this Court from the guardianship, and ordered by this Court to deliver the infant to his proper guardian. It now appears, that this lady, thus permitted to retain the custody of the infant in Scotland, went on to conduct herself and manage the infant in the same unsatisfactory way, which was to be expected from her previous conduct. This unfortunate situation of the infant attracted from other persons in Scotland that consideration for his welfare and comfort, which it appears the Court of Session thought the law of Scotland and the dignity of that Court prevented it from bestowing.

"Without any assistance from the Court of Session the infant was, during the vacation of that Court, and on the natural impulse of the good sense and kind feeling of his guardian, and of the Earl of Galloway, rescued from the custody of this lady, and placed where he now is, under the sanction of this Court, and with the concurrence of his guardian, under the kind and friendly care of the Earl of Galloway. That object of such urgent importance for the welfare and comfort of the infant was effected without the aid of the Scotch Court.

"All this shews plainly enough, that, so far as the wellbeing and comfort of the infant Marquis of Bute are concerned, there has been an unfortunate miscarriage in the Scotch proceedings. It is needless to trace the course of these proceedings further, except to consider, whether any and what benefit is likely to accrue to the infant from their continuance. Long before that litigation commenced, this Court, under a peaceable administration of its own jurisdiction, had approved of a scheme for the residence and education of the infant. But, by the orders of the Court of Session, this scheme is wholly superseded, and another substituted. This direct conflict of jurisdiction can hardly be for the benefit of the infant.

"The better opinion seems to be, that the Court of Session has no power to alter, vary, or discharge any order of this Court made under the jurisdiction of the Great Seal of Great Britain, which is as much the Great Seal of Scotland as of England. It is not the province of this Court to say, whether, according to the law of Scotland, the Scotch Courts are incapable of recognizing or enforcing the orders of this Court made under the authority of the Great Seal, or have power to annul or disregard such orders.

"This Court has sanctioned an appeal to the House of Lords which, under its supreme jurisdiction, will settle that question. If on the result of that appeal, the Scotch orders are affirmed, this Court can have no difficulty in assisting to give effect to them so far as necessary for the benefit of the infant, and can put matters in a state of as much, or greater, forwardness to assist the Scotch jurisdiction, than if all the expensive, harassing, and unseemly litigation were in the mean time allowed to proceed. On the other hand, if, as is not improbable, the House of Lords shall decide, that there has been a miscarriage in the Scotch Court, and shall reverse its orders, it cannot possibly be for the benefit of the infant, that there shall be in the mean time a continuance of a litigation which, in that event, will prove to have been erroneous, troublesome, expensive, and worse than useless.

"A conflict of jurisdiction in any case is an evil; but in a matter so important and delicate as the guardianship of infants, such a conflict is a calamity. It is the study of this Court to prevent such an evil. In proportion as the power of this Court, exercised under the Great Seal, is enormous, so it is the habit and duty of its Judges to be cautious and careful in its exercise. The system on which this Court manages the affairs of infants is a benign and kindly system. It prevents, and where it cannot prevent it, moderates and soothes, all angry dispositions. The property of infants is never more unrighteously squandered than in prosecuting angry quarrels as to guardianship. The great object is, the benefit of its wards, and this Court knows no jealousy on matters of jurisdiction which can interfere with the paramount duty of securing every benefit which its wards can obtain from any other quarter. Between an English jurisdiction and a Scotch jurisdiction, where the Courts of both countries sit under the authority of the same Sovereign of the United Kingdom, it is of essential importance that a harmonious action should prevail, and that all conflicts of jurisdiction should be avoided.

"What seems extraordinary in this case, and what has not been satisfactorily accounted for, is, that the defendant, Colonel Crichton Stuart, whose name appears as an active litigant in the Scotch Court, seems to be a reluctant and helpless actor in those proceedings. All the orders of this Court were, and still are, approved by him. His counsel on this occasion are instructed to say, and have properly said, that he has lent all his assistance to carry the order of this Court into effect. But at the same time, he is advised that he must claim to be allowed to proceed in Scotland in defiance of the orders of this Court—orders which he believes to be for the benefit of the infant—but which his Scotch advisers tell him it is his duty to endeavour to set aside by proceeding in the Scotch Court. I cannot doubt, that it is the duty of this Court to interfere by its injunction to relieve him in this state of perplexity, and to restrain him and his advisers in Scotland from further litigation, pending the appeal to the House of Lords. This Court cannot permit itself to doubt that the Scotch Court, and those who are acting in these proceedings in Scotland, will recognize the order which I propose now to make. The purpose of that order is, to restrain an indecorous conflict. It is inconsistent with the dignity of this Court, which acts under the authority of the Great Seal, to exercise its power for any other purpose than to forbid a continuance of such a contest till the supreme power of the House of Lords shall have settled the question.

"Lord Eldon, in the case of *Kennedy* v. *Earl of Cassillis*, 2 Swanst. 323, said, with reference to cases of this kind: 'It will be difficult to do justice unless the Courts in England aid the Courts in Scotland and the Courts in Scotland aid the Courts in England.' Every enlightened lawyer will concur in the wisdom of this benignant view. It is a view which forbids the continuance of a mischievous conflict. This Court always entertains, as it is bound to entertain,

a tender respect for the authority of the Court of Session. Its Judges are men whose distinguished learning and ability shed a lustre on their country, and they have in this matter done their best to administer that system of law which it is their duty to uphold. This Court, on an application like the present, ought not to withhold whatever assistance it can give to maintain the dignity and utility of that Court, by restraining the defendants in this suit from continuing, or being made instruments to continue, to make it the arena of worse than useless contentions.

"On that principle it is, that I cannot refuse the present application to restrain the defendant Colonel Crichton Stuart, and still more his advisers and agents, from continuing the contest in Scotland, where the nominally contending parties have really no adverse interests.

"As the real estates of the Marquis of Bute in Scotland, and his rights and interests in them, must be properly governed by the law of Scotland, it is not proper to extend the injunction to proceedings regarding them. In other respects, the injunction must go according to the prayer of the bill till the further order of this Court."

The tutor at law appealed, in the English Court of Chancery, against the Vice Chancellor's judgment, to the House of Lords, on the following grounds, stated in his *printed case* :—1. Because the appellant is the tutor at law of the respondent, duly appointed in Scotland, and as such possesses the right and is charged with the duty of managing the property of the respondent situate in Scotland, of protecting his person, and of superintending his residence and education. 2. Because the appellant is not responsible to the Court of Chancery for the due discharge of the duties of his office. But it is the duty of the appellant to recognize the authority of, and to carry into effect the orders which have been or which may hereafter be pronounced by the Court of Session in Scotland, the only Court of competent jurisdiction. And the injunction of the Court of Chancery will not exonerate him in Scotland from the consequences of any breach or neglect of what the Court of Session regards as his legal duty. 3. Because the appellant, having as matter of right according to the practice of Scotland obtained his appointment of tutor at law to the respondent from the Crown, the rights and privileges as well as the duties appertaining to his office must be determined according to the law of that country, and the orders pronounced by the Court of Session in Scotland relative to the custody and education of the respondent are obligatory on the appellant, and cannot competently be overruled or counteracted by an injunction of the Court of Chancery or any English tribunal. 4. Because it may be necessary, (as it has already once proved to be necessary,) for the due protection of the respondent, that the appellant should make speedy and summary application to the Court of Session in Scotland. 5. Because the injunction appealed against has the effect of impeding the appellant in the execution of his office, and of exposing him to hardship if he should discharge its duties; or otherwise, if he should not, of leaving the respondent without that guardianship for which the law of Scotland has made provision. 6. Because it is no part of the jurisdiction of the Court of Chancery, to interfere with guardians duly appointed by the law of a foreign country in the exercise of their duties within the bounds of such foreign country 7. Because, even if there were any such jurisdiction, it is inexpedient to exercise it, as has been done by the injunction appealed against, inasmuch as all questions relating to the custody and education of the respondent must be decided according to the law of Scotland and by the tribunals of that country where he was born and resides. 8. Because, the claim of the Court of Chancery to interfere with the appellant in his discharge of the duties of tutor at law to the respondent is not only inconsistent, but is in actual conflict with the jurisdiction of the Court of Session in Scotland, over the appellant as the holder of a Scotch office to which he was appointed by the Crown in Scotland; and the interests of his ward the respondent are prejudiced by the restraint under which the appellant is placed in the execution of his office by the incompatibility of the injunction of the Court of Chancery in England with the orders of the Court of Session in Scotland. 9. Because all proceedings instituted by the appellant have been instituted and prosecuted with perfect sincerity and good faith on his part, and solely for the welfare and due protection of the respondent.

LORD CHANCELLOR.—We think the counsel for the appellant in the Scotch appeal should begin, and the question of competency which is involved may be argued along with the merits. We leave it to counsel to arrange among themselves who are to be heard for the respondents.

Attorney General (Sir R. Bethell), for General Stuart.—The infant Marquis of Bute was born on 20th September 1847, and his father died on 18th March 1848. No guardian having been appointed by will, the infant was residing in England on 3rd May 1848, when a petition was presented to the Court of Chancery for the purpose of having the mother appointed guardian. It is true the infant was born in Scotland, but the present question ought not to turn on any question of domicile, but solely on what is for the benefit of the infant. The order making the mother guardian was regularly made, and there could be no doubt the Court of Chancery was competent to make it. The mother acted, accordingly, as guardian till her death, on 28th December 1859, and in her will she indicated a wish, that the Court of Chancery would appoint certain friends as guardians, and two of those persons, viz., General Stuart and Lady E. Moore, were duly appointed guardians on 7th February 1860. At that time the infant was in Scotland, having remained there, since the death of his mother, who died there; and the infant continued

there in the custody of Lady E. Moore. A correspondence took place between the two guardians as to the education of the infant, and Lady E. Moore professed her approval of the proposal that the infant should be educated in England. The infant was then thirteen years of age, and was far behind in his education. The General, therefore, pressed upon Lady E. Moore the importance of soon sending him to England. She promised to bring him there herself, and arrived in London after some delay. But when the time came for her parting with the boy, she changed her mind, and professed, that he was most averse to be put under the charge of General Stuart. The General remonstrated, and with her consent was about to apply to Vice Chancellor Stuart to settle a scheme of education. But, meanwhile, on 16th April 1860, Lady E. Moore carried away the child secretly during the night to Scotland, and thus put the child under the jurisdiction of the Court of Session. Now, whatever may have been the jurisdiction which the Court of Session had, it became its bounden duty to have exercised that jurisdiction, on being informed of the circumstances, by directing the child to be delivered up to General Stuart. Even admitting, that the Court of Session had an original jurisdiction, and, that it was not bound as a matter of necessity, or even as a matter of prudence, to follow or adopt what had been done by the Court of Chancery, still it was under a paramount obligation of doing that which was best for the interests of the child; and it ought to have directed the immediate restoration of the infant by Lady E. Moore, in order that his education might be proceeded with as proposed by General Stuart. On the day Lady E. Moore's stealthy departure became known, General Stuart presented a petition to the Court of Chancery, praying that a scheme of education should be settled. Lady E. Moore on that occasion appeared by counsel and consented—her previous authority to her solicitor not having been revoked by her departure to Scotland. Vice Chancellor Stuart directed an inquiry to be made into the different schemes, and that of General Stuart was adopted, whereby the infant was to go to a preparatory school with his tutor, and afterwards to go to Eton or Harrow. Vice Chancellor Stuart made his certificate accordingly, on 11th May 1860, which was served on Lady E. Moore in Scotland, but she refused to attend to it. A bill was then filed in the Court of Chancery, in the name of the infant by his next friend, Lord Harrowby, to take an account of his property, the immediate effect of which was to make him a ward of Court. It was not necessary to file a bill in order to make him a ward of Court, for he had already been so, on the petition of his mother in 1848, but the step was taken *ex abundanti cautelâ*. A petition was also presented to dismiss Lady E. Moore from her guardianship, and an order, after notice to her, was made on 6th July 1860, dismissing her, and ordering General Stuart to take steps to have the child delivered up to him. Having met with a refusal to obey this order, he presented his petition to the Court of Session, for an order or warrant on Lady E. Moore to deliver up the infant, and she appeared and objected to such order being made. Up to that time what had taken place in Scotland was this: By that law the nearest of kin, *ex parte paternâ*, had a right to be appointed tutor at law, and accordingly Lord James Stuart was appointed in 1848, after the infant's mother was appointed guardian in England; and on Lord James Stuart's death his son was appointed tutor at law in his stead. The office of tutor at law comes to an end when the infant reaches fourteen; he does not in person perform the office of custodier of the infant, but he has a right to select some one to be such custodier. The tutor at law appeared on the hearing of the petition against Lady E. Moore. The Court of Session first raised difficulties of its own suggestion as to the evidence of the proceedings in the Court of Chancery, and questioned the validity of the order, owing to some erasures and additions supposed to be not properly authenticated.

[LORD CHANCELLOR.—There was an initial on the margin of these erasures.]

[LORD CRANWORTH.—And stamped by the Court.]

It was of no consequence whatever to raise doubts as to the order, for the *status* and condition of the parties were fully admitted on both sides. The tutor at law was disposed to acquiesce in the infant being given up at once, but the Court, by various hints and suggestions, led the tutor at law on so as to finally oppose that step, and the Court instigated him to this conclusion, and blamed him for not having applied earlier. In England the Court of Chancery never hesitates on any information, conveyed in any manner, to do that which the infant's interests require, yet the Court of Session, while in the same breath lamenting over the delay, did what was quite inconsistent with that feeling, for it superseded consideration of the petition till November. Meanwhile the child was left with Lady Moore, and it was not till 3rd November 1860, that the Court of Session removed him from her charge, and put him to a temporary school at Musselburgh. The next thing the Court did was to grant a commission to an advocate to take depositions and make inquiries into the merits of the petition. This was wholly superfluous, for in reality nothing material had been in dispute. The Vice Chancellor Stuart refused permission to his registrar to attend before that commissioner to prove the order, the existence of which, in fact, had never been disputed; and also ordered General Stuart to desist from further proceedings in Scotland. It was an unfortunate order of the Vice Chancellor, for its effect was to give rise to questions of rival jurisdiction between the two Courts. There was no necessity to raise such questions at all, for the interests of the child might have been attended to without it. The

question of jurisdiction is one difficult to deal with, for the unfortunate decision of *Johnstone* v. *Beattie*, 10 Cl. & F. 122, made by the House of Lords some years ago, no doubt led to the difficulties which have arisen here. The Court of Session, ever since that case, has been smarting at the doctrines then laid down, and has only played off against the Court of Chancery its own principles, and pushed these to their legitimate conclusions. In *Johnstone* v. *Beattie*, a Scotsman had his whole property solely in Scotland, and had by deed appointed guardians to his infant child, yet, when the child was accidentally in England with her mother, who came to procure medical advice, without any allegation of misconduct against the Scotch tutors, a bill was filed in the Court of Chancery, and an English guardian was appointed, disregarding the Scotch tutors. That was a lamentable decision, for it in effect said this, that whenever a Scotch child is sent to England to be educated, or for a casual visit, and the father dies, the child may be at once made a ward of Court, and permanently detained in England. I do not disguise, that that decision did, to a certain extent, justify the Court of Session in acting in a similar manner towards the Court of Chancery. The true distinction, however, between that case and this is, that in *Johnstone* v. *Beattie*, the Scotch tutors were openly appointed by a Scotch deed, and not by the Scotch Court, and might therefore be treated as foreigners. Now, both the Scotch and English Courts derive their right to the custody of infants from the *paterna potestas* of the same Crown, and each Court ought to be bound to recognize the act and legal title of the guardian previously appointed by the other.

[LORD CHANCELLOR.—None of the Lords who took part in the decision of *Beattie* v. *Johnstone* doubted the jurisdiction of the Court of Chancery, though Scotch guardians had been appointed. Several of them only thought the jurisdiction unwisely and improperly exercised.]

True, the jurisdiction was not disputed, but only the propriety of exercising it by ignoring the capacity and status of the Scotch guardians. Here the Crown, through the Court of Chancery, had already competently appointed its officer as guardian, and the other Courts, acting under the same Crown, ought to be auxiliary in maintaining that appointment. Therefore that principle should be laid down, even though it should trench on the authority of the case of *Beattie* v. *Johnstone*. The same thing ought to be done in the converse case by the Court of Chancery.

[LORD CHANCELLOR.—It has been said, that the Lord Chancellor being the Lord Chancellor of Great Britain, greater authority is to be given to the Court of Chancery in Scotland than to the Court of Session in England, in that respect; but, as at present advised, I do not think, that is well founded, for, though he has certain functions which he exercises all over the kingdom, his judicial power as Chancellor is confined to England.]

The conclusion, therefore, is, that, as there is no doubt that the best thing for the infant is to send him to Eton, an order to that effect should be made. This should be done quickly, for, at the age of fourteen, now nearly approaching, the infant is left by the law of Scotland very much at large; he can choose his own curators; he may squander his income; he may make an imprudent marriage; all these inconveniences will be avoided by reclaiming him within the jurisdiction of the Court of Chancery. The inconveniences of the present state of things are obvious, for each Court threatens the respective guardians with punishment, if either allow the infant to go out of his own jurisdiction. The rule should therefore be laid down, that as the Court of Chancery first exercised the jurisdiction, and obtained seisin of the subject, that jurisdiction should be upheld.

Sir H. Cairns Q.C., (with him *Bacon* Q.C., *Macqueen* Q.C., and *Hobhouse*,) also for the appellant, General Stuart.—There can be no doubt it is for the benefit of this infant, that he should be educated at Eton, or some other public school in England. There alone will he receive a fitting education, and meet with his equals in rank. If he be left in Scotland, owing to the state of the Scotch law, the consequences may be alarming, for, at the age of fourteen, he will be entirely free to dispose of his person independently of any guardian, and no court of law can then restrain him—2 Fraser, Pers. Rel. 194. If the infant had no property in England, it might be enough to answer, that he must take the law of Scotland as he finds it; but as he has a larger property in England, and it is clearly for his benefit, that he should not become his own master at fourteen, it is expedient to adhere to the law of England. The Scotch Court seems never for a moment to have troubled itself with the consideration as to what would be most for the infant's benefit. The Court said this:—"We have jurisdiction over the infant since he is in Scotland; we are not bound by the jurisdiction of the Court in England over the infant when he is there; therefore it is fitting, that he should be educated in Scotland, and not leave Scotland." This was a wrong conclusion. The Court ought to have approved of a scheme allowing the infant to be taken to England. That was what, in fact, the Court of Chancery did in *Johnstone* v. *Beattie*. Though all the Lords agreed, that there was jurisdiction to appoint an English guardian, still that did not mean that the child was to be kept in England, for the Court might have ordered the child to be taken to Scotland to be educated, and the Lords there said as much as that that should be done. There is, and ought to have been, no conflict of jurisdiction whatever in this case. So in *Dawson* v. *Jay*, (3 De G. M. & G. 764,) an American child was brought to England by her relations, and though a guardian had been appointed in America, Lord Cranworth appointed an

English guardian; but then he said it did not follow, that the child would not be allowed to go back to America—So in *Hope* v. *Hope*, 4 De G. M. & G. 328. What the Court of Session ought to have done was to have made an order to allow this infant to go to England, and to have appointed General Stuart, or some other person, a custodier for that purpose, and to have required him to account to them afterwards, should any change of plan be necessary. That would have reconciled the jurisdictions sufficiently. When the age of pupillarity ceased, the Scotch Court could not, according to its principles, want to exercise further jurisdiction, and then the Court of Chancery would by its guardian step in, and take up the custody, and carry it on till the infant attained twenty one.

[LORD CHANCELLOR.—Something must be done to guard against the consequence of the child being left at large in Scotland at fourteen.]

The scheme should be this, that the child should be resident and educated in England until and after September 1861, and then if, at any time thereafter, it be desirable, that he should visit Scotland, there will be liberty to apply to the Court of Chancery to regulate the terms on which that visit should be made, and the means by which his restoration to the jurisdiction is to be secured. As the House has the joint powers of the Court of Session and the Court of Chancery it will be easy to associate the Earl of Galloway, as a Scotch custodier, with General Stuart, as the English custodier, and thereby to secure control over the child in both jurisdictions.

R. Palmer Q.C., for the tutor at law, Colonel Stuart.—The first Scotch appeal is not competent under the 48 Geo. III. c. 151, § 15. This was not a "cause" within the meaning of that section, but an incidental application by petition, and something quite outside of the statute. To hold the appeal competent would be to let in all kinds of appeals against summary applications.

[LORD CHANCELLOR.—When is the final judgment in such a case? It will not be till the pupil is fourteen.]

The final judgment is, when the order is either made or refused. At all events, the interlocutors in the first appeal are all interlocutory judgments, and not final. The second appeal is quite distinct from the first, and involves nothing of the nature of a final judgment, so that both appeals are incompetent. As regards the merits of the appeals: the infant was born in Scotland, and had all his life lived there; he had also a Scotch tutor at law duly appointed. When General Stuart went to Scotland, he alleged his appointment by the Court of Chancery, and prayed that, in three days, his petition should be granted in a summary manner. No Court, after the case of *Johnstone* v. *Beattie*, could be expected to proceed in this summary way. In the first place, the Scotch Court had no reasonable evidence of what the Court of Chancery had done. But even if it had, it was not bound by what had been done in England, or by the scheme there adopted. The duty of the Scotch Court was to give a full hearing to the cause, seeing that Lady E. Moore disputed the facts, and to allow a reasonable time to answer the case of the petitioner. If *Johnstone* v. *Beattie* was right, the Court of Session could not be wrong in informing itself and assuming jurisdiction, and was not bound to deviate from its regular course.

[LORD CHANCELLOR.—The Judges in Scotland seem to have doubted, whether the Court of Chancery ever made the orders founded upon, and thought it was fit to adjourn the matter.]

There were other facts in controversy, and the Vice Chancellor, having refused to allow evidence to be taken, prevented the cause ever coming to a hearing. The question of domicile had been disputed.

[LORD CHANCELLOR.—There might have been a dispute in point of law, but none as to the point of fact. All the facts were well known. Domicile had really very little to do with it. In a matter of this sort, the Judge will act on what he knows of his own knowledge; he will not require strict technical evidence of every fact that is to influence his judgment. If a fact is stated and not disputed, there is no legal evidence necessary.]

Even assuming, that what was stated and not disputed was admitted, the question of domicile remained, and no facts were before the Court sufficient to dispose of that question.

[LORD CHANCELLOR.—If the Court were to suspend the decision as to custody till all the facts requisite to determine the father's domicile were ascertained, such, for example, as we had before us in *Aikman* v. *Aikman*, 3 Macq. Ap. 854, *ante*, p. 997; the infant might come of age before that could be settled.]

If the domicile was material, it cannot be objected, that it would occupy a long time to settle it. Besides, Lady E. Moore stated other facts material, touching the inexpediency of a sudden removal of the infant, owing to his habits and constitution. The Scotch Judges thought these points material, and they required to examine into them. Moreover, the Judges did not profess to give any final judgment on the case; what they did was merely *ad interim*, and they did not preclude themselves from deciding afterwards, that it might be expedient to allow the infant to be educated in England. They even thought it might be expedient to allow the infant to go to England on proper terms; but they were reasonably anxious to satisfy themselves what could be the proper terms in such a case. In all that they were quite justified. They followed very much the same course as was followed by Lord Cranworth in *Dawson* v. *Jay*. There one of the

American guardians brought over the child to England, in defiance of the American jurisdiction, and the Court of Chancery appointed guardians, and considered the feelings of the child rather than the conduct of the foreign guardian, but, at the same time, the Lord Chancellor said he would not object to let the child leave the jurisdiction on proper security. So *Hope* v. *Hope*, *supra; Ex p. Watkins*, 2 Ves. Sen. 470, before Lord Hardwicke ; *Logan* v. *Fairlie*, 1 Jac. 193; *Ex p. Ord*, Jac. 94; *Wellesley* v. *Duke of Beaufort*, 2 Bligh, N.S. 124 ; 1 Dow & Cl. 154 ; 2 Russ. 1 ; all shew, that it is impossible for a Court, *brevi manu*, to send the infant out of the jurisdiction without taking securities for its being brought back. So here, unless General Stuart had remained in Scotland, the Court of Session would not have been justified in giving up the infant to him unconditionally.

[LORD CHANCELLOR.—You assume, that the Court of Session was aware of all the circumstances under which the child was taken to Scotland ?]

Yes. In *Dawson* v. *Jay*, the American jurisdiction was evaded also by the person who brought the infant to England. It was said, that this case differed from *Beattie* v. *Johnstone*, because there the guardian was not appointed by the Court, but by the deed of the father. But the law of Scotland places the guardian nominated by the father in a higher position than the guardian at law. Now, the Scotch tutor at law was appointed in Scotland, a fortnight after the infant's mother was appointed in England, and it was truly intended that each should act within the particular jurisdiction.

[LORD CHANCELLOR.—After the appointment of a guardian in England, which guardian had a right to the custody of the person of the ward?]

In England, and while the ward was in England, the English guardian had the right, but he had no further right than in England.

[LORD CHANCELLOR.—The infant might be removed clandestinely from the jurisdiction of the Court.]

That was considered in *Dawson* v. *Jay*, and yet it was held the duty of a foreign Court not to treat the right as attaching to the original jurisdiction.

[LORD CHANCELLOR.—The guardian has a right to the custody, and might have a writ of habeas corpus as a parent may have.]

[LORD CHELMSFORD.—Is the jurisdiction of the Scotch Court to be treated entirely like that of a foreign Court ?]

Yes ; if the case of *Beattie* v. *Johnston* is to be followed. It was there laid down, that the Scotch guardian had no authority in England, and was ignored there ; and other cases lay that down.

[LORD CHANCELLOR.—It will be a great encouragement to kidnapping.]

At all events, here there was no fraud, in the proper sense of the term, in conveying the child to Scotland; possibly Lady E. Moore may have misunderstood her position, and thought it safer to be in Scotland. At all events, if ever there was a case of fraud, *Dawson* v. *Jay* was that case. In this case the Scotch Court found a child, which was *primâ facie* a Scotch child, within their jurisdiction which had formerly been there, and the Court was not to be embarrassed by what had been done in England, or by the good or bad faith which had been shewn in bringing back the child. The Court of Session ought therefore to have been allowed to go into the merits of the petition, and acted rightly in the steps they took towards that end. It is said the law of Scotland was dangerous to infants of fourteen, but the Courts of Scotland were not likely, out of a mere admiration of a foreign law, to send away an infant, and renounce their own jurisdiction.

[LORD CHANCELLOR.—Suppose the guardianship in England had been regularly established, and it was for the infant's benefit that he should be kept there, and he is taken away clandestinely, would it be the duty of the Scotch Court to assert its authority ?]

The Scotch Court here had appointed a Scotch tutor whose authority was never in suspense for a moment, and that Court might have said—So far from the child being improperly in Scotland, he had previously been improperly in England. If the child had been English, the Court of Session might well have handed the child over to its English guardian.

[LORD CHELMSFORD.—Could the Scotch Court have ordered the infant to be brought back to its jurisdiction, if Scotch tutors had been appointed ?]

Yes; but the Scotch Court was not bound to take notice of any English guardian in this particular case, for it had an officer of its own to whom it looked for the infant's safe custody. The clandestine removal was no proper element in this case.

[LORD CHANCELLOR.—Was the infant not a ward of the Court of Chancery from the time of the order in 1848, making his mother the guardian ?]

Whether he was or was not, the jurisdiction of the Court of Chancery was confined to England. The mere clandestine removal does not make any difference, according to *Dawson* v. *Jay*. Then as to the English appeal, the Vice Chancellor was clearly wrong in granting an injunction against Colonel Stuart, the Scotch tutor at law, doing his duty as an officer of the Scotch Court, for the Scotch tutor was in no way amenable to English jurisdiction.

Patton, also for the tutor at law.—When the petition was presented to the Court of Session by General Stuart, and Lady E. Moore appeared to answer, several points were in dispute. One

was, that the mere presenting of a petition to the Court of Chancery did not make the infant a ward of Court, but that a bill must be filed. Another point was, that there was no proper evidence authenticating the order of the Vice Chancellor Stuart. A third point was the domicile. These were all novel and difficult points, and the hearing occurred just at the close of the summer session. The Court could not do otherwise than order answers, and have the matters fully discussed. General Stuart asked for probation, instead of taking the judgment of the Court on the case as it stood; and hence the delay. So that all that was done by the Court of Session was merely preparatory, and the Court had no opportunity to decide the case on the merits. Moreover, the infant was a Scotch peer, and having a Scotch domicile.

[LORD WENSLEYDALE.—This is a case in which two domiciles might well be admitted. It is only for the purposes of succession, that a man is said to have only one domicile.]

At all events, there were difficult questions to be dealt with, and the Court could not be justly called on to pronounce an order instantly. It is said the law of Scotland is bad on the subject of the custody of infants. It may be bad in theory, like the law of marriage, but nevertheless in practice it works well enough. The pupil is entitled to elect curators on attaining minority—2 Fraser, Pers. R. 188—and he can select his own residence; there is no absolute necessity for having curators. These are all privileges in the eye of a Scotchman. If therefore the infant is placed under the control of an English guardian, he is interfered with to a certain extent.

[LORD CRANWORTH.—At fourteen, if he is in Scotland, he would have a right to say, "I will not go to school at all"]

That is the law; and was it to be expected that a Scotch Court should go out of its way to abrogate the privileges of a Scotchman? The Court must administer the law as it is. Now, all that the Court is accused of is some hesitation in acting; but, considering the situation of the parties, and the aspect of the questions involved, that hesitation was not to be wondered at. The doctrine is well established, that a guardian has only a territorial authority, and the Scotch Court was bound to look to its own officer. The Scotch tutor at law was appointed long before General Stuart. It was obviously *ultra vires* of the Vice Chancellor to order a Scotch officer not to do his duty to the Scotch Court in Scotland, and that on some mistaken view, that the Scotch tutor had initiated an expensive litigation. The Vice Chancellor seems also to have proceeded on the doctrine, that the Great Seal had jurisdiction in Scotland.

[LORD CHANCELLOR.—The Chancellor has duties to perform in both countries, but judicially he has clearly no jurisdiction beyond the border.]

Rolt Q.C., for Lady E. Moore.—Lady E. Moore never desired the guardianship of the child; but having been requested by the dying mother to take charge of the child, she was anxious to see his interests fully attended to. At first she had a high opinion of General Stuart's fitness for the office of guardian, but she found that he did not command the affection and respect of the infant. The infant's feelings were entitled to some consideration, and he is not to be treated as a mere chattel. The infant has been brought up in the faith that he is a Scotchman, and will acquire the usual rights of a Scotchman at fourteen. It is not competent for the House, sitting as a Scotch Court, to say, that the law of Scotland is a bad law. It may or may not be a law only for a strong minded people. The Court below did rightly in not giving up the infant. The tutor at law was, after the death of the mother, the sole guardian, and the infant was not a ward of Court till the bill was afterwards filed in Chancery—*Re Hodge's Settlement*, 3 K. & J. 215. At all events, that was a moot point in Chancery practice, and might well cause the Court below to pause before doing anything hastily. Moreover, the question of domicile was very material, for according as the infant is Scotch or English his rights vary. Now, no Court, by ordering a particular residence, has the right of changing the domicile.

[LORD CHANCELLOR.—That is quite clear; a Court can only declare where the domicile is.]

But has the mother the right of changing the domicile? It seems, to say the least, a difficult question what the Court is to assume as to the domicile, for, according as one thing or another is assumed, the rights of a Scotchman or Englishman must be conceded as incidental thereto. Surely the status and rights of the infant must depend on his domicile, even though the Court of Chancery may have jurisdiction to appoint a guardian. What the House should do ought to be, to save at the very least all questions as to domicile and his Scotch rights. Inasmuch as the House is now sitting as a Scotch Court, the infant has a right to ask the House to protect his rights as a Scotchman; and the proper order would be, not to deliver up the infant to the sole control of General Stuart.

[LORD CRANWORTH.—The difficulty I have is this—I do not see what we have in the shape of a *constat*, that the infant has any reluctance to be with General Stuart.]

I wish to prove that allegation which we have made.

[LORD CHANCELLOR.—You are only an *amicus curiæ*.]

No. Lady E. Moore is next cognate by the law of Scotland, and we all represent the infant more or less. It is the duty of the House as a Scotch Court to make inquiry before handing over the child to General Stuart. What ought to be done is to order the tutor at law and Earl Galloway

to send the infant to an English school, and that they jointly with General Stuart may appoint the time and place of his returning to Scotland.

Gordon (with him *Millar*), also for Lady E. Moore.—The first question is, What Court has the jurisdiction in this case? and next, What is the system of law by which the right is to be determined? It is not the custom of the Scotch Courts to pronounce a decree conform on an English decree. The rule is, that a foreign judgment is subject to examination before it is acted on. If the converse case to the present had occurred, and the first appointment of a tutor had been in Scotland, and he had applied to the Court of Chancery to order the infant to be delivered up to him in England, the order would not have been made as a matter of course. In *Johnstone* v. *Beattie*, there was also a residence of the infant in England, with the tutor's permission, and so it was in *Dawson* v. *Jay*. Yet in those cases the Court of Chancery assumed jurisdiction to appoint guardians, and refused to recognize the exclusive right of custody in the foreign guardian. Why should it be expected, that the Court of Session, which has equal powers as to superintending the custody of infants, should act differently? It was said, that in *Beattie* v. *Johnstone*, the appointment of a tutor was by the father, and not by the Court of Session; but the former kind of appointment was preferable by the law of Scotland.

[LORD KINGSDOWN.—Will the appointment by the father of a tutor go beyond the age of 14?]

It may do so, if he appoint the same parties curators also, and the father's power of appointing curators will exclude the right of the child to nominate curators up to 21.

[LORD KINGSDOWN.—Still, as the curators have no power over the person, but merely over the estate, in truth it comes back to this, that by the law of Scotland, the authority of guardian, *qua* guardian of the person, by whomsoever appointed, ceases when the child attains the age of 14.]

That is so. In *Johnstone* v. *Beattie*, a case was referred to in M. 4595, which was also in 1 Paton, Ap. 454, and that case was obviously misapprehended. It is said, that here the first appointment of guardian was in England. The writ to appoint a tutor in Scotland, however, issued on the same day as the English appointment, though the Scotch appointment was not made till the 30th May. But in *Johnstone* v. *Beattie*, and *Dawson* v. *Jay*, the priority of appointment was disregarded. Moreover, the true test is the domicile of the infant, and that we allege is Scotch.

Sir R. Bethell replied.—It cannot be denied, that the Court of Chancery had jurisdiction, in the first instance, to appoint a guardian, and afterwards to renew that appointment. In *Johnstone* v. *Beattie*, there was no doubt as to the jurisdiction of the Court of Chancery; the only doubt was as to the proper exercise of it. It follows, that if the English Court validly exercises its jurisdiction, and appoints a guardian, that office should be recognized and adopted by the Courts even of a foreign country. The subject matter, when once adjudicated in either country, becomes *res judicata*. It is true the office of guardian will not interfere with the real estate in a foreign country, for that must be managed according to the *lex rei sitæ*. The House ought now, therefore, to declare, that General Stuart was, on 20th July, the guardian entitled to the exclusive custody of this infant. The Court of Session ought also to have inquired how the infant came to Scotland, and if it appeared the infant had been purloined in a fraudulent way out of the English jurisdiction, there should have been an order directing the immediate restoration of the infant to the custody from which it was surreptitiously taken. It is not necessary to allude to the defective state of the law of Scotland as to the custody of infants. The mischiefs which would otherwise result from that law are no doubt corrected to some extent by the prudent habits and moral disposition of the people. At the age of 14, an infant becomes his own master; he may associate with whom he likes, he may dispense with all education, and no one can interfere with him. This can scarcely be boasted of as a valuable privilege of Scotsmen, and the interests of the infant require, that he should be saved from the risk incidental to his being left at that age in Scotland. The jurisdiction of the Court of Chancery, or of the Court of Session, as to custody of infants, does not depend on the domicile of the infant. That was repudiated as an element in *Johnstone* v. *Beattie*. Even if it were an element, there are no materials now for deciding it.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, I think, that this case mainly depends upon the propriety or impropriety of the interlocutor of the Second Division of the Court of Session, dated 20th July 1860, refusing then to interfere respecting the custody of the person of the infant Marquis of Bute, and adjourning the further consideration of the subject for four months, till the 20th of November following. In examining this question, I beg to begin by observing, that, as to *judicial jurisdiction*, Scotland and England, although politically under the same Crown, and under the supreme sway of one united legislature, are to be considered as independent foreign countries, unconnected with each other. This case is of a judicial nature, although not between parties who are plaintiffs and defendants, and it is to be treated as if it had occurred in the reign of Queen Elizabeth. The third reason of the appellant is,—"Because in this case the Great Seal had authority in Scotland, the education of the infant Marquis involving public

considerations." The holder of the Great Seal of the United Kingdom is Lord Chancellor of Great Britain, and by statute he has important functions to exercise in Scotland, such as the appointment and dismissal of magistrates, and sealing writs for the election of Scotch Peers and of members of the House of Commons for Scotland. But as a Judge, his jurisdiction is clearly limited to the realm of England. Although Cardinal Wolsey was impeached for having, while Lord Chancellor of England, carried the Great Seal to Calais, I conceive, that the holder of the Great Seal may now lawfully carry it into Scotland, and there use it for sealing Scottish or Imperial documents which ought to pass under the Great Seal of the United Kingdom. Nevertheless, as Judge, he has no jurisdiction in Scotland whatever. In this respect there is entire equality and reciprocity between the two divisions of this island; and a decree of the Court of Chancery is not entitled to more respect in Scotland than an interlocutor of the Court of Session in England. Nor, as far as jurisdiction is concerned, does it make the slightest difference, that the ward for whose custody this dispute has arisen is a peer; and we care not whether he be denominated a peer of Scotland or of Great Britain, or whether he be a peer or a peasant. I must likewise observe, that our view of the question of jurisdiction will not be influenced by any comparison between the merits of the law of Scotland and of the law of England respecting minors. If I deem it inexpedient, that a boy should become his own master at fourteen, with the power of managing his property, of marrying as he pleases, of making a will, and of conducting his education according to his own fancy, or entirely neglecting it, I form my opinion on the interlocutor of 20th July 1860, as if this hazardous confidence in precocious prudence were to be attributed to the law of England, and the law of Scotland subjected orphans to the control of a guardian till they reach the mature age of twenty-one.

But it is material, that I should now state the facts which were before the Court of Session on the 20th July 1860, and on which it was their duty to adjudicate. The late Marquis of Bute, having died at Cardiff, on 18th March 1848, without having named any guardian for his son, then six months old, on 3rd May 1848 a petition was presented to COTTENHAM L. C. by the Marchioness of Bute, then in England with her child, that she might be appointed his guardian. COTTENHAM L. C. in the exercise of his unquestionable jurisdiction, by an order of 11th May 1848, reciting the petition, and that all parties concerned had attended his Lordship, including counsel representing Lord James Stuart, the nearest male relation of the infant, and the executors of the late Marquis, ordered, — "That Sophia Frederica Christina, Marchioness of Bute, be appointed guardian to the infant during his minority, or until further order of this Court." She was thereby lawfully constituted custodier of the person of the infant, till he should reach the age of twenty-one years. All parties consented and were satisfied. On the 30th May 1848, Lord James Stuart, as nearest agnate, was appointed "tutor dative" in Scotland, to manage the property in Scotland, without any contemplated interference with the guardianship of the Marchioness, under the authority of the Court of Chancery. Accordingly, without any question or interference from any quarter, she acted as custodier of the infant, and his sole guardian, residing with him sometimes in England, sometimes in Scotland, and superintending the management of his property in England, to the amount of £75,000 a year, till her death, which occurred on the 28th of December 1859. By her will she had expressed a strong desire that the Court of Chancery in England would appoint as guardians of her infant son, Major General Stuart, Sir Francis Gilbert, and Lady Elizabeth Moore. Sir Francis Gilbert was then resident abroad in a diplomatic capacity. But on the 7th of February 1865, on a petition, in the name of the infant Marquis, presented by "Lady Elizabeth Moore, his next friend," it was ordered by Vice Chancellor Stuart, representing the Lord High Chancellor, "that Charles Stuart of Hubborne Lodge, in the county of Hants, and the said Elizabeth Ann Moore, be appointed guardians of the person of the said infant, during his minority, or until the further order of this Court." The infant having been duly constituted a ward of the Court of Chancery, and the guardian first appointed to him being dead, there can be no doubt of the authority of the Court of Chancery to appoint other guardians in her stead. And General Stuart and Lady Elizabeth Moore were, *in loco parentis*, the lawful custodiers of his person till he should reach twenty-one, or the Court should otherwise order. The infant was then under the separate care of Lady Elizabeth Moore, the very dear friend of his mother. He had been most tenderly reared, and he gave promise of considerable intellectual capacity, as well as of good disposition; but his education had been sadly neglected, and it was reckoned highly desirable, that he should be speedily sent to a public school in England. Lady Elizabeth Moore, always acting from kindness and disinterested motives, although afterwards most indiscreetly, at first was willing to concur in this purpose, and to leave the boy to the management of General Stuart. Having him with her at Mountstuart House in the Isle of Bute, on the 11th of February 1860, she wrote to General Stuart, "Mine is, after all, merely a nominal guardianship; the duties and difficulties of such an important post naturally devolve upon a man. It affords me great satisfaction that my young cousin has a guardian good and wise, and experienced in the world, like General Stuart." On the 14th of February, General Stuart wrote back to her: "Vice Chancellor Stuart was decidedly of opinion, that Bute should be brought at once away

from his island and mix with other boys; in short, that he should enter on a boy's world, like his contemporaries. He had formed this opinion before I had had any communication with him; but I did then tell him, that the boy had lived with a nurse until the present time, that the woman was still with him, and that I did think the time was come to separate him from her altogether. The Vice Chancellor desires to have a general scheme of education proposed by the guardians, and laid before him. I informed him, that our ward, though precocious in intellect, and in some respects in general information, is very backward in Latin, and quite ignorant of Greek, and, what is perhaps worse, that he knows nothing of French. I therefore suggested, that he should come to my home at once, where I could best judge of his tutor's suitableness for his post. The scheme, which I laid in rough before the Vice Chancellor, met with his unqualified approval; but before it is finally submitted to the Court, I shall of course wish to know what you think of my suggestions." The following was her most praiseworthy answer:—"I am quite ready to give up the boy whenever you like to claim him. I believe the changes you contemplate making are likely to be highly advantageous to him in every respect." General Stuart accordingly repaired to the Isle of Bute to receive the boy. Lady Elizabeth refused then to part with him, and entreated, that he might be left with her for a short time, she undertaking to come with him herself to London, and there to surrender him. General Stuart too easily consented to this arrangement. She actually did bring the boy to London. While at Newcastle, on her journey to the south, she wrote to General Stuart: "After Monday next I think of proposing to take Bute to Hubborne, at any time that may best suit your arrangements;" and a few days after her arrival in London she wrote to General Stuart: "There are still some visits that Bute must pay. I propose taking Bute to Hubborne any time that it is quite convenient to you, on or after Wednesday next." General Stuart wrote back, appointing Friday, March 30th. A delay arose on account of the alleged indisposition of the young Marquis, although General Stuart had "deeply lamented the loss of several weeks to a boy so backward in his education." A complete change had now come over the mind of Lady Elizabeth, and she had formed the resolution of keeping the poor ill-used boy entirely to herself and the nurse. On the 2d of April she wrote to General Stuart in the following alarming strain:—"Much has passed in my mind on the subject of your plans with respect to Bute. I find he contemplates leaving me with alarm, and is so unhappy about it, that I cannot but feel it is a step which ought not to be directly taken, without any actual necessity. I think you will feel, that Bute himself ought to be consulted before we decide on what is so material to his future prospects. I therefore feel the absolute necessity of my entirely giving up my intended visit to Hubborne." In General Stuart's answer, on the 3d April, he writes: "You say that Bute himself ought to be consulted, a point on which I regret to be compelled to differ with you entirely. If a child is to be fit judge of such matters, why should he have a guardian at all? I propose to submit to the Vice Chancellor, that the present unsettled state of things is most injurious to Bute; that he should learn at once whom he is to belong to and be guided by during his minority; and that, if my house is to be his home, it is absolutely necessary, that he should come to it at once. He certainly did not appear to contemplate the idea with any alarm a month ago. Had I not, in deference to your wishes, abandoned my intention to bring him away with me from Mountstuart, this alarm perhaps would never have existed, or, at all events, have long since ended, and he would ere this have been reconciled to the change, and peaceful and happy with me." On the 5th of April she wrote back, that, as they differed, the Vice Chancellor ought to decide between them; and next day he gave her notice, that he should take the necessary steps for that purpose. General Stuart according called in professional aid, and himself saw the Vice Chancellor on the subject. Lady Elizabeth, to favour the stratagem she had now formed, for a time gave reason to believe, that she entirely concurred in this course, for on the 16th of April she presented a petition to the LORD CHANCELLOR, as "next friend" of the infant, joining the name of General Stuart as a petitioner, and praying, "That a scheme should be settled for the education and maintainance of the infant." On the 20th of April an order was made for such a scheme, Lady Elizabeth appearing by counsel and consenting to the order. But in the meantime she had clandestinely and furtively and fraudulently removed the infant from the jurisdiction of the Court of Chancery, and was prepared to set the Court of Chancery at defiance. In the evening of the same 16th of April she had carried the infant with her to the railway station at King's Cross, notwithstanding his supposed indisposition; had conducted him by rail under the cloud of night from London across the Border between England and Scotland, and next morning had deposited him at the Granton Hotel, near Edinburgh. A "scheme" nevertheless was proposed, and on the 11th of May was regularly approved of by the Vice Chancellor, directing (*inter alia*) as follows:—"The infant Marquis, together with a tutor, is to reside with his guardian, the said Charles Stuart, or where the said Charles Stuart shall consider proper, till the end of the month of August 1860; and he is then to be sent to a proper private school; and on his attaining the age of fourteen years he is to be sent with a private tutor to Eton or Harrow, as his guardians, the said Charles Stuart and Lady Elizabeth Ann Moore, may determine. Necessary and proper establishments at Cardiff Castle, in South Wales, and Mountstuart, in the island of Bute, are to be kept up for the

occasional residence of the infant Marquis." General Stuart forthwith proceeded to Edinburgh to reclaim his ward. On the 21st of June, a copy of this order was personally served on Lady Elizabeth Moore, and she was required to deliver up the ward to General Stuart, but she absolutely refused to do so. In consequence of her misconduct a suit was commenced in the Court of Chancery in the name of Lord Harrowby, as next friend of the infant; and on the 20th of June a petition was presented to the LORD CHANCELLOR, praying that Lady Elizabeth Moore might be ordered to deliver up the ward to General Stuart, and that she might be discharged from the guardianship.

This petition was personally served upon her at Edinburgh, where she still retained the child in her custody. On the 6th of July an order was made by the Court of Chancery under the Great Seal, "That Lady Elizabeth Moore should on or before the 13th day of July 1860 deliver up the infant Marquis to Major General Stuart, to the intent, that he might reside with him, or where he (the Major General) should consider proper, in conformity with the scheme; and it was further ordered, that Lady Elizabeth Moore should be discharged from being a guardian of the person of the infant Marquis; that Major General Stuart should be continued as such guardian; and that he should be authorized to take all necessary steps (if any) according to the law of Scotland for having the Marquis delivered up to him." Next day this order was personally served on Lady Elizabeth Moore. General Stuart, still wishing to treat her with courtesy, requested an interview with her. This she positively declined. He then called at the hotel, where she kept the boy in close custody; but he could not gain access either to the one or to the other. Now began the judicial proceedings in Scotland which have given rise to this appeal. On the 13th of July a petition, setting forth the facts of the case, was presented to the Court of Session by General Stuart and Lady Adelaide Keith Murray, the next cognate relation of the infant in Scotland; praying the Court "to order the said Lady Elizabeth Moore forthwith to deliver up the said infant Marquis of Bute to the petitioner, the said Charles Stuart, in conformity with the said order of the Court of Chancery, and, if necessary, to grant warrant to the petitioner, the said Charles Stuart, or to such other person as the said Court of Session might appoint for that purpose, to remove the said Marquis of Bute from the custody of the said Lady Elizabeth Moore, and to take or deliver him into the charge of the petitioner, the said Charles Stuart, or to grant such other orders or warrants as to the said Court of Session should seem proper." On the 18th, 19th, and 20th days of July 1860, this case came on to be solemnly heard by the Judges of the Second Division of the Court of Session. There has been laid before us a full account taken by shorthand writers, and allowed to be accurate, of all that was said during these three days at the bar and from the bench. I am grieved to say, my Lords, that I can by no means read this account, and the interlocutor at last pronounced, with the satisfaction and the pride generally excited in my mind when I am called upon to examine the judicial proceedings of my native country. This was a case, if ever there was one, requiring *festinum remedium.* No fact at all material was in dispute. Indeed, Lady Elizabeth Moore's counsel, not controverting the facts relied upon by the petitioners, boldly, in the just discharge of his duty, contended that, although she had been discharged from the guardianship by the Court of Chancery, and although she had no longer any right to the custody of the ward, her custody of him ought not to be disturbed, and the ward ought not to be delivered up to the guardian from whom he had been clandestinely and furtively and fraudulently taken, in contempt of the supreme court of a foreign country, having indisputable jurisdiction to appoint a guardian. The Judges asked for a precedent for such an order as was prayed, without suggesting, that since the institution of the Court of Session, there ever had been an instance of such a ravishment of ward, or of a ward so brought into Scotland, and so reclaimed. The Judges talked of the petitioners being disentitled to the relief claimed on account of the length of time the child had been in Scotland, their Lordships not considering how slowly litigation may sometimes proceed in Scotland, and forgetting that General Stuart, having made fresh pursuit after the fugitives, had done all in his power to obtain speedy redress in that country. The Judges likewise relied much on the objection, that the orders of the Court of Chancery were not sufficiently authenticated, although their authenticity had not been seriously questioned, although a dispute about the custody of a ward be a proceeding in which technical forms are not strictly observed, although reasonable evidence of the authenticity of the orders had been given, and although an offer was made to send by telegraph for the desiderated proof, which in twenty four hours might have been regularly laid before the Court.

Finally, knowing that Lady Elizabeth Moore had broken her word and betrayed her duty by her flight from London to Edinburgh with the ward of Chancery, and that it was of vital importance to the welfare of the ward, that he should, as soon as possible, be under the management of General Stuart, and be sent to a public school, instead of remaining under the tutelage of a nurse, the Court refused altogether to interfere with the custody of the ward: and requiring an answer where no fact was disputed, they pronounced an interlocutor "superseding consideration of the petition till the third sederunt day in November next," being the 20th of November, thus creating a delay of four months, from which most serious detriment inevitably must arise to the

unfortunate ward. The Court of Session had undoubted jurisdiction over the case. By their *nobile officium*, conferred upon them by their sovereign as *parens patriæ*, it is their duty to take care of all infants who require their protection, whether domiciled in Scotland or not. But I venture to repeat what I laid down for law in this House nearly twenty years ago, "that the benefit of the infant is the foundation of the jurisdiction, and the test of its proper exercise." Can any human being doubt, that on the 20th of July 1860, it would have been for the benefit of the infant Marquis of Bute, that he should be taken from the custody of Lady Elizabeth Moore and the nurse, and sent to a public school, under the superintendence of General Stuart, who had been selected as guardian with the consent of the whole Bute family, and whom Lady Elizabeth herself had described, as so well qualified to act as guardian to a young nobleman?

The refusal to interfere is rested on the decision of this House in *Johnstone* v. *Beattie;* and I do sincerely believe, that that decision was the true cause why the Court of Session in this present case refused to interfere. I regret that decision, and I must confess, that in some of the proceedings in that case, and in the language of some members of your Lordships' House who took part in that decision, there was ground for the Scotch Judges apprehending, that the Court of Chancery was encroaching on their jurisdiction. The application for English guardians there made, was certainly with an intention, which the parties making it entertained, to supersede the Scotch guardians, who had been duly appointed to the female child in Scotland, under her father's will, she being domiciled in Scotland, being in England only for a temporary purpose, having landed estates in Scotland, having no property whatever in England, there being a prayer in the bill for appointing English guardians, so that the Scotch guardians should account to them, and there being no suggestion, that the Scotch guardians had in any respect misconducted themselves, or were in any respect incompetent to take charge of her education; but all that can be considered as judicially decided by the House was, that if there be a foreign child in England, with guardians duly appointed in the child's own country, the Court of Chancery may, without any previous inquiry whether the appointment of other guardians in England is or is not necessary, and would or would not be beneficial for the child, make an order for the appointment of English guardians. Allowing the jurisdiction of the Court of Chancery, I thought, that it was not properly exercised for the good of the infant, and that such an exercise of it was a dangerous precedent for the appointment of guardians to any foreign child residing casually in England, for health, education, or amusement; the necessary consequence of which is, that the ward, till reaching the age of twenty one, cannot leave the realm of England without leave of the Court of Chancery. But the House did not decide, and no member of the House said, that foreign guardians are to be entirely ignored, or laid down anything to countenance the notion that a guardian who has been duly appointed in a foreign country, and who comes into England or Scotland to reclaim a ward stealthily carried away from him, is to be treated as a stranger and an intruder. On the contrary, an alien father, whose child had been so carried away from him, and brought into England, would undoubtedly have the child restored to him in England by a writ of *habeas corpus;* and I believe, that the same remedy could be afforded to a foreign guardian, standing *in loco parentis*, on the ravishment of his ward. Lord Langdale, who was one of the Lords who concurred in the judgment of the House in *Johnstone* v. *Beattie*, said: "If it should unhappily become necessary to call upon the Courts of the two countries to exercise their powers, I know of nothing which would render it impracticable for the English Court of Chancery to order the guardian resident in England to deliver up the infant to the guardian resident in Scotland. And why should we doubt, that the Scotch Courts would consider beneficial to the infant the same course of management which upon evident consideration had been approved by the English Court of Chancery, and, if necessary. order the guardian resident in Scotland, being the tutor or curator there, to deliver up the infant to the guardian resident in England? I cannot anticipate differences of opinion, or that either of the Courts would have any difficulty in directing that which would be most beneficial to the infant. It is not reasonable to suppose, that the Courts of the two countries would conflict in such a matter. If difficulties should occur, they must be met as they best may, by adopting that course which, under the circumstances, shall appear to be for the benefit of the infant." I must use the freedom to observe, that whatever opinion the Scotch Judges may justly form of the decision of this House in *Johnstone* v. *Beattie*, they would have acted with more dignity and more magnanimously, as well as more judicially, if they had calmly and promptly considered what was for the benefit of the infant, and had recollected, that a Court may not only be censured for exceeding its jurisdiction, but for declining to exercise its jurisdiction for the relief of a suitor, from the apprehension, that in another cause its jurisdiction has been unjustifiably encroached upon by another Court. I can take upon myself to say, that *Johnstone* v. *Beattie*, whether properly or improperly decided, is no authority whatever for the interlocutor of the 20th July, appealed against. In perfect harmony with that decision, the petition, for the restitution of the ward to the guardian, might have been immediately granted.

Mr. Palmer argued, that this could not have been done till the domicile of the infant had been determined; a period, from our experience in *Aikman* v. *Aikman* and other cases, which very probably would not expire till the infant had not only reached puberty, according to

the Scottish law, but majority according to the English. In truth, however, though the domicile may hereafter be important, it was of no importance then, and matters ought immediately to have been restored to the position in which they were before the removal of the ward.

There is only one other case, which I think I am called upon to notice, *Dawson* v. *Jay*, before LORD CHANCELLOR CRANWORTH. As at first stated at the bar, it certainly seemed closely in point, and it alarmed me much; for we were told, that an American infant, who had a guardian, regularly appointed by the Supreme Court at New York, having been fraudulently brought to England against the will of the guardian, LORD CRANWORTH had refused to interfere, and would not order the infant to be delivered up to the injured guardian. But on the case being examined, it turns out, that the infant came to England with the entire concurrence of the guardian originally appointed, who continued guardian at the time of the removal; and that it was another guardian afterwards appointed with doubtful regularity, who wished to get possession of the infant, and carry her back to America, after she had been living several years in England. It further appeared, that she was a British subject, though born in America; and the LORD CHANCELLOR was thus called upon, without any offence being imputed to her, to sentence her to transportation to America by the decree of a Court of Equity. That case, therefore, has no application to the present. I do not think I ought to say more upon the technical objection about evidence of the proceedings in Chancery, Mr. Palmer having very properly admitted, that the Judges may be considered as having pronounced the interlocutor of 20th July 1860, with knowledge of the proceedings in Chancery. In my opinion, the interlocutor of 20th July 1860 must be reversed. All the others included in the first and second appeal, necessarily fall along with it. As to the incompetency of the appeals, because no final judgment has been pronounced, I do not think it necessary to say more than this: either this petition respecting the custody of the person of an infant, although a *judicial proceeding*, is not a *cause* within the meaning of the statute regulating appeals; or that every order respecting the custody of an infant, whether granting or refusing the petition, must be considered final; otherwise there might be no competent appeal respecting the custody or the education of the infant till he has come of age. Besides, the interlocutors 23d of Nov. 1860, and 6th Feb. 1861, were certainly final; and the two appeals, *ob contingentiam*, may be considered as conjoined. If the interlocutors appealed against are reversed, the orders of the Court of Chancery, the subject of the third appeal, become wholly immaterial, and by consent they are to be vacated.

It remains now for your Lordships, as the tribunal of appeal from the Court of Chancery, to pronounce your judgment as to the guardianship of the infant Marquis, and his education and maintenance. I think, that Major General Stuart should be confirmed as his sole guardian during his minority, or till further order of the Court of Chancery. This arrangement ought to be cheerfully acquiesced in by the young Marquis; and from the gratifying statement we have of his good sense and right feelings, we doubt not, that such will be the result, notwithstanding the assertions which Lady Elizabeth Moore has instructed her counsel to make to the contrary. The scheme proposed for the ward's education meets with my entire approbation. And I do trust, that this interesting youth, being aware, that what this House judicially ordains must be obeyed by every good subject as the law of the land, and that our only anxiety is to direct that which we conceive to be for his good, will go on auspiciously while *in statu pupillari;* will, in due time, take his seat in this House, an accomplished nobleman; and will add fresh splendour to the illustrious house which he now represents.

LORD CRANWORTH.—My Lords, it is not my intention to trouble your Lordships with more than one or two observations upon this case, for however important it is, in truth it involves very little of principle which requires illustration. In the exercise of the jurisdiction of the Lord Chancellor, as representing the Crown as *parens patriæ*, and protector therefore of infants who have had the misfortune to lose their parents, and in the exercise of what is called the *nobile officium* of the Court of Session, which corresponds very much to that which exists in the Lord Chancellor in this country, there is but one object which ought to be kept strictly in view, and that is the interest of the infant. Now it appears to me to be a matter beyond all controversy, that in the interlocutor pronounced by the Court of Session on the 20th of July 1860, the sole object which the Court ought to have had in view was entirely lost sight of. Whatever order the Court ought to have made, certainly that which they did make was one in which the interests of the infant were lamentably neglected. For at this important period of this infant's age, when his education having been so lamentably neglected, that every week and every day was important, to leave the matter undecided for four months could not have been right. It appears to me, further, that there was sufficient before the Court to make it their duty at once to order the infant to be delivered up to the guardian who had been selected by the Court of Chancery. That is the opinion which has been expressed by my noble and learned friend: and entirely concurring in that, all the rest seems to me to follow as of course. I would make a passing observation upon the case of *Johnstone* v. *Beattie*. Perhaps it might have been a decision more consonant to the principles of general law, to have held there, that every country would recognize the status of guardian in the same way as they undoubtedly would recognize the status of parent or the status of

husband and wife. But supposing that not to have been the view taken by this House, then there is nothing in that decision of *Johnstone* v. *Beattie* that could have been decided otherwise, or that could at all interfere with or touch the present question. For all that was decided there was, that the status of guardian, not being a status recognized by the law of this country, unless constituted in the country, it was not a matter of course to appoint a foreign guardian to be English guardian: but that that was only a matter to be taken into consideration. That was all that was decided in that case; and whether or not (as I have already said) it might have been better to have held, that the status of guardian was to be itself recognized without further inquiry, is quite immaterial to the present question. My Lords, I am fully prepared to say, that if the converse of the present case had occurred between these two conflicting jurisdictions, I should have felt it my duty to recommend your Lordships to take precisely the course which I now recommend you, with the concurrence of my noble and learned friend, to take in the present case. If, for instance, an infant, having Scotch guardians, having all his interests in Scotland, and having had a proper scheme for his education in Scotland, proposed to and sanctioned by the Court of Session in Scotland, had been brought to this country; I will say further, even if it had not been brought clandestinely, I think it would have been the duty of the Court of Chancery, seeing that the scheme which had been settled by the Court in Scotland was a proper scheme, manifestly for the interest of the infant, to order the infant to be delivered up to the Scotch guardian, the Scotch guardian applying for it in order to carry that scheme into effect. I think it ought to be understood, that there is a perfect reciprocity upon this subject between the two countries. And such reciprocity existing, in my opinion, the suggestion of my noble and learned friend is perfectly correct; and I think the order ought to be made in the terms that were suggested by the Attorney General. I have very slightly modified those terms; and those terms, with the permission of your Lordships, I will read. "It appearing to this House that when the Court of Session pronounced their interlocutor of the 20th July 1860, the interests of the infant Marquis required, that he should be delivered to General Stuart, to be educated according to the scheme settled by the Court of Chancery, and that the Court of Session ought then to have given such directions as were proper for accomplishing that object; and it further appearing, that the interests of the infant Marquis still require that he should be so educated: therefore, reverse the interlocutor of the 20th of July, and the subsequent interlocutors complained of, and refer it back to the Court of Session to make such order or orders as may be proper for causing the infant Marquis to be forthwith delivered to General Stuart, (unless he shall previously have been so delivered,) in order that he may be educated as aforesaid, according to the directions of the Court of Chancery. And this House doth order, that all persons parties to these appeals, or any of them, do forthwith concur in all acts necessary and proper for obtaining such order or orders. And with these declarations and directions remit the matter to the Court of Session." As to the order of Vice Chancellor Stuart, dated 9th of February 1860, I understand that by consent of all parties that order may be reversed. We think that the costs of all parties ought to be paid out of the infant's estate.

LORD WENSLEYDALE.—My Lords, I agree entirely with my noble and learned friends, who have preceded me, in the advice which they have given to your Lordships.

It is much to be lamented, that, in a case so urgent, in which delay was likely to be most prejudicial to the best interests of the noble Marquis, the Court of Session should have interposed an objection on a matter upon which there really was no dispute, and required formal proof of the appointment of General Stuart as guardian to the infant by the Court of Chancery in England, and of the order of the Vice Chancellor Stuart to deliver up the infant to his English guardian. The result of that objection was, that the Court, by their order of the 20th July 1860, superseded the consideration of the petition until November 1860, an order most injurious to the interests of the ward, whose education was of the utmost importance and required immediate attention. This does not appear to me to be an interlocutory order, within the meaning of the 28th George III. cap. 151, § 15, which applies to such orders in regular suits, and not to those relating to the custody of infants, in which every order may be considered as final. And therefore the appeal against the order of the 20th July 1860 is not open to this objection. But, at all events, the appeal against the orders of the 23rd of November 1860 and the 7th of February 1861, particularly the latter, is not open to that objection; and the important question of the custody and education of the infant may certainly be disposed of on that appeal.

Your Lordships have therefore now to decide whether that order is proper under the circumstances of this case, which relate to the custody and education of a young nobleman, a British and Scotch Peer, having a Scotch domicile and origin, large possessions in Scotland, but much larger in England, but who has, in the undoubted exercise of its lawful authority, been made a ward of the English Court of Chancery. I cannot have the least difficulty in saying, that the Court of Session ought not to have looked at this case in a mere Scotch point of view, and to have dealt with it as if the noble Marquis had been solely a Scotch pupil. The order of the 7th of February is therefore, in my view, wrong. It prohibits and discharges the appellant from removing the pupil, on any pretence whatever, from the jurisdiction of that Court. The Court

ought, I think, (though it is not necessary to say whether they were bound to do so,) to have availed themselves of the opportunity of giving the young Marquis a proper education, which has been hitherto unfortunately neglected, by delivering him up to the care of the English guardian. I do not for a moment dispute, that a very good education may be had at a grammar school in Scotland, or at a more advanced period of life, in one of the seats of learning, the universities of that country. But the question here is, as to the education of a person who is to be a member of this House, and to move in the higher ranks of society. And he ought to be sent to a place of education where he will mix with many of the same class, and not only be educated with them in studies suitable to their station, but where he may form friendships and intimacies which may be most useful to him, and may last, as we know by experience, for the whole of life. I cannot, therefore, for a moment doubt, that he ought to be sent to one of the great public schools for the higher classes in England, and one of the universities of this part of the United Kingdom. And for that purpose he ought to be delivered up to the English guardian. And he will then remain happily under his care till he attains the age of majority in England, and will not be left in the very dangerous position of being almost his own master at the age of fourteen. I concur, therefore, entirely in the proposed judgment.

LORD CHELMSFORD.—My Lords, I am happy to be able to express my cordial concurrence in your Lordships' determination, because I am satisfied, that it is calculated for the benefit of the infant, which ought to be the chief object of our regard, and I trust, that it will have the effect of protecting him against himself at that perilous age which is fast approaching, when, according to the Scotch law, without discretion to guide himself, he would become the uncontrolled master of his own person and fortune. I cannot help deeply regretting, that so many precious months have been consumed, and irrecoverably lost, in which the Courts of the two countries, instead of cordially co-operating to advance the best interests of the infant, have placed him, as it were, in the centre, as a prize to be contended for by conflicting jurisdictions. I should be sorry to see the authority of the Scotch Courts broken in upon by any invasion of the English Courts, but I think there was no cause for the jealousy which has unhappily been excited upon the present occasion. I agree with my noble and learned friend opposite, that if the circumstances had been reversed, if the Scotch Court had assumed the guardianship of the infant, and the infant had been improperly removed from their jurisdiction, and the guardian had come to this country to reclaim possession of his infant ward, the English Courts would have facilitated the guardian in his object; and I think, that they would not have examined with a very nice and critical eye the proof of the orders which had emanated from the Scotch authority, or if there had been any imperfection in the proof, they would have facilitated the Court in obtaining the necessary means of establishing their authority. But all this has passed. Your Lordships have now, by your supreme authority, dictated a scheme for the care and protection of the infant. I am quite satisfied, that the Court of Session will cheerfully perform everything that is required of them to do, in order to accomplish your Lordships' objects, and that at last the lost time may be redeemed, and the infant Marquis may commence a course of education becoming his high rank and his extensive fortune.

LORD KINGSDOWN.—My Lords, I entirely concur in the order proposed.

The following was the *order* finally settled *by the House of Lords* in the Scotch appeals:—"It appearing to this House, that, when the Court of Session pronounced their said interlocutor of 20th July 1860, the interests of the infant Marquis of Bute required, that he should be delivered to Major General Charles Stuart, the appellant, to be educated according to the scheme settled by the Court of Chancery, and that the Court of Session ought then to have given such directions as were proper for accomplishing that object; and it further appearing to this House, that the interests of the infant Marquis of Bute still require, that he should be so educated, It is therefore ordered and adjudged by the Lords spiritual and temporal in Parliament assembled, that the said interlocutors of 14th and 20th July, and 21st November 1860, and 5th and 6th and 23d November 1860, and 7th February 1861, be, and the same are hereby reversed; and it is further ordered, that it be, and is hereby remitted back to the Court of Session in Scotland to make such order or orders, as may be proper for causing the infant Marquis of Bute to be forthwith delivered to Major General Stuart, unless he shall previously have been so delivered, in order that he may be educated as aforesaid according to the directions of the Court of Chancery; and this House doth further order, that all persons, parties to these appeals, or any of them, do forthwith concur in all acts necessary and proper for obtaining such order or orders: And it is further ordered, that the costs of all parties in the matters be paid out of the estates of the infant Marquis of Bute; and it is also further ordered, that the matters be, and they are hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with these declarations and directions and this judgment."

For Appellants, Clayton, Cookson, and Wainewright, Solicitors, London; Maconochie and Duncan, W.S., Edinburgh.—*For Lady E. Moore*, Maitland and Graham, Solicitors, London; Maclachlan, Ivory, and Rodger, W.S., Edinburgh.—*For Tutor at law*, Farrer, Ouvry, and Farrer, Solicitors, London; J. and F. Anderson, W.S., Edinburgh.