REPORTS OF CASES

ARGUED AND DETERMINED

IN

The House of Lords.

GUARDIANSHIP OF THE MARQUIS OF BUTE.

1861. *May 2nd, 3rd, and 17th.*

MAJOR-GENERAL CHARLES STUART, . APPELLANT.

LIEUTENANT-COLONEL JAMES FREDERICK DUDLEY CRICHTON STUART, AND THE HONOURABLE ELIZABETH ANN MOORE, SPINSTER, COMMONLY CALLED LADY ELIZABETH MOORE, . RESPONDENTS.

Summary.—On the 10th May 1848, the infant Marquis of Bute, when only seven months old, had been made a ward of the Court of Chancery. He had considerable estates in Scotland, and very large estates in England. He was born in Scotland. Whether his domicile was Scotch the parties disputed ; the Appellants asserting that it was English. On the 16th March 1860 the infant was clandestinely carried out of England into Scotland by Lady E., one of his English guardians. The Court removed her from the guardianship, and ordered her colleague in the guardianship, Major-General S., to pursue her and recover the infant, whom she was ordered to deliver up for education in England, according to a scheme settled by the Court. She was served with the Order, but she refused to surrender the infant. The Major-General then applied for aid to the Court of Session, which, being on the eve of the Long Vacation, postponed the consideration of the case for four months. Determined, by the House, that an immediate and instant Order ought to have been made for delivery of the infant.

Held, also, that the fact of there having been at the time of the application a Scotch tutor-at-law, but retoured

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subsequently to the appointment of the English guardian, made no difference in the case, because the Great Seal had the prior seisin, and the presence of the infant in Scotland was the result of a furtive abduction.

Infant's Benefit.—The benefit of the infant is the foundation of the jurisdiction, and the test of its proper exercise ; p. 60.

Conflicts of Jurisdiction.—When conflicts of jurisdiction arise, they must be met by adopting that course which under the circumstances shall appear to be most for the benefit of the infant.

Reciprocity—Jurisdiction.—A decree of the Court of Chancery is not entitled to more respect in Scotland than an Interlocutor of the Court of Session is entitled to in England. In this respect the two divisions of this island are on a footing of perfect equality ; p. 50.

Great Seal.—The holder of the Great Seal of the United Kingdom, although he has important functions to exercise in Scotland, has no *judicial* authority in that country ; p. 49.

Ward of Court.—An infant may be made a ward of the Court of Chancery on petition without bill ; pp. 36, 46.

Festinum Remedium—Appeal.—In a matter relating to the custody of an infant, and demanding *festinum remedium*, an Interlocutor postponing judicial interposition for four months is an Interlocutor on merits, and appealable ; because in such a case promptitude is of the essence of the remedy.

Proceedings upon Petition.—*Semble,* proceedings upon petition are not within the 48 Geo. 3. c. 151. ; p. 65.

Beattie v. *Johnstone,* 10 Cla. & Finn. 42, commented on ; p. 61.

Dawson v. *Jay,* 3 De Gex, McN., & G. 764, commented on ; p. 64.

The late Marquis of Bute's parentage.

JOHN, second Marquis of Bute, deceased, a British Peer, and a Lord of Parliament, was the eldest son of the Honourable John Stuart, commonly called Lord Mountstuart ; who, having resided all his life in Eng-

land, died on the 20th of January 1794, and was buried in the county of Essex.

The late Marquis of Bute's birth, 1793.

His son, the late Marquis of Bute aforesaid, was born in his father's London mansion, on the 10th day of August 1793. His boyhood was passed in England. He was educated at Eton and Cambridge, and in 1812 took his honorary degree as Master of Arts. In 1814 he became Marquis of Bute (*a*). In 1818 he married the Lady Maria North, eldest daughter and co-heiress of the third Earl of Guildford. In addition to the family mansion in London, he kept up establishments at Cardiff Castle, in Glamorganshire; at Luton Hoo, in Bedfordshire; at Kirtling, in Cambridgeshire, and at Stuartfield Lodge, in the county of Durham. When absent from London, he resided at one or other of these seats. He occasionally visited Scotland. He laid out large sums in finishing Luton Hoo, but his chief attention was devoted to the improvement of his Glamorganshire property, and more especially to the formation of certain docks there, on which alone he expended nearly 300,000*l*.

Death of the late Marquis of Bute's first wife, without issue, 1841.

His wife, the Marchioness, died in 1841, without issue.

He becomes Commissioner to the Scotch General Assembly, 1842.

In 1842 the late Marquis became Her Majesty's Commissioner to the General Assembly of the Church of Scotland. During his tenure of this high office he adhered to his practice of residing occasionally from time to time at his different seats. While Parliament sat, he was always in London; but he repaired to Scotland to preside at the General Assembly, when necessary, for a fortnight each year, as the Queen's Commissioner aforesaid, having the

(*a*) On the death of his grandfather, who had been created a British Marquis, by letters patent under the Great Seal of Great Britain, in the year 1796.

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Royal Palace of Holyrood assigned to him by Government for his accommodation.

The late Marquis's second marriage, 1845.

In 1845 the late Marquis married the Lady Sophia Frederica Christina Hastings, second daughter of the first Marquis of Hastings, a British Peer and a Lord of Parliament. The ceremony of marriage took place in London.

Birth of the present Marquis, 12th Sept. 1847.

The sole fruit of this union was a son, John Patrick Crichton Stuart, now an infant of the age of thirteen, who was born at Mountstuart House, in the island of Bute, in Scotland, on the 12th day of September 1847. His baptism was alleged by the Appellant to have been in accordance with the ritual and formalities of the Church of England.

Death of the late Marquis, 18th March 1848;

The late Marquis died on the 18th day of March 1848, at Cardiff Castle, where he had been residing with the Marchioness and their infant son. He was buried at Kirtling aforesaid.

And accession of the infant, the present Marquis.

On the death of the late Marquis the honours of the family descended on the infant aforesaid, who is now the Marquis of Bute.

The late Marquis's Will, and Probate thereof in England, on the footing of an English domicile; 19th April 1848.

The will of the late Marquis, bearing date the 22nd day of July 1847, was in the English form, and was duly proved as an English will, according to the law of the domicile, by the executors thereof, namely, Lord James Stuart (his brother), Onesiphorus Tyndall Bruce, and James Munro Macnabb, in the Prerogative Court of Canterbury, on the 19th day of April 1848.

No provision in the Will for guardianship.

The said will did not contain any provision for the guardianship of the infant Marquis.

Petition to have the Marchioness, mother of the infant, appointed guardian, 5th May 1848.

On the 3rd of May 1848 a petition was presented on behalf of the infant Marquis to the Right Honourable Charles Christopher Baron *Cottenham*, then Lord High Chancellor of Great Britain, praying that the Marchioness of Bute, widow of the late Marquis, and

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mother of the infant Marquis, might be appointed guardian of the person of the said infant during his minority; and, the *Lord Chancellor* having ordered that all parties concerned should attend him, an Order was made, bearing date the 10th day of May 1848, whereby the Marchioness was duly "appointed guardian " of the infant Marquis during his minority, or until the " further Order of the Court." The infant's uncle, the said Lord James Stuart, and the other two executors aforesaid of the deceased Marquis's will, appeared by Counsel on the hearing of the said petition, and consented to the said appointment. At this period the infant Marquis was of the age of seven months, and was under the natural care of the Marchioness, then residing at Cardiff Castle aforesaid.

The Marchioness appointed guardian, 10th May 1848.

On the 30th May 1848 the said Lord James Stuart obtained in Scotland Letters of Tutory Dative to the said infant Marquis; but it was no part of his function to take cognizance of the person of an infant British Peer already in the custody of the British Great Seal. Accordingly, the said Lord James Stuart never interfered with the person of the said infant Marquis.

Tutor-at law retoured in Scotland, 30th May 1848.

The Marchioness acted as guardian of the infant Marquis till her death, which event took place at Mountstuart, on the 28th day of December 1859.

Death of the Marchioness, 28th December 1859.

In the will of the Marchioness, bearing date the 2nd day of June 1859, the following recommendation and trust was expressed, showing that she never dreamt of any authority interfering with the guardianship of her son, except that of the Great Seal, under which she had herself acted for eleven years. Thus she says:—

Recommendation of the late Marchioness.

In the event of my dying before my son attains the age of twenty-one years, I recommend and trust that the Court of Chancery will appoint as his guardians Colonel Charles Stuart (*a*),

(*a*) The Appellant, Major-General Stuart.

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late of the 13th Light Infantry, Sir Francis Hastings Gilbert, Baronet, and Lady Elizabeth Moore, whose near relationship entitles them to the office, and in whom I have the most perfect confidence.

Resolution to apply to the Court of Chancery consequent on the Marchioness's recommendation.

At the date of the Marchioness's death, Sir Francis Hastings Gilbert being out of the kingdom as British Consul at Scutari, the Appellant, Major-General Stuart (described in the Marchioness's will as Colonel Charles Stuart, but herein-after to be named as Major-General Stuart,) and Lady Elizabeth Moore were advised to apply to the Court of Chancery to appoint them to be guardians of the person of the young Marquis. A correspondence on this subject took place between Major-General Stuart, who was then in England, and Lady Elizabeth Moore, who was then at Mountstuart, in Scotland. The absence, moreover, of Sir Francis Hastings Gilbert, and an uncertainty whether he would return and join in the guardianship, occasioned some little delay.

Letter from Lady Elizabeth Moore to Major-Gen. Stuart, 2nd Feb. 1860.

On the 2nd February 1860 Lady Elizabeth Moore addressed the following letter to Major-General Stuart :—

Mountstuart,
MY DEAR COLONEL STUART, 2nd February 1860.

WITH regard to the subjects you have named, respecting the boy's education, public and private schools, tutors, &c., I feel that this is so entirely *your* concern, that I hardly venture to hazard an opinion upon topics that I have never been accustomed to think of. It rests with you to consider and decide upon these points. As to Bute himself, from my intimate knowledge of his singular character, as well as from the very great influence I have over him, I do *not* think it is for his advantage (or yours) to remove him too hastily from my care. I would not precipitate matters *if I could help it*, but would gradually accustom him to the necessity of a change, which, believe me, would greatly lessen the pang of parting from old friends. If conversed with rationally, he is far too wise not to see and understand the real state of the case. I have talked to him of school, of young and pleasant companions; I have told him he *must* work hard at Latin and other languages; and that he cannot pass the whole of his childhood at Mountstuart. For Bute's present and future welfare, I earnestly wish you to

acquire a lasting influence over his mind. I also wish him to love and confide in Mrs. Stuart; but this will not be accomplished in five minutes, for he has an immense deal of Scotch caution (and reserve *when he pleases*), and, childlike as he naturally is in some ways, he is as old, and as shrewd, and as long-headed as a grown-up man in other ways. Ill understood, he might prove cunning. How thankful—how very thankful—I should be if you *both* could make it convenient to visit the child at his home before taking him to your house or to school! I should like to keep Bute under my own eye for two (or may be three) months longer *if I were allowed.*

Major-Gen. Stuart and Lady Elizabeth Moore appointed guardians to the infant Marquis, 7th Feb. 1860.

The Great Seal, whose jurisdiction had already attached in fixing the guardianship of the infant Marquis by the aforesaid Order of the 10th May 1848, again by a continued exercise of its authority interposed in the same matter, and did so at the direct instigation of Lady Elizabeth Moore, who proposed herself for the office of guardian, as appears from the following Order of Her Majesty's High Court of Chancery, made by his Honour the Vice-Chancellor Sir *John Stuart*:—

On Tuesday, the 7th day of February 1860, in the matter of the Most Honourable John Patrick Crichton Stuart, Marquis of Bute, an infant, by the Honourable Lady Elizabeth Ann Moore, spinster, his next friend, upon the application of the above-named John Patrick Crichton Stuart, Marquis of Bute, an infant, by the said Elizabeth Ann Moore, of 23, Dover Street, Piccadilly, in the county of Middlesex, his next friend, and upon hearing Counsel for the Applicant, and upon reading an Order, dated the 10th May 1848, an affidavit of John Clayton, filed the 21st January 1860, an affidavit of Robert Whyte, and an affidavit of Alexander Bruce, filed respectively the 1st February 1860, and an affidavit of John Clayton, filed the 2nd February 1860, it is ordered that Charles Stuart, of Hubborne Lodge, Christchurch, in the county of Hants, a colonel in Her Majesty's army, and the said Elizabeth Ann Moore be appointed guardians of the person of the said infant during his minority or until further Order of this Court.

Lady Elizabeth Moore's letter to Major-Gen. Stuart 10th Feb. 1860.

On the 10th February 1860 Lady Elizabeth Moore addressed Major-General Stuart as follows:—

I received your letter announcing the decision of the Court of Chancery. *Of course* your judgment must be altogether unfettered, or it would be impossible for you to act. I rejoiced that

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you stood (as I thought) alone without interference respecting Bute's education. There is nothing I should more deeply deplore than your resigning the charge of the boy; in fact, I think it would be his destruction. There is no one fitted like yourself for the position. Besides, it was the earnest wish of his mother, who so highly esteemed, regarded, and trusted you. It really is a task of humanity, which I am confident only a feeling of duty could induce you to undertake. I hope I have not conveyed to you or Mrs. Stuart a disagreeable impression of our young cousin. I am also happy to tell you that Bute is looking quite well, and Dr. Gibson assures me he is so. I offer no objection to whatever you think best for Bute's advantage. When he is once established in your house, I trust the Vice-Chancellor will become more tranquil and satisfied as to his future. *I pray you not to give up the boy!* His great worldly position is to me a melancholy object of thought and anxiety. Poverty may be a discomfort, but enormous wealth does not bring happiness. I am, my dear General Stuart, with much esteem, and with thanks for the patience you have shown towards me,

Yours very sincerely,

ELIZABETH A. MOORE.

Lady Elizabeth Moore's letter to the Solicitor of the Bute family, 11th Feb. 1860.

On the 11th February 1860 Lady Elizabeth Moore addressed the following letter to Mr. John Clayton, the solicitor of the Bute family, at Newcastle-on-Tyne:—

MY DEAR SIR, Mountstuart House, 11th February 1860.

I GOT your letter acquainting me with the decision by the Court of Chancery. I make no doubt that General Stuart will shortly receive Lord Bute into his own house. 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. I am pleased to have had the care of poor Bute when I could be a comfort to him at a time of deep sorrow. You will like to know that he is now looking well, and performing his studies with his tutor, I hope satisfactorily.

E. MOORE.

Major-Gen. Stuart's letter to Lady Elizabeth Moore, 14th Feb. 1860.

On the 14th February 1860 Major-General Stuart addressed a letter to Lady Elizabeth, as follows:—

I regret that I had not time to answer your very kind letter before I left London yesterday, and to tell you the result of my interview with the Vice-Chanceller Stuart. He was decidedly of opinion that Bute should be brought at once away from his island,

and mixed up with other boys; in short, that he should enter upon 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 house 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. I had a long talk with the Vice-Chancellor Stuart about maintenance. He recommended (which I believe means something more than a recommendation) that the amount should be regularly fixed and awarded by the Court. I hope ere long to be with you at Mountstuart, and then I trust you will not object to Bute's coming away with me.

Lady Elizabeth Moore's letter to Major-Gen. Stuart, 17th Feb. 1860.

On the 17th day of February 1860 Lady Elizabeth wrote from Mountstuart to Major-General Stuart as follows:—

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.

Major-Gen. Stuart's first journey to Scotland to obtain the infant, between 17th Feb. and 9th March 1860.

In the interval between the 17th February and the 9th March 1860 Major-General Stuart went to Mountstuart House, in the island of Bute, and there passed some days with Lady Elizabeth Moore and the young Marquis, the Major-General's intention having been to obtain delivery of the infant and bring him forthwith to England. But Lady Elizabeth Moore entreated that he should be left with her, she promising and undertaking to come with him herself to London, and there to surrender him to the Major-General, who, yielding to her Ladyship's importunities, returned home without the Marquis.

Major-Gen. Stuart returns without the infant.

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Lady Elizabeth Moore's letter to Major-Gen. Stuart, 9th March 1860.

On the 9th March 1860 Lady Elizabeth Moore, while in Edinburgh on her journey southwards, wrote to Major-General Stuart as follows :—

MY DEAR GENERAL STUART, Alma Hotel, 9th March.

THIS was the day we were to have started, then I thought of to-morrow (meaning to spend Sunday at York). I had many visitors yesterday—Lady Glasgow, her sisters, &c.

I am very sincerely yours,
ELIZABETH A. MOORE.

Lady Elizabeth Moore's letter to Major-Gen. Stuart, 14th March 1860.

On the 14th March 1860 Lady Elizabeth, being still in Edinburgh, wrote from the Alma Hotel to Major-General Stuart, saying :—

I pray you not to imagine that I am making unnecessary delay. I love Bute too dearly. I have his real interest too much at heart ever to encourage him to idle his time. His learning is to me a matter of as deep anxiety as it can possibly be to you. I hope to sleep at Newcastle on Monday.

I beg you to believe me very sincerely yours,
ELIZABETH A. MOORE.

Lady Elizabeth Moore's letter to Major-Gen. Stuart, 21st March 1860.

On the 21st March 1860 Lady Elizabeth Moore wrote from Newcastle to Major-General Stuart, saying :—

We shall reach London by the express to-morrow, at ten minutes after six o'clock. I stop at York to-night, because Bute has always a particular fancy to see the Minster. I think it would be well, before going into the country, to have his teeth looked at by a good dentist, just to know that all is right. After Monday next I think of proposing to take Bute to Hubborne (*a*) at any time that may best suit your arrangements.

Believe me, in haste, very truly yours,
E. MOORE.

P.S.—Bute's love to you and Mrs. Stuart.

Lady Elizabeth Moore's arrival in London with the infant Marquis.

On the 23rd March 1860 Lady Elizabeth, having arrived with her charge in London, wrote to Major-General Stuart, saying :—

Her letter to Major-Gen. Stuart, 23rd March 1860.

23, Dover Street, 23rd March.

There are still some visits that Bute must pay. I also hope to manage the dentist; but that is not so easy—he is always so busy. I propose taking Bute to Hubborne any time that

(*a*) The Major-General's residence in Hampshire.

is agreeable to you, on or after Wednesday next, March 28th. Perhaps you will have the kindness to let me have one line in answer to this.

Major-Gen. Stuart's letter to Lady Elizabeth Moore, 23rd March 1860.

On the same 23rd March 1860 Major-General Stuart wrote to Lady Elizabeth, saying:—

I was very glad to learn that you were so far on your way south. I hope that you are now safe in London. We have held ourselves entirely disengaged during the present week, hoping that you would have arrived, at all events before the end of it. Next week I am not so free. I must therefore reluctantly ask you to defer coming here till Friday the 30th. Mr. Stacey is now quite prepared to resume the task of tuition, and I earnestly entreat you to allow him *to take Bute in hand again* next Monday. Four hours' steady reading, judiciously divided, will neither impede amusements nor visits to friends, and it is most urgent that no more time should be lost. I do not merely deplore the unfortunate indisposition which has deprived a boy so lamentably backward as poor Bute of several weeks actual learning, but I sadly fear that the habit of application, which he was only beginning to acquire at Mountstuart, will be lost, and Mr. Stacey will find himself much where he was when he commenced his up-hill task last January. We find that we can so arrange as to take Mr. Stacey in with ease, whilst we have the pleasure of your company, and I hope and believe without any inconvenience to yourself. I should therefore beg him to accompany you here.

Major-Gen. Stuart's letter to Lady Elizabeth Moore, 31st March 1860.

On the 31st March 1860 Major-General Stuart wrote to Lady Elizabeth, saying:—

I trust that you are better, and Bute quite himself again. May we hope to see you and him next Wednesday? If it is not quite convenient to you to come here with Bute by that time, perhaps you will send him with Mr. Stacey, and give us the pleasure of your visit at a somewhat later period. I mention this because we have for the last three weeks, in the hope of seeing you, put off every engagement except the inevitable Levée.

Lady Elizabeth Moore's letter to Major-Gen. Stuart, 2nd April 1860.

On the 2nd April 1860 Lady Elizabeth addressed to Major-General Stuart the following letter, which betrayed an alteration of her tone:—

I hasten to reply to your letter of the 31st. 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 have twice in my life been brought to the brink of the grave by bronchitis, from an attack of which I am now suffering. I therefore feel the absolute necessity of my entirely giving up my intended visit to Hubborne. In great haste for post,

Yours very truly,
ELIZABETH A. MOORE.

Major-Gen. Stuart's letter to Lady Elizabeth Moore, 3rd April 1860.

On the 3rd April 1860 Major-General Stuart wrote to Lady Elizabeth, saying:—

DEAR LADY ELIZABETH,

I HAVE received your letter of yesterday with some surprise and much regret. It now seems that I have been labouring under a complete delusion as to your views and intentions. I understood that you had no wish to interfere in matters concerning Bute's education, and that at the expiration of a very short time you would be ready to resign him altogether to my charge. In fact, I was under the impression, as indeed he appeared to be when we were last together at Mountstuart, that he was to come here in the second week in March, and take up his abode altogether with me. Every preparation was therefore made to receive Bute here, and to make him as comfortable as I could. You now, on the contrary, speak of his separation from you as "a step which ought not to be directly taken, without any actual necessity," and 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 a 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 of bringing him away with me from Mountstuart, this alarm, perhaps, would probably 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.

Lady Elizabeth Moore's letter to Major-Gen. Stuart, 5th April 1860.

On the 5th April Lady Elizabeth wrote from 23, Dover Street to Major-General Stuart, saying:—

I agree with you that unless we can reconcile our views, the Vice-Chancellor is the proper person to decide what is right. I am quite of your opinion, that the sooner the matter can be settled the better it will be for the progress of the dear boy's education.

On the 6th April 1860 Major-General Stuart wrote from Hubborne to Lady Elizabeth, saying:—

Major-Gen. Stuart's letter to Lady Elizabeth Moore, 6th April 1860.

I have the pleasure to thank you for the offer which you are good enough to make to concur with me in an arrangement for laying the subject of our differences respecting the guardianship before the Court of Chancery. I think, however, that in the reference which it is unfortunately necessary to make, it will be better for me to take my own independent course. I regret being obliged to remind you that the immediate cause of my being compelled to seek the authority of the Vice-Chancellor is that you have deemed it right (on the plea of alarm at the idea of being separated from you, newly arisen in Bute's mind) to depart entirely from the assurance which I repeatedly received from you, that he should, ere this time, be consigned to me, and that all arrangements respecting his education should rest entirely with me.

Communications with the Vice-Chancellor Stuart.

At this stage the correspondence between Lady Elizabeth and Major-General Stuart ceased for a time; but each of them had some communication with the Vice-Chancellor.

Lady Elizabeth Moore's flight with the infant Marquis to Scotland, 16th April 1860.

On the evening of Monday the 16th April 1860 her Ladyship suddenly, and in a clandestine manner, left London by the night railway train, taking with her the infant Marquis; and they both arrived at the Granton Hotel, near Edinburgh, on the following morning.

Petition to the Lord Chancellor for a scheme for the education and maintenance of the infant Marquis, 16th April 1860.

On the same 16th April a petition was presented to the Lord High Chancellor of Great Britain, in the matter of the said infant Marquis, by Lady Elizabeth Moore, his next friend, the Petitioners being the infant aforesaid and Major-General Stuart; such petition stating that the Petitioners were desirous that a scheme should be settled for the education and maintenance of the said infant, and praying the same accordingly.

Order that a scheme should be settled by the Judge, 20th April 1860.

On the 20th April 1860 the Court ordered that a scheme should be settled by the Judge for the education, maintenance, establishment, and residence of the

infant Marquis, Lady Elizabeth Moore appearing by Counsel, and consenting to the Order.

Certificate for the maintenance and education of the infant Marquis, 10th May 1860.

In pursuance of this Order, the Chief Clerk of his Honour the Vice-Chancellor Sir *John Stuart* duly made his certificate, dated the 10th day of May 1860, containing a scheme for the maintenance and education of the Marquis, and such certificate was in the following terms :—

In pursuance of the directions given to me by the Vice-Chancellor Sir John Stuart, I hereby certify that the result of the proceedings and inquiry which have been taken and made in pursuance of the Order made in this matter, dated the 20th day of April 1860, is as follows :—The Petitioners, the Marquis of Bute and Charles Stuart and Lady Elizabeth Ann Moore, in the Order named, have attended by their respective solicitors. The Petitioner, Charles Stuart, and the Right Honourable James Archibald Stuart Wortley, also attended in person. Having regard to the will and codicils of the Most Honourable John Patrick Crichton Stuart, Marquis of Bute and Earl of Dumfries, deceased, the father of the said John Patrick Crichton Stuart, Marquis of Bute and Earl of Dumfries, a scheme for the education, maintenance, establishment, and residence of the said infant has been settled, and such scheme is 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 14 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. The said infant Marquis was born in the month of September 1847, and is now in the thirteenth year of his age. The fortune of the said infant Marquis consists of the following particulars :—The late Marquis of Bute, the father of the said infant Marquis, died intestate as to his estates in Scotland, and the said infant Marquis succeeded thereto. Under the will of the late Marquis, dated the 22nd July 1847, the infant Marquis is tenant for life in possession of certain estates in Wales, subject to a term of years for raising money to discharge incumbrances. The English estates, situate in the counties of Bedford, Herts, Northumberland, and Durham, are by the said will of the said late Marquis directed to be sold, for the purpose of raising funds for the payment of debts and incumbrances upon

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the English and Welsh estates, and for the purchase of lands in Scotland and Wales, to be settled to the use of the said infant Marquis for life; but by a codicil he desires that his heir may have the option of purchasing the estates in Northumberland and Durham. The net annual proceeds of the English and Welsh estates, after payment of the interest of mortgage debts and other annual charges, is 76,000*l.*, and the net annual proceeds of the Scotch estates is 17,000*l.*, making together 93,000*l.* The relations of the said infant Marquis *ex parte paternâ* are his first cousins, J. F. Dudley Stuart, a Lieutenant-Colonel in Her Majesty's army; Herbert Windsor Stuart, of 6, Whitehall Place, in the city of Westminster, Esquire; and Mary Ann Frances Stuart, of Brighton, in the county of Sussex, spinster; and his relations *ex parte maternâ* are his aunts, Lady Adelaide Augusta Lavinia Keith Murray, the wife of Sir William Keith Murray, Baronet, and Lady Selina Constance Henry, the wife of Charles John Henry, of Cheltenham, in the county of Gloucester, Esquire. It will be proper that the sum of 2,500*l.* per annum out of the rents of the English and Welsh estates, and 4,500*l.* per annum out of the rents of the Scotch estates, making together 7,000*l.* per annum, should be allowed for the time to come during the minority of the infant Marquis, or until the further Order of the Court, for the maintenance and education of the infant Marquis, for keeping up the said establishments at Cardiff Castle and Mountstuart, and for making all proper voluntary and annual payments for ecclesiastical and charitable purposes, and to dependants of the family. The evidence produced on this proceeding and inquiry consists of the probate of the will of the said most Honourable John Crichton Stuart, late Marquis of Bute and Earl of Dumfries, the father of the infant Marquis, the affidavit of John Clayton, filed the 21st day of January 1860, and the affidavit of Charles Stuart, filed the 27th day of April 1860. The scheme of the said Lady E. A. Moore for the education of the said infant Marquis is that the said infant Marquis should, together with his tutor, reside with her at Mountstuart, 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. The evidence produced on the last-mentioned scheme consists of the affidavit of the said Lady Elizabeth Ann Moore, filed 7th May 1860; the affidavit of Thomas Gibson, filed 7th May 1860; and the affidavit of James F. Simpson, filed 7th May 1860; and the affidavit of Charles Kaye Freshfield, filed 9th May 1860.

Annual proceeds of the Bute estates in England and Scotland, 93,000*l.*

This certificate was approved of by his Honour the Vice-Chancellor *Stuart* on the 11th day of May 1860.

Approval of the Certificate by the Vice-Chancellor Stuart, 11th May 1860.

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Major-Gen. Stuart's second journey to Scotland to obtain the infant, May 1860.

Early in May 1860 Major-General Stuart, having ascertained that Lady Elizabeth Moore had carried the infant Marquis to Edinburgh, proceeded thither to demand him from her Ladyship.

Service of the Certificate on Lady Elizabeth Ann Moore, 21st June 1860.

A copy of the certificate was served on Lady Elizabeth on the 21st day of June 1860, at the Granton Hotel, near Edinburgh, and application was made to her to surrender the Marquis, but without success, her Ladyship absolutely refusing to comply, and retaining the Marquis in her custody.

Lady Elizabeth Moore's refusal to give up the infant Marquis.

Suit instituted in the Court of Chancery, by the Earl of Harrowby, the infant's next friend, 13th June 1860.

In a cause instituted in Her Majesty's High Court of Chancery between the infant Marquis, by the Right Honourable Dudley Ryder Earl of Harrowby his next friend, Plaintiff, and Charles Stuart (the present Appellant), John Boyle, the Right Honourable Stuart Wortley, James Frederick Dudley Crichton Stuart aforesaid, Jane Mary MacNabb, and Elliot Macnaghten, as Defendants, the Bill, filed on the 13th June 1860, stated that it was desirable that the infant Marquis should be a ward of the Court, and prayed that proper provision should be made for his maintenance and education.

Lord Harrowby's Petition to the Lord Chancellor, 29th June 1860.

On the 29th June 1860 a petition was presented to the Lord High Chanceller of Great Britain in the above cause, and in the matter of the infant Marquis, by the said Earl of Harrowby, his next friend, praying that Lady Elizabeth Moore might be ordered to deliver up the Marquis to Major-General Stuart, and that she might be discharged from the guardianship. This petition was personally served on her Ladyship in Scotland on the 3rd July 1860, at the Granton Hotel aforesaid.

Order discharging Lady Elizabeth Moore from the guardianship, 6th July 1860.

On the 6th day of July 1860 an Order of the High Court of Chancery, under the Great Seal, was made by his Honour the Vice-Chancellor Sir *John Stuart*, to the following effect, namely, that the certi-

ficate aforesaid should be confirmed; 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.

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This Order of the 6th of July 1860 was personally served on Lady Elizabeth Moore at the Granton Hotel aforesaid, on Saturday, the 7th of July 1860.

Served on Lady E. Moore on the 7th July 1860.

On Tuesday, the 10th July 1860, Major-General Stuart wrote to Lady Elizabeth Moore a letter in the following terms:—

Major-Gen. Stuart's letter to Lady Elizabeth Moore, 10th July 1860.

MADAM, Caledonian Hotel, 10th July 1860.

I WAS very anxious to save your Ladyship the trouble of a personal interview, and I therefore, on Saturday last, served a copy of the Vice-Chancellor's Order of the 6th instant, on your Ladyship through my agents. I regret, however, to find from a letter received from London this morning, that it is considered by my Counsel indispensable I should myself make the demand upon you in person for the delivery of Lord Bute; and I must therefore intimate to your Ladyship that I shall be in attendance at the Granton Hotel, on Wednesday next (to-morrow), the 11th instant, at one o'clock in the afternoon, or at any other hour to-morrow that may be more convenient for your Ladyship, to deliver in person the Vice-Chancellor's Order, and to make a formal demand on your Ladyship for implement of it.

I have the honour to be, Madam,

Your Ladyship's most obedient humble servant,

CHARLES STUART.

This letter of the 10th July 1860 was delivered on the same day to Lady Elizabeth Moore personally;

Lady Elizabeth Moore's letter to Major-Gen. Stuart, 11th July 1860.

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and next morning Major-General Stuart received from her Ladyship the following answer :—

SIR, Granton Hotel, 11th July 1860.

I BEG to acknowledge the receipt of your letter of yesterday's date, and to inform you that I am advised to decline granting you the interview you seek.

I have the honour to be, Sir,
Your very humble servant,
ELIZABETH A. MOORE.

Major-Gen. Stuart's ineffectual endeavour to see Lady Elizabeth Moore, 11th July 1860.

Notwithstanding such answer so received from Lady Elizabeth Moore, Major-General Stuart proceeded to the Granton Hotel at the time he had appointed, namely, at one o'clock on Wednesday, the 11th July 1860 ; but on then and there asking for Lady Elizabeth Moore, he was refused admittance, and was informed by a servant of the hotel that her Ladyship's party "were all out."

Petition of Major-Gen. Stuart, and other relatives, to the Court of Session, 13th July 1860.

On the 13th July 1860 a petition was presented to the Court of Session (Second Division) by Major-General Stuart, Lady Adelaide Augusta Lavinia Keith Murray, and her husband Sir William Keith Murray, of Ochtertyre, Baronet, stating that the only next of kin of the infant Marquis then resident in Scotland was the said Lady Adelaide Augusta Lavinia Keith Murray (who was, in fact, sister of his mother, the late Marchioness), and that the Petitioners considered it to be their duty to obtain from the said Court of Session such Order or Warrant as might be necessary to compel Lady Elizabeth Moore to deliver up to Major-Gen. Stuart the infant Marquis aforesaid; and therefore praying the said Court of Session as follows :—

"To ordain 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; or, in the event of their not disposing of the Petition before the rising of their 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 as should appear to be proper."

Note lodged in the Court of Session by Lady Elizabeth Moore, 17th July 1860.

On the 17th July 1860 Lady Elizabeth Moore lodged a "Note," praying the said Court to indulge her with time to enable her to answer the Petition last mentioned.

Hearing of Major-Gen. Stuart's Petition, 18th, 19th, and 20th July 1860.

On the 18th, 19th, and 20th days of July 1860, Counsel were heard for the Petitioners on the one hand, and for Lady Elizabeth Moore on the other.

Warm support of that Petition by the new Tutor-at-law, 19th July 1860.

On this occasion Lieutenant-Colonel Crichton Stuart, one of the Respondents to the present Appeal, appeared voluntarily by Counsel before the Court of Session, in the character of Tutor-at-law to the young Marquis, retoured as his nearest male agnate, in succession to his father, the prior Tutor-at-law, Lord James Stuart aforesaid, who had died in September 1859, and whose own retour had been subsequent to the appointment of the Marchioness as guardian, under the Order aforesaid of the 10th of May 1848. The new Tutor-at-law, following the example of his father, never in any way interfered with the custody of the said infant's person until stimulated into action by some remarks of the learned Judges in the Court of Session. On the contrary, he warmly assisted and supported the Major-General in his application for the assistance of the Court of Session, stating that he did so in compliance with the wishes of every member of the Bute family.

Observations of the Lord Justice-Clerk, 20th July 1860.

On the 20th July 1860 the presiding Judge of the Court of Session, the *Lord Justice-Clerk* (a), expressed himself as follows:—

This Petition was presented to your Lordships for the first time last Saturday, and it was represented by the Petitioners to

(a) The Right Hon. John Inglis.

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be a matter of great urgency; and they asked for a service upon the Respondent, and an order upon her to lodge answers within three days. It appeared to the Court that that was a very peremptory order in the circumstances, but still, moved by the representation of the Petitioners as to the extreme urgency of the matter, they appointed the Petition to be served, and allowed the Respondent "to lodge answers by Wednesday next, in order to the application being disposed of before the rising of the Court." Lady Elizabeth Moore, the Respondent, being, as she represented, unable to avail herself of that permission to lodge answers within so short a period, put in a note in which she asked the Court to appoint answers to be lodged at some more distant period, and in the meantime to abstain from doing anything in the matter of the Petition. Still, acting upon the representation of the Petitioners as to the extreme urgency of this matter, the Court were induced to put out the case to be heard yesterday upon the Petition alone, without answers; and we did hear parties yesterday at very considerable length, and the question now comes to be what the Court ought to do in the matter of this Petition, in the present stage of these proceedings. We have given the matter as serious and careful consideration as the shortness of the time would permit, and I am now to state the result at which the Court have arrived. The Petition is presented in name of Major-General Charles Stuart, and of certain other Petitioners who appear only for the purpose of concurring. The title stands entirely in the person of General Stuart, and that title is represented to be an appointment by the Court of Chancery of General Stuart, along with the Respondent, Lady Elizabeth Moore, as guardians to the pupil, the Marquis of Bute. General Stuart alleges that his co-guardian, the Respondent Lady Elizabeth Moore, in the course of arrangements being made in the Court of Chancery for providing for the custody and education of the pupil, suddenly left London in April last, carrying the young Marquis with her, and is now living in Scotland. And upon that statement of his own position as guardian,—and now sole guardian, he says, because Lady Elizabeth Moore, in consequence of leaving the jurisdiction of the Court of Chancery, with the pupil, has been removed from the guardianship—upon that allegation as to his character of guardian, and upon the further allegation that Lady Elizabeth Moore has carried the Marquis of Bute out of the jurisdiction of the Court of Chancery and brought him into Scotland, he makes an application to your Lordships "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 he refers to an Order of the Court of Chancery, in which it is alleged that Vice-Chancellor Stuart ordered that the said Lady Elizabeth Moore be discharged from being guardian, and at the same time that she

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should deliver over the person of the Marquis of Bute to the Petitioner. My Lords, this application is admitted to be not only novel, but quite unprecedented. That is by no means conclusive of its incompetency, or of the impropriety of granting it. By no means. But at the same time, its being an unprecedented application clearly shows that it is one that cannot be entertained by the Court without the most serious and deliberate consideration; and it appears to us that we are not in a position at present to pronounce any order upon this Petition, except merely with a view of preparing the case for being disposed of. In the first place we are met with this difficulty at the outset, that we have no authentic evidence whatever of the appointment of the Petitioner as guardian to the pupil; and in the second place we are equally obstructed by the absence of any authentic evidence of that Order of the Vice-Chancellor which it is the object of the present Petition to enforce. This, probably, would have been in itself a sufficient reason for abstaining from pronouncing any operative Order upon this Petition in the meantime. But the difficulties in which the Court are placed by no means end there. If there were evidence of the appointment of General Stuart as guardian, and evidence of an Order having been pronounced by the Court of Chancery in the terms set out in this Petition, then there would arise the question how far an application of this kind is at all competent in this Court; and, in the second place, whether, if it be competent, it is one that this Court, in the exercise of its equitable jurisdiction, could with propriety grant. I am desirous to speak, as I am sure all your Lordships are, with the greatest possible respect of the proceedings and orders of the Court of Chancery; but it is rather a singular position in which to place a Supreme Court to ask, that it shall merely register and execute the decree of another Court. It is said by the Respondent, and, apparently, that statement seemed to be acquiesced in by the Petitioner, that we must consider the Court of Chancery in the present case as a foreign Court. That is, perhaps, not, strictly speaking, a correct description of the Court of Chancery in its relation to the Court of Session, but for all practical purposes it is correct enough. It is not a foreign Court in this sense, that both the Court of Chancery and the Court of Session derive their power from the same sovereign source, and they are Courts of the same United Kingdom, and form integral parts of the British constitution, and in that sense they can hardly be said to stand to one another in the relation of foreign Courts. But, on the other hand, each of these Courts is supreme and independent within its own distinct and separate territory, and the one is just as independent and as supreme in the kingdom of England as the other is in the kingdom of Scotland; and that supreme and independent character is not in the slightest degree affected by the two kingdoms being united under one sovereign. And therefore, in so far as principles of

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jurisprudence are concerned, such a case as this will fall undoubtedly to be disposed of upon the same grounds as if the two Courts were really Courts of countries foreign to one another. But whenever the Court of Chancery on the one hand, or the Court of Session upon the other, in the exercise of its proper and undoubted jurisdiction, pronounces an order or decree, and a proposal is made to carry out that order and decree in another part of the United Kingdom, I need hardly say that every Court in that other part of the United Kingdom will be disposed to pay the greatest deference to the decree of the Court which pronounced the decree, and to give it effect if it be competent, and if it be consistent with the duty of the Court to which application is made. And my disposition would be unquestionably to give effect to every decree of the Court of Chancery which is sought to be carried into execution in Scotland, if we can do so consistently with the principles of that law which we are bound to administer, and without in any respect prejudicing or deserting our own duty. But supposing an application of this kind to be presented even in the most favourable circumstances; supposing an application to be presented by English guardians appointed by the Court of Chancery, setting forth that some unauthorized person has carried their ward out of the jurisdiction of the Court of Chancery and brought him into Scotland, the ward being a native of England, the son of English parents, of English origin and domicile, and in no way connected with Scotland, all I shall say of such a case—the most favourable that can be supposed in support of such an application as this—is, that I should still look upon the application, in respect of its perfect novelty, as demanding the most serious consideration before it could be granted. But so far from that being the state of the facts before us, we know, in point of fact, that the pupil here is not only himself connected very intimately with Scotland, but represents an ancient Scottish family, and an ancient Scottish peerage; and although he has estates in England, and is also a British Peer, his connexion with Scotland, and that of his father before him, it is in vain to dispute, because it is notorious, and very intimate indeed. It is averred upon the part of the Respondent that the late Marquis of Bute died a domiciled Scotchman, that Lady Bute, during her widowhood, continued to be a domiciled Scotchwoman, and resided regularly in Scotland, with slight exceptions, along with the young Marquis her son; that upon her death accordingly the present Marquis of Bute, the pupil, was unquestionably not merely a Scotchman by origin, but a Scotchman by domicile derived from both his parents; and we must add to that a fact which is beyond all dispute, that he is under the guardianship in Scotland of a Tutor-at-law, duly served and retoured, which of itself affords a very strong presumption that the pupil is a domiciled Scotchman. I do not say that it is conclusive on that question of fact, but it affords a very strong

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presumption indeed that the pupil is a domiciled Scotchman. Now, in this state of circumstances, we have considered the question—which, under any circumstances, as I said before, would be an extremely important and grave one—how far this application can be entertained as a competent application, and, at the same time, as one which, with propriety and in consistency with our duty, it is possible for us to grant. My Lords, the position of the pupil at this moment is, that he is resident in Scotland, and he is there under the guardianship of his Tutor-at-law, who is responsible to this Court for his guardianship; and the meaning of this application—for it is quite in vain to disguise it—is, that the person of the pupil shall be handed over to the Petitioner, for the purpose of being removed out of the jurisdiction of this Court. The order of the Vice-Chancellor, as set out in this Petition, clearly imports as much. The prayer of this Petition plainly means the same thing. Now, to pronounce an order upon the mere presentation of a Petition before answers have been lodged by any party, to the effect of carrying out of the jurisdiction of this Court a Scotch pupil, under the tutelage of a Tutor-at-law duly served and retoured, is the most startling proposal that I suppose ever was made in this Court. I think it unnecessary to say more as to the clear incompetency, as well as impropriety, of granting any such order *in hoc statu.* I am not in the least degree disposed, and I am sure none of your Lordships are, to pronounce an order dismissing this Petition without further hearing and consideration. There may be very grave constitutional questions remaining to be argued under this Petition; and we shall be quite prepared to hear those questions argued, and to dispose of them in due time. But in the meantime it is quite impossible to make an order in terms of that leading part of the prayer of the Petition. But then certain other proposals have been made on the part of the Petitioner which it is necessary to consider. In the first place he says, that if the Court has not time before the occurrence of the vacation to consider and dispose of this matter, they ought to remit it to the Lord Ordinary on the Bills, to dispose of it in vacation. I think it enough to say, with regard to that proposal, my Lords, that I should think the remit of such a Petition as this to the Lord Ordinary on the Bills would be of no avail to the Petitioner, for this very simple reason, that I do not believe there is any Judge of this Court who, sitting singly in the Bill Chamber, would take upon him to pronounce any order in terms of any part of the prayer of this Petition. But even if such a thing were possible, it would be in the highest degree improper that we should put it into the power of any single Judge to grant such an order; and therefore that proposal we cannot listen to. Then, in the next place, it was proposed on the part of General Stuart that delivery of the person of the pupil should be made to

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him upon terms; and he represented that he was willing to come under an obligation, and to grant ample security that he would not, until this Petition was further considered, remove the person of the pupil beyond the jurisdiction of the Court, but that, on the contrary, he would discharge to the pupil his duties as guardian by himself taking up his residence within the jurisdiction of this Court. That proposal was made in the course of debate, and I cannot help thinking, that if the Petitioner's Counsel had had time to consider the matter before making the proposal, it never would have been made. It seems to me to be met by insuperable objections, some of which I should have thought it would have been the interest of the Petitioner himself to consider and give effect to. In the first place, what is the Petitioner in reference to this pupil? A guardian appointed by the Court of Chancery; and he proposes, as a guardian appointed by the Court of Chancery, to take up his own residence, and also that of the pupil, in Scotland, out of the jurisdiction of the Court of Chancery, and to bind himself under heavy penalties not to go within the jurisdiction of the Court of Chancery. That is a very startling proposal; but the only thing that we have to consider is, whether it is consistent with his Petition, and with his position here as a Petitioner. Now, his sole title being that of guardian appointed by the Court of Chancery, we certainly should not be aiding the Court of Chancery or giving effect to its decree, by allowing a guardian of its appointment so to violate his duty to that Court. But in the second place, such a proposal is not within the prayer of this Petition, because the prayer of this Petition is to give effect to the Order of the Vice-Chancellor; and to make such an Order as is now proposed, would be to go right to the teeth of the Order of the Vice-Chancellor. And therefore upon that ground it is impossible to entertain the proposal under the prayer of the Petition which is before us. But then, if this would not be an enforcement of the Chancery Order, there occurs this third difficulty. Has the Petitioner any *persona standi* in this Court except to enforce the Chancery Order? His title as Petitioner is guardian appointed by the Court of Chancery. That is not merely his only title under this Petition, but it is the only *persona standi* which he can have in reference to any question connected with the custody or education of the Marquis of Bute. And, lastly, my Lords, I cannot leave out of view the very strong allegations which have been made—verbally, no doubt, for there has been no time to have them made in any other way—by the Respondent Lady Elizabeth Moore, as to the extreme repugnance of the pupil to be placed in the custody or under the guardianship of the Petitioner. Therefore it seems to me quite impossible to entertain that proposal, and I am not aware that we have any other before us. No doubt this leaves the case in a position which is not altogether satisfactory, because the lady who is at present in charge of the

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pupil has certainly no legal title to the custody of the pupil. That is quite true. And she does not allege that she has any legal title to the custody; and she can hardly disguise, that in leaving the jurisdiction of the Court of Chancery, and carrying the ward into Scotland, she has been violating, if not an express, an implied Order of that Court. But then, on the other hand, my Lords, one cannot help considering the circumstances which are urged upon the other side; for although this lady has no legal title to the custody of the pupil, it is undeniable that she was one of the most intimate friends of his late mother, the Marchioness of Bute, that she was selected by her as one of the persons to whom she desired to commit the custody of her son; that upon the death of the Marchioness she did, apparently with the assent of all concerned, take charge of the young Marquis, and that he has lived with her without objection from anybody from that time down till the 16th of April last, when she left London in his company; and the only change of circumstances which has occurred is what is said to be her surreptitious removal of the pupil from London to Edinburgh. Now that may or may not have been a proper proceeding. The Court can give no opinion upon that at present. They have no occasion to do so. But what Lady Elizabeth Moore says in her own vindication with reference to that (and which I neither take as fact, nor do I disbelieve at the present stage of the proceedings,) is this, that she was under the impression that nothing could have been more desirable than that the young Marquis should have been put under the personal superintendence and guardianship of the Petitioner, General Stuart; and with that impression she carried him to London, in order that an arrangement might be made before the Vice-Chancellor for his education; but that during her residence with her charge in London she became aware that he entertained feelings of very strong repugnance to being under the same roof constantly with General Stuart, and under his control and superintendence. And it then occurred to her, she says, that by carrying the pupil to England, she might possibly have seriously prejudiced his rights, and exposed him to danger in regard to a matter on which she thought his feelings ought to be consulted; and therefore she considered it to be her duty to the young Marquis to restore him to Scotland, from whence she had brought him. Now, whether that may or may not be the case, at all events one cannot altogether discharge from consideration the explanation which is thus offered on her part, or refuse to take it into consideration, in connexion with the allegations which are made against her on the other side. But what appears to me to be the consideration, which is sufficient to reconcile the Court to allow matters to stand as they are until further discussion can take place on this Petition is, in the first place, that it is not alleged that, apart from the recent surreptitious

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removal of the pupil from England to Scotland, there is anything in the character or position of Lady Elizabeth Moore to render her an unfit custodier of this young Peer; and, in the second place, and this is by far the most important consideration, that although the custody of his person is to be left with Lady Elizabeth Moore, the legal title to look after the pupil is in the Tutor-at-law; and the Tutor-at-law of course will understand that the Court hold him answerable for the custody of the pupil, as well as for everything else connected with him during the time which must now elapse before this application comes to be further considered. If Lady Elizabeth Moore or anybody else were to attempt to alter the position of matters as they now stand, during the vacation in such a way as either to interfere with the jurisdiction of this Court or with the rights of the pupil, it will be the duty of the Tutor-at-law to see that that is prevented; and he will bear in mind that there is never in this country any surcease of preventive justice. The Bill Chamber is always open to an application for an interdict. I think therefore, and I believe your Lordships are all of the same opinion, that the best course which we can follow is to leave the pupil at present in the custody of the Respondent. There is the greatest possible objection obviously in point of propriety and expediency, to making an order in the meantime, which might transfer his custody to some person, who in the course of a few months' time we might find to have no title to his custody, and thereby lead to a shifting of the responsibility for the custody of this young Peer's person, which I think would be productive of the most hurtful consequences to himself, and certainly could serve no good purpose as regards the rights of other parties, or the vindication of the law. I ought to say in conclusion, with regard to the position of the Tutor-at-law, that we cannot, of course, recognize him at present as being a party to this Petition at all. He is not even sisted as a party to the proceedings, and it has not been served upon him; and though we were very glad to see him represented at the bar by his Counsel, and to hear what he had to say through his Counsel, we cannot at present deal with him as a party to this application. What the Court therefore propose to do, is to appoint Lady Elizabeth Moore, the Respondent, to answer this Petition, and further to appoint service of the Petition upon the Tutor-at-law, and also separately on the pupil, with a view to his being heard in the matter of this Petition through a tutor *ad litem*; and the Tutor-at-law will of course consider whether he ought or ought not to lodge answers to this Petition. *Quoad ultra*, we shall supersede consideration of this Petition until the third sederunt day of November.

Interlocutor of the Court of Session, appealed from, 20th July 1860.

The Court pronounced the following Interlocutor:—

"Edinburgh, 20th July 1860.—The Lords having advised the Petition, and heard Counsel for the Petitioners Major-General

Charles Stuart and others, and for the Respondent Lady Elizabeth Moore, and also for Colonel James Stuart, Tutor-at-law of the Marquis of Bute: before farther answer, and reserving all questions of competency, appoint the Respondent Lady Elizabeth Moore to answer the petition, and farther, appoint the petition to be served on the said Tutor-at-law, and separately on the pupil, with a view to his being heard in the matter of this petition through a Tutor *ad litem*, to be hereafter appointed; and allow the Tutor-at-law, if so advised, also to lodge answers: *quoad ultra*, supersede consideration of the petition till the third sederunt day in November next.

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Consequences of this Interlocutor.

The certain consequence of this decision was, that Lady Elizabeth Moore, who had violated her duty, and who had been discharged from her office, was left for four months in the exclusive custody of the infant Marquis.

Removal of Lady Elizabeth Moore with the infant Marquis and his private tutor to Dumfries House, 2nd August 1860.

The Tutor-at-law having collected from the remarks of the Scotch Judges on the 20th July 1860, that "they looked to him as answerable for the custody of the Marquis," made arrangements for the accommodation of Lady Elizabeth Moore, of the infant Marquis, and of Mr. Stacey, who accompanied them as private tutor to the infant Marquis. After having been at the Granton Hotel aforesaid from the 16th of April till the 2nd of August 1860, they, on the said 2nd of August, arrived at Dumfries House, in the county of Dumfries, a seat of the Bute family in Scotland, which the Tutor-at-law had prepared for their reception, intending that they should there remain till the "third sederunt day" of the Court of Session—in other words till the 23rd of November 1860, when the question of legal custody was, by the appointment of the said Court, to be resumed.

Stay of Lady Elizabeth Moore, &c., at Dumfries House till October 1860.

Lady Elizabeth Moore, the infant Marquis, and Mr. Stacey remained at Dumfries House during August and September, and during part of October, 1860.

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Dismissal of the Marquis's private tutor by Lady Elizabeth Moore.

The infant Marquis complained to Mr. Stacey of Lady Elizabeth Moore's harshness. Lady Elizabeth Moore responded by dismissing Mr. Stacey, a Fellow of Trinity College, Cambridge.

Her departure from Dumfries House with the Marquis, 24th October 1860.

On the 24th October 1860 Lady Elizabeth Moore suddenly left Dumfries House, having in her custody the infant Marquis, without a servant and without any change of clothing.

Her expedition to Glasgow, Rothesay, and the island of Bute, with the Marquis.

Arriving in Glasgow, she, at 11 o'clock at night, carried the infant Marquis to an obscure lodging, totally unfit for one of his high rank. She thence took him to Rothesay, in the island of Bute, where she put up at an hotel, instead of going to Mountstuart House, the family residence in that island.

The Tutor-at-law's Petition against her to the Court of Session, proposing to place the Marquis at a school near Musselburgh, 3rd Nov. 1860.

On the 3rd November 1860 the Tutor-at-law, having been apprised of Lady Elizabeth Moore's movements, presented his petition to the said Court of Session and to the *Lord Ordinary* officiating on the Bills, stating the facts which had occurred subsequently to the Interlocutor of the 20th July 1860, and praying the Court—

"To grant authority to him to place the infant Marquis at the school of Loretto, near Musselburgh, under the care of the Rev. Thomas Langhorne, the master and proprietor of that establishment, or at such other educational institution, and under the care of such other master, as their Lordships, or the Lord Ordinary officiating on the Bills, might approve of, with a view to his Lordship's education, till the further Orders of the Court; or otherwise to pronounce such other Order relative to the custody of the said Marquis, or his residence or education, as to their Lordships, or the Lord Ordinary officiating on the Bills, should seem proper, and in the meantime, and in any event, to interdict, prohibit, and discharge the said Lady Elizabeth Moore from removing the said John Patrick Marquis of Bute, the Petitioner's ward, to any place of residence not authorized by the Petitioner, and in particular any place beyond the jurisdiction of the Court (the Court of Session), and also from interfering with or obstructing the Petitioner in the discharge of his duties as Tutor-at-law in reference to his Lordship's residence or education; or to do otherwise in the premises

as to the said Court, or the Lord Ordinary officiating on the Bills, should seem necessary and proper."

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Interlocutor of the Lord Ordinary, 5th Nov. 1860, appealed from.

On the 5th November the *Lord Ordinary* officiating on the Bills appointed the petition aforesaid "to be intimated to the parties in the prayer thereof mentioned." His Lordship also appointed—

"Intimation to be made to the infant Marquis; and he appointed them, or any of them, if so advised, to lodge answers thereto; and he reported the case for the consideration of the Lords of the Second Division, interdicting in the meantime, and prohibiting, Lady Elizabeth Moore from removing the Marquis to any place beyond the jurisdiction of the Court of Session."

Major-Gen. Stuart's Answers to the Petition of the Tutor-at-law, 14th Nov. 1860.

On the 14th November 1860 Major-General Stuart lodged answers in the Court of Session to the petition aforesaid of the Tutor-at-law. By such answers Major-General Stuart, while he adhered to the prayer of the joint petition aforesaid, presented by himself and by Lady Adelaide Augusta Lavinia Keith Murray and her husband, on the 13th July 1860, yet did not feel himself "called upon to oppose any temporary arrangement under which the infant Marquis might be withdrawn from the custody and control of Lady Elizabeth Moore, and placed *ad interim* at a private school until the joint petition aforesaid should be disposed of."

Lady Elizabeth Moore's Answers to the Petition of the Tutor-at-law, 14th Nov. 1860.

On the same 14th November 1860 Lady Elizabeth Moore lodged answers to the petition aforesaid of the Tutor-at-law.

Lady Elizabeth Moore's Answers to the Major-General's Petition, 14th Nov. 1860.

On the same 14th November 1860 Lady Elizabeth Moore also lodged answers to the joint petition aforesaid presented to the Court of Session on the 13th July 1860, by which answers her Ladyship affirmed, *inter alia*, that—

"She did not feel herself at liberty to take any step without the authority of the Court (meaning thereby the Court of Session);

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but she ventured to suggest for consideration whether it was in any view desirable to move Lord Bute to a boarding school so suddenly, and without the possibility of the ordinary preparations being made for such a step. And finally, her Ladyship consoled herself with the reflection, that having *protected* the infant Marquis in this matter hitherto, to the extent of her ability, and to the effect of bringing the whole case under the cognizance of the Court of Session, *she humbly felt that she had done her duty.*"

The Tutor-at-law's Answers to the Major-General's Petition, 14th Nov. 1860.

On the said 14th November 1860 the Tutor-at-law also lodged answers to the joint petition aforesaid, stating that—

"Having had occasion maturely to consider his position as Tutor-at-law in Scotland, and the difficulties arising from the removal of the infant Marquis into a jurisdiction where his rights might come to be essentially different; he (the Tutor-at-law) had come to the conclusion, that until some arrangement should be made whereby the exercise of these rights might be secured, it was his duty to withhold assent from the prayer of a petition involving his removal to England."

The Tutor-at-law, however, expressed by his said answers, "his conviction that a continuance of any control or custody of the Marquis's person, on the part of Lady Elizabeth Moore, would not be for his advantage."

Hearing before the Court of Session, 20th Nov. 1860.

On the 20th November 1860 Counsel were heard on these several petitions and answers before the Judges of the Second Division of the Court of Session.

Interlocutor appealed from, 21st Nov. 1860.

On the 21st November 1860 an Interlocutor was pronounced by the said Court of Session (Second Division), as follows:—

"Edinburgh, 21st November 1860.—The Lords having resumed consideration of the petition for Major-General Stuart, with the answers for Lady Elizabeth Moore, and the answers for the Tutor-at-law, and heard Counsel: In respect of the appearance of the said Tutor-at-law, and of the answers given in for him; and, in respect the interests of the pupil are now sufficiently represented and protected by his said Tutor, find it unnecessary to appoint a Tutor *ad litem;* before further answer, allow the Petitioner a proof of the averments in his petition; grant dili-

gence for citing witnesses and havers; and commission to Mr. George Moir, advocate, to take their depositions and receive exhibits. The proof to be reported *quam primum*.

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Minute of the Tutor-at-law, again proposing to place the Marquis at a school near Musselburgh, 22nd Nov. 1860.

On the 22nd of November 1860 the Tutor-at-law presented to the said Court, by his Counsel, a "Minute," which was as follows:—

"Patton and Millar for the Tutor-at-law, and with reference to the petition at his instance submitted, for the approval of the Court, the following arrangement for the Marquis of Bute. This arrangement to subsist until the further Orders of Court. That the Marquis should be placed at Loretto School, near Musselburgh, kept by the Reverend Thomas Langhorne, for the purpose of education. That the charge of the custody of the person of the Marquis, including a superintendence of the arrangements for his health and comfort, should be given to the Earl of Galloway, who should, during the holidays at school, receive the Marquis into his family at Galloway House. That, in order to the Marquis becoming acquainted with the Earl of Galloway and his family, he should, before going to school, reside for such time as the Earl of Galloway might think desirable at Galloway House. That, in the event of its appearing to the Earl of Galloway that any change in reference to the mode or place of education would be desirable, he should bring the matter under the notice of the Tutor-at-law, who should bring it before the Court. The Tutor, therefore, moved the Court: To approve of the nomination of the Earl of Galloway as Custodier of the person of the Marquis of Bute, to grant authority to the Tutor to place the Marquis at Galloway House, with a view to his residence there for such time as the Earl of Galloway might think desirable, and thereafter to place the said Marquis at the school at Loretto, near Musselburgh, with a view to his receiving education in the establishment of the Reverend Thomas Langhorne there."

Interlocutor appealed from, 23rd Nov. 1860.

On the 23rd November 1860 the said Court of Session (Second Division) pronounced the following Interlocutor:—

"Edinburgh, 23rd November 1860.—The Lords having heard Counsel on the petition for Colonel James F. D. C. Stuart, Tutor-at-law to the Marquis of Bute, a pupil, and answers thereto for Lady Elizabeth Moore, and separate answers for Major-General Stuart, and Minute for the said Petitioner, No. 17 of Process, approve of the arrangement proposed in the said Minute for the custody, residence, and education of the pupil, and ordain the same to be carried into execution, as an interim arrangement,

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subject to the future Orders of the Court; and in terms thereof grant authority to the Petitioner to place the person of the pupil under the custody of the Earl of Galloway *quam primum*, with a view to his residence in the family of the said Earl at Galloway House, and to his being thereafter placed at the school of Loretto, near Musselbugh, by the said Earl, for the purpose of education, under the instruction and superintendence of the Reverend Thomas Langhorne, master of the said school; and discharge all persons whatever, during the subsistence of this arrangement, and until the Court shall otherwise order, from interfering with the said Earl, or with the said Reverend Thomas Langhorne, in the matter of the custody, residence, and education of the said pupil; but this Order and Warrant are pronounced subject to the declaration, that the said Earl of Galloway shall not, during the subsistence of this arrangement, remove the said pupil, or suffer him to be removed, beyond the jurisdiction of the Court, and decern and dispense with reading in the Minute Book.

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Surrender of the infant by Lady Elizabeth Moore, 25th Nov. 1860.

Infant committed to the care of the Earl of Galloway.

On the 25th November 1860 Lady Elizabeth Moore surrendered the infant Marquis to the Tutor-at-law, who committed him to the care of the Earl of Galloway.

Minute for the Tutor-at-law, 4th February 1861.

On the 4th February 1861 the Tutor-at-law lodged in the said Court of Session a "Minute," referring to his petition aforesaid of the 3rd November, and also referring to his "Minute" aforesaid of the 22nd November, with the aforesaid Interlocutor following thereon, of the 23rd November.

Infant Marquis with the Earl of Galloway on the 4th February 1861.

The said "Minute" of the 4th February stated that "the custody of the person of the said Marquis of Bute had been assumed by the Earl of Galloway, with whom the said Marquis went to reside, and with whom he was then residing."

Tutor-at-law's motion to resume proceedings in the Court of Session.

The said "Minute" of the 4th February concluded by moving the Court of Session—

"To resume consideration of his (the Tutor-at-law's) petition, and the proceedings and interlocutory order following thereon, and to give such further directions, or to pronounce such Interlocutor or Order as to the said Court of Session might seem fit as to the residence of the pupil, and the proceedings in the Court of Chancery regarding the proposed removal of the pupil to England;

and in particular to give such explicit directions relative to the matter as might provide for the rights and privileges of the pupil, and the fulfilment of the Orders of the said Court in the cause."

Lady Elizabeth Moore's "Note" of the 6th Feb. 1861.

On the 6th February 1861 Lady Elizabeth Moore lodged in the Court of Session a "Note," stating, among many other things, that, by the death of Lady Adelaide Augusta Lavinia Keith Murray, she (Lady Elizabeth Moore) had become the infant Marquis's nearest cognate or relation on the mother's side resident in Scotland, and adding the expression of her desire that the proceedings in Chancery, which she asserted had been instituted without "the knowledge or authority" of the infant Marquis, should be brought under the notice of the Court of Session, "in order that the interests of the infant Marquis might not be prejudiced by proceedings taken elsewhere in his name."

The learned Judges of the Second Division pronounced the following Interlocutor:—

Interlocutor of the Court of Session (Second Division), 7th Feb. 1861, appealed from.

Edinburgh, 7th February 1861.—The Lords having resumed consideration of the petition and answers, and considered the Minute for the Petitioner, Colonel James Frederick Dudley Crichton Stuart, No. 18 of Process, and the Note for Lady Elizabeth Moore, Respondent, No. 21, and heard Counsel, no appearance being made for the other Respondent, Major-General Charles Stuart, to whom the said Minute for the Petitioner has been duly intimated; in respect the Petitioner, as Tutor-at-law, has the sole legal title and right of administering the Scotch estates of the Pupil, the Marquis of Bute, during his pupillarity, and is also during the same period vested with the exclusive right and charged with the duty of providing for the custody, residence, and education of the Pupil, subject to the orders and directions of the Court; and in respect the Order made by the Interlocutor of 23rd November 1860, under this Petition, approving of the arrangements suggested by the Petitioner for the custody, residence, and education of the Pupil, subsists and is effectual during the whole period of his pupillarity, unless altered by subsequent Orders of the Court; and in respect no grounds have been stated and no circumstances have occurred to render any alteration of the said arrangement necessary or expedient, ordain the said Petitioner to take all necessary steps, so far as this has not been done, for having the said arrangement carried into full effect as a permanent arrangement, to subsist till the Pupil attain the age of puberty; interdict, prohibit, and

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discharge the Petitioner Colonel Stuart and also the Earl of Galloway from removing the Pupil beyond the jurisdiction of the Court, and from permitting or suffering any other person, on any ground or pretence whatever, to remove the Pupil beyond tne jurisdiction of the Court, or to interfere in any way with his custody, residence, and education, as settled by the orders of the Court: Interdict, prohibit, and discharge the said Major-General Stuart, Respondent, and all other persons whatsoever, from removing, or aiding or assisting in removing the Pupil beyond the jurisdiction of the Court, and from interfering in any way to prevent the said arrangement for his custody, residence, and education being carried into full execution: Renew the Interdict formerly granted against Lady Elizabeth Moore, Respondent: Appoint a certified copy of this Interlocutor to be served on the Earl of Galloway, and further appoint the same to be intimated to the Respondent, Major-General Stuart, personally, and decern and dispense with reading in the Minute Book.

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Injunction by Vice-Chancellor Stuart, and Appeal by Lieutenant-Colonel Stuart.

On the 9th of February 1861 the Vice-Chancellor *Stuart* issued an Injunction against the Tutor-at-law, restraining him—

"From further proceeding with or prosecuting his Petition to the Court of Session, and from instituting or prosecuting any further or other proceedings in Scotland or elsewhere relative to the infant Marquis, without the leave of the Court of Chancery" (*a*).

Against this order the Tutor-at-law appealed to the House.

Major-General Stuart's Appeal against the decision of the Court of Session by leave of the Court of Chancery.

Major-General Stuart, by leave of the High Court of Chancery, also appealed to the House against the decision of the Court of Session, and did so in a duplicate form, tendering in fact two Appeals; his first Appeal being against the aforesaid Interlocutors of the 14th and 20th days of July, and of the 21st day of November 1860, pronounced on his Petition of the 13th day of July 1860; and his second Appeal being against the Interlocutors of the 5th, 6th, and 23rd days of November 1860, and of the 7th day of February 1861, pronounced on the Petition of the Tutor-at-law aforesaid of the 3rd day of November

(*a*) See Appendix to this Report, N° 1.

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1860,—in the hope that the said several Interlocutors might be reversed or altered; and that the House would be pleased to pronounce, or direct the Court below to pronounce, such Interlocutor or Interlocutors as the Court below ought to have pronounced, instead of the Interlocutors which it had pronounced.

Appellant's Argument.

The *Attorney-General* (*a*), Sir *Hugh Cairns*, and Mr. *Macqueen*, in support of the Appeal.

Cardinal principle as to the custody of infants.

The true interest and real benefit of the infant Marquis have been overlooked in the Court of Session. —With reference to the custody of infants, a cardinal principle had been laid down in this House, namely, " that the benefit of the infant is the foundation of the jurisdiction, and the test of its proper exercise "(*b*).

What the interest of the infant Marquis required.

The benefit of the infant in the present case required that he should be instantly rescued from the hands of Lady Elizabeth Moore and instantly restored to Major-General Stuart.

Concurrent application of the relatives.

This was the conviction of the principal members of the Bute family, then in Scotland—those most interested in his welfare—who concurred in supporting Major-General Stuart's application. The infant's nearest relative on the female side, Lady Adelaide Augusta Lavinia Keith Murray, with her husband, Sir William Keith Murray, joined in the Petition. The Tutor-at-law, his nearest paternal relative, warmly supported it, instructing his Counsel to inform the Court of Session, as he did on the 19th of July 1860, that—

" The wish and desire of the Tutor-at-law was that the custody of the infant Marquis should be given to Major-General Stuart; and he was moved to that from what he knew of Major-General Stuart, and from the feeling which the whole family entertained with respect to his fitness for the position."

(*a*) Sir Richard Bethell.

(*b*) Per Lord Campbell in *Johnstone* v. *Beattie,* 10 Cla. & Finn. 122.

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Appellant's Argument.

Instead of consulting the interest and studying the benefit of the infant Marquis, the learned Judges of the Court of Session discussed the learning of rival and hostile jurisdictions, announcing the important proposition that the "authority of the Court of Ses-" sion was no less supreme in the kingdom of Scot-" land than that of the Court of Chancery was in the " kingdom of England." Having done this, they compelled the Tutor-at-law to oppose the Major-General.

The infant Marquis a ward of Court since 10th May 1848.

Secondly, the Appellant's Counsel urged that the jurisdiction of the Great Seal effectually and conclusively attached on the 10th May 1848, when the late Marchioness was appointed guardian of the infant Marquis's person by Lord Chancellor *Cottenham* (*a*), and it was the duty, and consequently the right, of the subsequent Lords Keepers of the Great Seal to retain that custody and continue that appointment.

A formal suit is not necessary to make a ward of Court, as was erroneously supposed in the Court of Session (*b*).

(*a*) *Suprà*, p. 5.

(*b*) Mr. Monro, the Chief Registrar of the Court of Chancery, has had the kindness to furnish some early precedents respecting the custody of infants. On the abolition of the Court of Wards and Liveries this jurisdiction resulted to the Great Seal in the Court of Chancery. Looking over Mr. Monro's precedents, we find that infants had guardians appointed to them, and were made wards of Court, upon oral application. This seems to have been the practice in the seventeenth century, as appears by the following cases, though many others may be cited. Thus, on the 8th of February 1652 two infants named Cowdery, "coming " personally into Court, desired that their uncles might be their " guardians, which request this Court held reasonable, and doth " order that they be assigned guardians to the said infants " accordingly."

On the 6th June 1653 three infants asked that their mother " should be assigned their guardian to manage their estate, and " to prosecute and defend any suit on their behalf, if there shall " be cause."

When Lord *Cottenham* appointed the late Marchioness guardian of the infant Marquis, the child, then seven months old, was with his mother at Cardiff

On the 2nd July 1653 "Simon Fulke, an infant, appeared in "Court with his mother, and by her consent, in respect his "father is a distempered man [suffering from illness], did choose "Mr. Cleggatt to be his guardian. Their Lordships do order "that the said Mr. Cleggatt be assigned guardian of the said "infant accordingly."

On the 6th October 1653 the Lords Commissioners of the Great Seal were "informed by Mr. Amherst, being of Counsel for "Thomas Gifford, an infant about the age of seventeen years, that "his father is lately dead, and it is thereupon ordered that a "commission be awarded to commissioners in the country to "assign a guardian to the said infant, such as he shall choose, "to take care of his person and estate, and to prosecute and "defend any suit in this Court or elsewhere on the said infant's "behalf."

On the 7th February 1696 the often cited case of Hampden is recorded as follows: "*Hampden Expte.* M.R., 7th Feb. 1696, "A. 1696, fo. 469. Whereas John Hampden, Esq., late father "of the said Richard Hampden, is lately dead (showing that the "said Richard Hampden is entitled to a considerable estate "under a settlement and the will of his grandfather), and who, "(*i.e.* the infant) is now about the age of seventeen years, and "there being no guardian or trustee appointed by the said deed "of settlement or will, for the receipt of the rents and profits, "letting of leases, or managing of the said estate, and to take "care of the maintenance and education of the said infant during "his minority, and the said infant this day personally appearing "before the Right Honourable the Master of the Rolls, and "praying that Letitia Hampden, his grandmother, may be "assigned his guardian, to receive the rents and profits and to "manage his said estate as aforesaid, and the said Mrs. L. "Hampden being now present, and willing to accept the same, "his Honour, conceiving it for the advantage and benefit of the "said infant, doth order the same accordingly."

It would appear from these and many other precedents furnished by Mr. Monro, that the common, if not the only way of making an infant a ward of Court in the seventeenth century was on oral motion, without petition or bill. It is remarkable that the case of Hampden, from which we cite the order set out above, is described by Mr. Hargrave (2 Fonbl. Eq. p. 228, and see Macpherson on Infants, p. 97), as being "the first instance to be "found of a guardian appointed by the Chancellor on petition "without bill." Mr. Hargrave states he had this information from a "respectable gentleman in the Registrar's Office." But the

Castle. The guardian of an infant is the officer of the Great Seal appointed to discharge the duties that it has to provide for; and the death of the Marchioness, on the 28th December 1859, did not affect the Great Seal's guardianship of the infant. It continued as before. The appointment of Major-General Stuart and Lady Elizabeth Moore was but a continuation of the original appointment, which original appointment was itself anterior to the service of the first Tutor-at-law (*a*)—a service which took place when the infant Marquis was not in Scotland.

The infant Marquis was in the custody of the Great Seal when he accompanied his mother during her visits to Scotland. He was in the custody of the Great Seal when he came back from Scotland, and arrived in London with Lady Elizabeth Moore on the 23rd of March 1860. The right of custody was not changed by the abduction of the 16th April. The subsequent detainer in Scotland is illegal. A wrongful act can give no jurisdiction. The case is to be dealt with

respectable gentleman was wrong; for the appointment was made on oral motion.

In the early part of the eighteenth century guardians were appointed on petition. But when property was to be administered, and receivers to be appointed, bills were resorted to. By a convenient doctrine the infant was held to become a ward of Court the moment the bill was filed, although no petition was presented for the purpose, and although the bill was silent as to the guardianship. Then arose a curious doctrine, which has been cherished for more than a century, namely, that when a guardian is appointed on petition merely, the infant is not a ward of Court, but a ward of the guardian (see note to Deave's Practice in Mr. Monro's possession, p. 284). Even the great Lord Hardwicke gave his countenance to this refinement. But see Lord Chancellor Sugden's Judgment *In re McCulloch* (Drury, 266). And see also Lord Chancellor Cranworth's Judgment *In re Hodge's Settlement* (3 Kay & J. 216). Now, however, we have the solemn judgment of the House in this Bute case that the young Marquis was to all intents and purposes effectually and completely made a ward of Court by Lord Cottenham's Order of the 10th May 1848, which was an order on petition only, without bill.

(*a*) *Suprà*, p. 5.

Appellant's Argument.

judicially, as if Lady Elizabeth Moore had done her duty. In other words, as if the infant Marquis had never been out of England since the 10th of May 1848.

The Act of Union.

Thirdly, the Great Seal in this case had authority in Scotland (*a*), the education of the infant Marquis, a British peer and a Lord of Parliament, necessarily involving public considerations, that is to say, considerations which concern not Scotland alone, but the whole United Kingdom (*b*). The Act of Union provides that the Great Seal shall be the Seal of England in all matters whatsoever, and shall be the Seal of "the whole United Kingdom" in all matters "which concern the whole United Kingdom."

The Shaftesbury case.

In the celebrated Shaftesbury case (*c*) the Lords Commissioners of the Great Seal (Sir *Joseph Jekyll*,

(*a*) This proposition, though advanced in the printed case signed by Counsel, was abandoned at the Bar of the House. At all events it was not pressed. But it appears that in course of the argument before the Court of Session, the Lord Justice-Clerk suggested that "there might be very grave constitutional questions remaining under this petition." The Marquis of Bute was a Peer of Great Britain and a Lord of Parliament. Strictly speaking he was not a Peer of Scotland, the well-established doctrine being that Scotch Peers ceased to be Scotch Peers, and became British Peers by the Articles of Union. See Rep. on the Dig. of the Peerage, ordered by the House of Lords to be printed 29th July 1822, pp. 7–11. Now Lord Redesdale says, in the Strathmore case (4 Wils. & Shaw, App. 89; 6 Paton, 658), that British Peers "are subject to the law of Great Britain, and not to the peculiar law of a particular district." What the "law of Great Britain" here referred to is, his Lordship does not omit to explain, for he says expressly that the law of Great Britain *is the law of England.* Now if the Marquis of Bute, as a British Peer, the progeny of the British Great Seal, was subject to the law of England, and not subject to the law of Scotland, the Great Seal, as representing the law of England, might, it would seem, have had authority in this matter, even in Scotland. The point was deemed not unfit to be put forward in a case of so much novelty and difficulty. It had previously been considered by two eminent judges who disagreed in opinion. See Appendix to this Report, Nos. 1 and 2.

(*b*) See the opinion of Lord Wensleydale, *infrà*, pp. 70 and 71.

(*c*) 2 Peere Williams, 103.

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Appellant's Argument.

Baron *Gilbert*, and Mr. Justice *Raymond*), in giving their judgment, after commenting on sundry precedents which had been cited to them affecting private persons, noticed, as the distinguishing peculiarity of the case before the Court, that it was one of a public nature, the Peerage being concerned. Said the Lord Chief Commissioner *Jekyll*,—

The public interested in the education of a Peer.

But the present case is still of a higher nature, as it is the case of a Peer of the Realm, in whose education the public is interested.

Reason why the public is so interested.

The ground for the distinction is given in the Purbeck case (*a*), where it is stated to be, that a Peerage "is not so much a private interest as a public right; "for Peers are born Councillors of State and part of "a senatory body." They are, says the Report, "interested in each other."

Circumstances of the Shaftesbury case.

Fourthly, the infant Marquis, if left in Scotland, would be without protection from the age of fourteen to that of twenty-one.—The circumstances of the Shaftesbury case suggest topics of grave reflection in the present. The Earl of Shaftesbury had been induced at the age of fourteen, without the sanction of his guardian, to marry a daughter of the Earl of Gainsborough. It was answered, says Peere Williams, the reporter, that,—

Here was no disparagement of the infant Earl, inasmuch as the birth of the noble Lady whom he had married, and also her quality, were equal to those of her husband, and she had the advantage of being educated under the Countess of Gainsborough, her mother, a lady of great honour, virtue, and quality.

Principle of the order made in the Shaftesbury case.

But the Court resolved that what constituted the offence was the contriving and effecting of the marriage "without the consent of the guardian." A sequestration was therefore issued against the Countess Dowager of Shaftesbury and against the Countess of Gainsborough; and the infant Earl, though married, was ordered to be forthwith restored to his guardian. What became of his wife does not appear. The nuptials had probably been solemnized by a Fleet Parson.

(*a*) Shower's Cases in Parliament, p. 1.

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Appellant's Argument.

Marquis of Bute's danger in Scotland.

Now, applying the principles of this case to that of the infant Marquis of Bute, what is *his* danger, supposing him to remain in Scotland under the jurisdiction of the Court of Session? At fourteen years of age this young nobleman will become his own master. The control of the Tutor-at-law will have ceased. New functionaries, "the Curators," will then come into being; but they will have no power over the person of the Marquis; their duties will be exclusively confined to the care of the minor's property and estates. If the mischief of improvident disparaging connexions is great in all cases, it is more than ordinarily disastrous and lamentable when a member of the Peerage is the victim. This was the express ground of the decision in the Shaftesbury case.

Matrimonial restrictions unknown in Scotland.

No restrictions upon matrimony exist in Scotland. A noble and learned Lord (master of all knowledge), in a Committee of this House on the subject of Scotch marriages, put the following question to the *Lord Justice-General*, head of the Scotch law, then *Lord Advocate*, a witness examined:—

"Suppose a young nobleman of fourteen is trepanned into a marriage by a woman of bad character, of thirty or thirty-five, and he says, in such a way that it can be proved, 'I take you for my wife,' and she says, 'I take you for my husband at this moment,' —would that be a valid marriage, and carry a dukedom and large estates to the issue"?

The *Lord Justice-General's* reply was in the affirmative (*a*).

Helplessness of the Scotch law and Judges.

Therefore the law and the Judges of Scotland are alike without power to avert a mischief which can scarcely be called improbable, and which, once perpetrated, is irreparable.

(*a*) Report of the Lords Select Committee on Scotch Marriages, Session 1844. But see a stronger case—a real one—cited, not by the Appellants, but by the Respondents, below, p. 45.

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Appellant's Argument.

Inquiry whether the Marquis was "a native Scotchman."

Fifthly, the points relied upon in the Court of Session were immaterial.—The *Lord Justice-Clerk* in the present case, on the 18th of July 1860, said, "We should like to be informed whether the Marquis of Bute is not a native Scotchman." His Lordship was told that the Marquis was "born in Scotland;" to which the learned Judge responded, "Well, is not that being a native Scotchman?" The fact of the young Marquis's birth in Scotland is not disputed. He was born at Mount Stuart House, during a short visit of his parents to the Island of Bute. But he was very soon afterwards carried by them to Cardiff Castle, in Wales, where, his father, the late Marquis, dying, the unconscious infant, at the age of seven months, became at once a British Peer and a Lord of Parliament, subject to the law of England, which forthwith (on the 10th of May 1848) placed him under the custody of the Great Seal, his sole legitimate protector ever since.

The Marquis's domicile.

The domicile of the infant Marquis is in England, as his father's was before him. But if this were otherwise, the regal prerogative, once invoked, must prevail. Domicile is beside the question.

The English guardian required to prove his title, though his title if proved would have been disregarded.

Sixthly, the inquiries ordered by the Court of Session would have produced no result.—The Court of Session insists on the possession of an exclusive jurisdiction in this case. It insists also that the English guardian must prove his title, for which purpose a commission, not sought by either party, was issued by the Interlocutor of the 21st of November. Now, it may respectfully be asked what object could have been gained by adducing evidence under this Commission, if, after all, the Scotch law and the principles asserted by the Scotch Court must predominate?

All the material facts already established in the Court below.

Another and a still more cogent objection to the investigation under the Commission, forced upon the Appellant by the Interlocutor of the 21st November,

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Appellant's Argument.

was that all the facts material for judgment were already and most amply established by what had taken place in the Court of Session. To show this, it is only necessary to direct attention shortly to the admissions of Lady Elizabeth Moore, by her printed pleadings and by the speeches of her learned Counsel.

Admissions of Lady Elizabeth Moore.

Her Ladyship appeared voluntarily at the very outset to defend herself in the Court of Session, and she has ever since been a party to the proceedings there, uniformly represented by four learned Counsel, one of them the *Solicitor-General* for Scotland. She confessed from the first what she had done. She confessed that she had been appointed by the Court of Chancery with Major-General Stuart joint guardians of the infant Marquis's person. She admitted that this appointment was in pursuance of a testamentary recommendation from the late Marchioness. She admitted that she had, in breach of her duty, though, as she alleged, with good intentions, carried the infant Marquis out of the jurisdiction which had given her the only power she possessed over him. She admitted that she had by consequence been removed from the guardianship. She admitted that her colleague had been continued in that care of which she had herself been found unworthy; and, finally, she acknowledged that she had refused to deliver up the Marquis, although required to do so by the Order of the 6th of July, which she did not dispute was an Order of the Court of Chancery.

It is clear, therefore, that the Court of Session ought to have made an immediate "Decree conform," on the 20th July 1860, so as to secure the restoration of the infant Marquis, who, to his great detriment and prejudice, had been kept in Scotland from the 16th of April 1860 without any scheme adjusted and adhered to for his present or his future education.

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Respondents' Argument.

Mr. *Roundell Palmer*, Mr. *Patton*, and Mr. *J. Miller* for Lieutenant-Colonel Stuart, the Scotch Tutor-at-law.

The Appeal incompetent.

This Appeal is incompetent. If it is allowed, the House will soon be overwhelmed by a flood of Scotch litigation. One Interlocutor appealed against is an Order giving Lady Elizabeth Moore time to answer. But in fact all the Orders are peculiarly interlocutory, and the Judges who pronounced them were unanimous. Therefore the Appeals ought to be dismissed in respect of the provisions of the 48 Geo. 3. c. 151.

The Marquis's domicile is Scotch.

The domicile of the infant Marquis is a Scotch domicile. The late Marchioness and her child had been in Scotland uninterruptedly.

[The LORD CHANCELLOR: I saw them myself at Cardiff Castle.]

An immediate decree conform would have been wrong.

What the Court of Session has done here is in precise conformity with the rules of the Court of Chancery. It would have been wrong to grant an immediate decree conform.

[The LORD CHANCELLOR: There were no disputed facts. If the question of domicile had been gone into, when would the inquiry end? The infant would have attained his majority before the investigation could be concluded.]

[Lord CHELMSFORD: Particularly as the litigation was in Scotland.]

The Scotch Court followed the English rule.

We think the question of domicile was very material. Even assuming that the Court of Session was informed of the clandestine manner of the removal, the course taken was correct. The Court acted on the principle of *Johnstone* v. *Beattie* (*a*), which decided that a

(*a*) 10 Cla. & Finn. 42.

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guardian appointed by the Court of a foreign country is not to be acknowledged by the Courts of this country. A guardian's power is local. The moment he leaves his proper territory his authority is gone. In *Dawson* v. *Jay* (*a*), Lord Chancellor *Cranworth* refused to assist an American guardian who had come over to this country to recover his ward. Then there is no ground for censuring the Court of Session in respect of its refusal to send the infant Marquis out of its own jurisdiction, especially when the child was already under the care of a Scotch Tutor properly appointed.

Rights of the child at fourteen.

It has been said the infant might suffer great injury if left in Scotland till the age of fourteen, inasmuch as he would then in that country become his own master. Such might be an unwise state of the law; but until the Legislature interferes, the law must be followed. The rights of an infant in Scotland, although regarded in England as dangerous to the infant himself, are held in Scotland to constitute most valuable privileges. Thus a boy of fourteen and a girl of twelve are freed from the disabilities of infancy. To show this a remarkable case may be cited from Mr. Fraser's useful work on the Personal Relations (*b*). A girl twelve years and five days old having been placed at school, determined to exercise her rights, and informed her guardians by letter that she intended to go abroad. The guardians in great alarm applied to the Court of Session for an interdict against the child's leaving the country. But the Court responded that they had no controlling power over the persons of boys of fourteen or girls of twelve.

[Lord CRANWORTH: Do you mean to affirm that in

(*a*) 3 De G., M., & G. 764. (*b*) 2 Fraser, 194.

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Scotland a boy of fourteen can say, "I won't go to school"?]

However strange it may appear, such is the law of Scotland, and the Court of Session had no power to abrogate that law, or to mould it according to the dictates of expediency.

Lady Elizabeth's sole object, the infant's benefit.

Mr. *Rolt* and Mr. *Patton* for Lady Elizabeth Moore. The ruling motive of Lady Elizabeth was the benefit of the infant, who, now near the age of fourteen, had feelings, passions, and tastes which deserved to be attended to. The English guardian, though of the highest character and the most unquestionable respectability, unfortunately was not personally quite acceptable to the infant. This was the solution of Lady E. Moore's conduct.

The infant was not a ward of Court.

The Order of the 10th May 1848 was an Order made on petition merely. It did not make the infant a ward of Court. It constituted the Marchioness guardian of the infant. But suppose the guardian to die, who was then to take care of the child?

[The LORD CHANCELLOR: When the guardian dies, the Great Seal is guardian.]

[Lord CHELMSFORD: The Lord Chancellor makes a ward by appointing a guardian.]

The Scotch law must be held right.

Domicile, we contend, is here most material, because the infant's rights are so very different in the two countries. The House cannot go on the notion that the Scotch law is wrong. The House in its judicial capacity, reviewing a Scotch judgment, must hold that the Scotch law is right. The question for examination is whether the Interlocutors appealed from are in conformity with the Scotch law, not whether that law is or is not the perfection of reason.

The Chancery order was of no force in Scotland.

The Order of the Court of Chancery, which the Scotch Court was asked to enforce, was the Order of

Respondents' Argument.

a foreign Court. It was not binding in Scotland. The Scotch Court was not bound to endorse it. If the Scotch Court chose to give effect to it, it would do so from comity only, and not from obligation.

Appellant's Reply.

The *Attorney-General* replied. The Court of Chancery had appointed the deceased Marchioness guardian on the 10th May 1848, three weeks before a Scotch Tutor had been heard of. The Court of Session therefore ought to have enforced the Order of the English Court, simply by reason of priority of seisin, which is the first ground we stand upon. Secondly, we say the Court of Session ought to have gone on the fraudulent and furtive abstraction or ravishment of the ward. The infant's presence within their jurisdiction was owing to circumstances of which the *nobile officium* ought not to have taken advantage, the surreptitious removal of the ward from England into Scotland having been an act of force, deception, disobedience, and fraud. But, thirdly, we maintain that the Court of Session overlooked that which ought to have been the main and first topic of inquiry, namely, the interest and benefit of the infant Marquis. Under all the circumstances we humbly and respectfully submit that your Lordships ought now to pronounce an Order to the following effect, namely :—

That the Interlocutors complained of be reversed, and it appearing to this House that the interest of the infant required that he should be delivered up to General Stuart for the purpose of his education being proceeded with according to the scheme approved by the Court of Chancery, order the Court of Session to make an Order to deliver up the infant accordingly to General Stuart, and direct all parties to concur in obtaining such Order, and remit the cause for that purpose.

One could not help being amused with some of the expressions used by Mr. *Palmer* and Mr. *Patton* in arguing this case, when, after expatiating on the de-

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Appellant's Reply.

tails of the law of Scotland touching the subject of the custody of infants—details which on the face of them were fraught with the merest unadulterated mischief to the infants themselves—they seemed to insist upon the Marquis of Bute being detained in Scotland, in order that the Marquis might claim the benefit of these laws as the privileges of a Scotsman.

[The LORD CHANCELLOR: Mr. *Patton,* no doubt, merely meant that nothing was to be done by the Court of Session contrary to the law of Scotland.]

The *Attorney-General:* Oh, much more than that. The privileges of Scotsmen were talked of, and Mr. *Rolt,* who represented Lady Elizabeth Moore, actually told your Lordships that he put her conduct on the ground not of its propriety so much as because it was the wishes of the dying Marchioness, who had always carefully inculcated on this child the duty of at all all times standing up for the privileges of a Scotsman. It was very fortunate, indeed, for a nation when even its bad laws were counteracted by the counteracting morals of the people themselves. The state of the law of Scotland on the subject of infants possessing property was most unfortunate; but like many other defects in the law of Scotland, they were to some extent corrected by the natural and instinctive prudence and orderly habits of the people. What was now the proper thing to be done, and which, it was to be hoped, the House would at once do, was to order the infant Marquis to be given up to General Stuart, his English guardian, who would carry on his education in England in accordance with the plan approved by the Court of Chancery.

Appeal from the Court of Chancery.

On the appeal of Colonel Stuart against the *Vice-Chancellor's* injunction (*a*), Mr. *Palmer* and Mr. *Hob-*

(*a*) See *suprà,* p. 34; and see also Appendix to this Report.

house appeared for the Appellant, and the *Attorney-General*, Mr. *Bacon*, and Mr. *C. T. Simpson* for the Respondent, the Major-General. The turn, however, which the leading Scotch Appeal took at the hearing, rendered it unnecessary to open this English appeal as a separate cause.

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Their Lordships at the close of the argument above set forth took time to consider of their judgment.

On the 17th May 1861 the following opinions were delivered :—

1861. *May 17th.*

The LORD CHANCELLOR:

Lord Chancellor's opinion.

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

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in Scotland, such as the appointment and dismissal of magistrates, and sealing writs for the election of Scotch Peers and of Members for Scotland of the House of Commons. 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 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

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Lord Chancellor's opinion.

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 and proceedings which were before the Court of Session on the 20th of July 1860, and on which it was their duty to adjudicate.

The late Marquis of Bute having died at Cardiff in Glamorganshire, on the 18th of March 1848, without having named any guardian for his son, then an infant six months old, on the 3rd of May 1848 a petition was presented to Lord Chancellor *Cottenham* by the Marchioness of Bute, then in England with her child, that she might be appointed his guardian. Lord Chancellor *Cottenham*, in the exercise of his unquestionable jurisdiction, by an Order bearing date 10th 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 of 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,

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Lord Chancellor's opinion.

and superintending the management of his property in England to the amount of 75,000*l.* a year till her death, which occurred on the 28th of December 1859 (*a*).

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 7th February 1860, 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.

(*a*) It did not appear that the Marchioness interfered with the estates.

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Lord Chancellor's opinion.

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 house 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."

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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 Bute must pay us. I propose taking Bute to Hubborne any time that 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 2nd 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

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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 3rd 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 a 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 of bringing 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 accordingly 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

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the name of General Stuart as a Petitioner, and praying "That a scheme should be settled for the education and maintenance 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 June a copy of this order was personally served on Lady Elizabeth

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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.

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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 short-hand 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

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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 the 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 (*a*).

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 24 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

(*a*) See the Report in the Second Series and Scottish Jurist.

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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 "superseded 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 near twenty years ago, "that the benefit "of the infant is the foundation of the jurisdiction, "and the test of its proper exercise" (*a*). 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

(*a*) It seems to be the leading doctrine in all countries to consult the good of the children. Thus M. Demolombe, after a reviewal of the French authorities, arrives at the conclusion that the whole matter is in the discretion of the Court, having regard to the interests of the children; his expression being *Les tribunaux aviseraient, suivant les cas, pour le plus grand avantage des enfants* (Du Mariage, 613). And Mr. Bishop goes on the same ground. "The Court," he tells us, "will look into the circumstances, and make such order as the good of the children requires" (Bishop on Marr. and Div. § 637). "Consequently the interests of the children are to overshadow all other interests, in that picture of things whence the Judge is to draw his decision of the question of their

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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 peculiarly 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 this decision was the true cause why this Court 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

custody" (§ 641). Children are favourites of Courts of Justice (1 Black. 475). Accordingly where infants are concerned the Court of Chancery receives information from all quarters, whether from relatives or from strangers, and whether upon oath or without oath. Forms and technicalities, too, are disregarded, because infants are helpless, unprotected, unrepresented. Thus in *De Manneville* v. *De Manneville* (10 Ves. 59) Lord Eldon said, "It has been truly observed, that the petition being presented upon the part of an infant, the Court will do what is for the benefit of the infant without regard to the prayer." Again, in the same case, Lord Eldon adds, "I can look to all these circumstances only as relating to the simple consideration what is fit to be done with the person of the child."

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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*

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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

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authority whatever for the Interlocutor of the 20th July appealed against. In perfect harmony with that decision, the order praying 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*(a) 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, although the domicile of the infant may hereafter be very important, it was of no importance then, and matters ought immediately to have been restored to the position in which they were before the fraudulent removal.

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 the case being examined, is 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

(a) *Aikman* v. *Aikman* was a long contested case of domicile decided by the House on the 12th March 1861. See the preceding volume of these Reports, p. 854.

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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 that 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 Statutes 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 of 23rd of November 1860 and 6th of February 1861 were certainly final, and the two Appeals, *ob contingentiam*, may be considered as conjoined.

If the Interlocutors of the Court of Session appealed against are reversed, the Order of the Court of Chancery, becomes wholly immaterial, and by consent it is to be vacated.

It remains for this House, as the Tribunal of Appeal from the Court of Chancery, to pronounce its judg-

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ment 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's opinion.

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 with that which exists in the Lord Chancellor in this country, there is

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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, that 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 with the principles of general law to hold 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

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the country, it was not a matter of course to appoint a foreign guardian to be English guardian, but 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 the infant had not been brought clandestinely; 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 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 Lord-

Lord Cranworth's opinion

ships, 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's opinion.

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

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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 48th Geo. 3. c. 151. s. 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 November 1860 and the 7th 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 of 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

Lord Wensleydale's opinion.

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 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.

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Lord Chelmsford's opinion.

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.

THE BUTE GUARDIANSHIP.

Lord Chelmsford's opinion.

Lord KINGSDOWN:

My Lords, I entirely concur in the order proposed.

Lord Kingsdown's opinion.

THE JUDGMENT ON THE SCOTCH APPEAL.

It appearing to this House, that when the Court of Session pronounced their Interlocutor of the 20th of 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 the 14th and 20th of July and the 21st of November 1860, complained of in the said first Appeal, and the said Interlocutors of the 5th and 6th of November 1860, and of the 23rd of November 1860, and the 7th of February 1861, complained of in the said second Appeal, 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 Charles 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.

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THE JUDGMENT ON THE ENGLISH APPEAL (a).

Ordered and *Adjudged*, by consent of all parties, That the Order of the Court of Chancery of the 9th February 1861 be and the same is hereby reversed: And it is further *Ordered*, That the costs of all parties in the matter be paid out of the estates of the infant Marquis of Bute: And it is also further *Ordered*, That the matter be, and is hereby remitted back to the Court of Chancery, to do therein as shall be just, and consistent with this Order and Judgment.

CLAYTON, COOKSON, & WAINEWRIGHT — FARRAR, OUVRY, & FARRAR—MAITLAND & GRAHAM.

MEMORANDUM.

In compliance with a suggestion from the *Lord Chancellor* (b), we insert at the close of this long report the following remarks delivered by the *Lord Justice-Clerk* on application being made to the Court of Session to have the judgment of the House carried into execution. The *Lord Justice-Clerk* said :—

The Lord Justice-Clerk's remarks on applying the Judgment of the House.

By this petition we are called on to make an order for the purpose of carrying out certain directions contained in a judgment of the House of Lords pronounced on the 17th day of this month, regarding the custody and education of a pupil, the Marquis of Bute. It is our constitutional duty to give implicit obedience to those directions, without any consideration of the grounds on which they proceed; and this is a duty which the Court always performs promptly and cheerfully. But the present case is distinguished by one peculiarity which I believe to be entirely unexampled, and which makes it indispensable that the performance of our duty should be accompanied by a few words of explanation. The House of Lords, exercising a purely appellate jurisdiction, have pronounced a judgment disposing of

(a) See *suprà*, p. 34; and see Appendix to this Report.

(b) Lord Campbell, who also expressed a wish that this Report should be published without delay.

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this case on its merits; while the Court of Session (the Court of Radical Jurisdiction) had never applied its mind judicially to a consideration of the merits, and could not, when the case was before them, consistently with their ordinary rules of procedure, pronounce any judgment on the merits. I make this statement not by any means for the purpose of impugning the legality of the judgment of the House of Lords as involving a usurpation of the functions of a Court of Radical Jurisdiction. I am very far, indeed, from even desiring to suggest a doubt on the subject; my only object is to explain distinctly the position in which this Court now stands. When General Stuart presented his petition to us in the last week of the summer session, we gave him a preference over all the other suitors before us, such as is never conceded except in cases of extreme urgency. But the Petitioner failed to convince us that we could then with propriety or safety make any order in an application of an entirely unprecedented kind, which appeared to us to involve considerations of the gravest difficulty. The case, therefore, necessarily stood over till after the vacation; for no one could have seriously proposed that we should leave to a single Judge in vacation the final disposal of so serious a case. On the reassembling of the Court in November, answers having been lodged for the Tutor-at-law and for Lady Elizabeth Moore, the parties were at issue on matters of fact which appeared of essential importance to the determination of the questions raised by the pleadings. We had before us competing claims to the guardianship of the pupil—the claim of the Scotch Tutor-at-law and the claim of a guardian appointed by the Court of Chancery in England. The most material fact in determining that competition seemed to be whether the pupil was a Scotchman or an Englishman, and upon that matter of fact the parties were entirely at variance. They were not even agreed which of the titles of guardianship was the earlier in date, for the Petitioner contended that his title drew back to the date of the original appointment of Lady Bute as guardian by the Court of Chancery, while the Respondents denied that such was the effect of the Chancery proceedings. This also, being foreign law, was matter of fact requiring to be proved. We therefore appointed a proof to be taken by our Interlocutor of 21st November, and evidence was led before our Commissioner by General Stuart, and on inquiry I find that the proof would in all probability have been completed within a few days or weeks, when the farther progress of the General's proof was stopped by an injunction issued by Vice-Chancellor Stuart prohibiting the General from proceeding further with his petition to the Court of Session. Since the date of that injunction, on the 13th December, of course no further proceedings have been or could be taken on the petition at General Stuart's instance; and the Court, therefore, on the application of the Tutor-at-law, made such arrangements for the residence and

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The Lord Justice-Clerk's remarks on applying the Judgment of the House.

education of the pupil as seemed to them in the circumstances most expedient. To have adjudicated on the merits of General Stuart's petition without any inquiry into disputed facts, apparently most material, would have been inconsistent with the settled rules and practice of the Court. The General, if he thought the facts immaterial, might, without admitting these facts, have renounced his right to prove them; in which case we should have given judgment immediately. But this he distinctly declined to do, and hence the Interlocutor of 21st November, allowing him a proof. Had the General been allowed to proceed with his proof, it might have been completed in the month of December, and the petition would have been disposed of on its merits not later than the month of January. The delay, therefore, since the month of January, is ascribable solely to the order of the Vice-Chancellor restraining General Stuart from further proceeding in the Court of Session. It is thus beyond all question that the Court has never had an opportunity of considering the merits of the petition, the prayer of which they are now directed by the House of Lords to grant. For this singular position of the case this Court is in no way responsible. In what has been laid before us as an authorized report of the observations of the Lord Chancellor in moving the judgment of the House of Lords, it is stated that the refusal of the Court to interfere without inquiry was rested on the decision of the House of Lords in *Johnstone* v. *Beattie*. The noble and learned Lord is reported to have said:—" I do sincerely believe that this decision was the true cause why the Court of Session in this case refused to interfere." And in another place:—" 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." I feel sure that in noticing this passage I shall at once be acquitted of any want of courtesy or deference towards one whom, both officially and personally, I regard with the highest respect and esteem. But I must say it is truly lamentable that the Court of Session, and the rules and principles which guide and regulate its proceedings, should be so little appreciated or understood in the Court of Appeal. The judgment of the House of Lords in *Johnstone* v. *Beattie*, being pronounced on an Appeal from the English Court of Chancery, is not an authority binding in Scotland; and when it was brought under the notice of the Scotch Judges, and the legal profession in Scotland incidentally some years ago, it was universally felt that, however sound an exposition it might furnish of the rules of English Chancery law, it involved a violation of the principles of international law recognized in Scotland and all the States of the

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The Lord Justice Clerk's remarks on applying the Judgment of the House.

Continent of Europe, so direct and unequivocal, that I believe the very last thing that would ever enter into the mind of a Scotch Judge would be to follow the authority or adopt the principle of *Johnstone* v. *Beattie*. If it was cited to us in the course of the arguments, it must have been for some collateral purpose merely; and so far from giving rise to any spirit of antagonism or retaliation on the part of the Court, it did not in the slightest degree influence or affect the mind of any member of the Court in deliberating on the proper course of procedure to be followed in this case. The Court, therefore, can hardly have sacrificed any of its dignity by following *Johnstone* v. *Beattie*. Indeed, I am quite at a loss to understand how the dignity of this Court can have been truly involved—either compromised or enhanced—by its proceedings in this case. We are not in use to seek the promotion of our dignity, except by a simple and unpretending discharge of our duty. We have no opportunities for the display of magnanimity. We must be content to rest our reputation on a faithful observance of our oath of office, which binds us to administer the law of Scotland; and we strive to do so with the lights we have to the best of our ability. We have also another duty occasionally to perform, which is to carry out the orders of the House of Lords adversely to our own original opinions, and to this duty we address ourselves most cheerfully and with the fullest reliance on the wisdom of that most honourable House. But we are now (I think for the first time) required to execute a judgment of the House of Lords, without the possibility of knowing whether, if we had been allowed to consider and decide the case, our judgment would or would not have been in accordance with that of the Court of Appeal. The form of the Order will be to apply the judgment, and in terms thereof to authorize and ordain Colonel Stuart and the Earl of Galloway to deliver the person of the pupil to the Petitioner, and to this effect to recall the interdicts formerly granted (*a*).

Final Restoration of the infant Marquis to the Great Seal.

In due time, that is to say, in course of a very few days, (towards the close of May 1861,) the young Marquis, after an absence of more than thirteen months, was brought back to England and placed at Malvern under the care of an eminent instructor, whose duty it will be to prepare this young nobleman for Eton, with an ultimate view to Oxford or Cambridge, conformably to the scheme of the High Court of Chancery.

(*a*) The above was sent to the Lord Justice-Clerk, who approved of its insertion, and who also suggested the Appendix to this Report, No. 2.

THE BUTE GUARDIANSHIP.

APPENDIX N° 1.

REMARKS by the VICE-CHANCELLOR SIR JOHN STUART on the 9th February 1861, on granting the Injunction against the Proceedings in Scotland (*a*).

Remarks of the Vice-Chancellor Stuart, 9th Feb. 1861.

The *Vice-Chancellor:* What is now to be disposed 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 proceedings which are sought to be stayed. Having now read the papers, there remains in my mind no doubt as to the propriety of granting the Injunction.

By ordering the Defendant Colonel Crichton Stuart to desist from those proceedings till the further Order of this Court, it seems to me that the interest 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 other 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 the interests of the infant 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 proceedings.

The litigation in Scotland has originated in the Order of this Court of 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 for 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

(*a*) Taken from the authorized Report of Mr. Giffard, vol. ii. p. 582, which the Vice-Chancellor has recognized as authentic.

Remarks of the Vice-Chancellor Stuart, 9th Feb. 1861.

the Order (if indeed any evidence was necessary when 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, further than by its subsequently sanctioning the arrangement, 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 shows plainly enough, that so far as the well-being 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 a scheme for the residence and education of the infant. But, by the Order 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,

Remarks of the Vice-Chancellor Stuart, 9th Feb. 1861.

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 meantime 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 meantime 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 duty 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 babit 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 influence. It prevents, and where it cannot prevent, it moderates and soothes all angry disputations. 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 conflict 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 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 with a litigation 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 proceedings in the Scotch Court.

Remarks of the Vice-Chancellor Stuart, 9th Feb. 1861.

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 powers 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* (*a*), 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, 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, whose character shed a lustre on their country, and they have in this matter no doubt done their best to administer the 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 Defendant in this suit from continuing, or being made an instrument to continue, to make it the arena of worse than useless contention.

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.

(*a*) 2 Swanston, 323.

APPENDIX N° 2.

REMARKS of the LORD JUSTICE-CLERK (*a*) on the 19th February 1861, with reference to the Vice-Chancellor Stuart's Injunction.

Remarks of the Lord Justice-Clerk, 19th Feb. 1861.

The *Lord Justice-Clerk:* My Lords, in this Petition a note has been put in for Lady Elizabeth Moore, one of the Respondents, calling our attention to an Injunction granted by the Court of Chancery, which is in these terms:—" This Court doth order that " an Injunction be awarded against the said Defendant, his " advisers and agents, until the further Order of this Court, from " further proceeding with or prosecuting his Petition to the Right " Honourable the Lords of Council and Session in Scotland, in " the pleadings of this cause mentioned, and from instituting or " prosecuting any further or other proceedings in Scotland, or " elsewhere, relative to the Plaintiff, the Most Honourable John " Patrick Crichton Stuart, Marquis of Bute and Earl of Dumfries, " without the leave of this Court."

The Respondent suggests that the Injunction, while it remains in force, may interfere with the tutor-at-law performing his duty to the pupil in the matter of the Petition, and therefore that the Court ought to appoint a tutor *ad litem* to represent and protect the interests of the pupil, in so far as they are affected, or may be affected, by proceedings under this Petition, and the Respondent moves the Court accordingly. The Respondent further states, that " this is the more called for, as notices of intention to present, " on the 19th instant, Appeals against your Lordships' Interlocutors " or Orders in the present process, and also in the Petition of " Major-General Stuart, against the Respondent and others, have " been served upon her agents."

The Petitioner, the tutor-at-law, admits by his Counsel that an Injunction has been issued against him in the terms stated by the Respondent, and also that the other Respondent, Major-General Stuart, has intimated his intention of bringing the Interlocutor of this Court, both in this and the relative Petition, at his instance, under the review of the House of Lords by Appeal. Your Lordships thought it right, before giving judgment on this motion, to appoint the tutor-at-law, as Petitioner, to make a written statement in the form of a minute. We have now that minute before us, and we find that the tutor-at-law has been advised that he is " not prevented by the Injunction issued by Vice-Chancellor " Stuart from appearing and defending in the House of Lords " the judgments pronounced by your Lordships in the Petition at " the instance of General Stuart, and in the Petition at his own

(*a*) Taken from the Sec. Ser., vol. 23, p. 597, and inserted here by his Lordship's suggestion.

Remarks of the Lord Justice-Clerk, 19th Feb. 1861.

" instance, and that it was his intention to appear as Respondent
" in the Appeals taken by General Stuart in these proceedings,
" and to defend the judgments accordingly. They further stated
" that it was also his intention to take the judgments of Vice-
" Chancellor Stuart direct to the House of Lords, which course
" he was advised would be both competent and expedient."

The Respondent, in support of her motion, further brought before us what bears to be a report of the observations made by the Vice-Chancellor at the time of granting the Injunction; and had the tutor-at-law admitted (as he emphatically declined to do) the accuracy, or even the substantial accuracy, of that report, the Court might have been placed in a position of considerable difficulty in disposing of this motion; for, by the report, the Vice-Chancellor is made to say, "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 these " proceedings. All the Orders of the Court of Chancery 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." Now, if the tutor-at-law had actually assumed the position here ascribed to him in the Court of Chancery, a very serious question would have been raised for your Lordships' consideration. But the tutor-at-law entirely disclaims the views and statements imputed to him in this report, and we must take his disclaimer to be quite sincere. We are the more disposed to disregard altogether the report to which I have referred, and to receive the statement of the tutor-at-law with perfect reliance, because, as regards other portions of the report, it is obviously quite inaccurate, for it puts into the mouth of the Vice-Chancellor statements which it is impossible that any one so distinguished, not only for his learning and ability, but also for the care, accuracy, and precision of his judgments, could have been led into, even by the misrepresentations of the parties before him. I attach no particular importance to the statement in the report, that the authenticity of the decrees of the Court of Chancery produced by General Stuart under his Petition was admitted, though your Lordships are aware that the Respondent in that Petition positively refused to admit their authenticity. Neither is it of much consequence that the Vice-Chancellor, as reported, seems to suppose that there is a litigation about the guardianship of the pupil going on in this Court, than which there could be no greater mistake. But there is one statement which alone is sufficient to show how completely inaccurate the report must be, for the learned Judge is made to say :—" 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

Remarks of the Lord Justice-Clerk, 19th Feb. 1861.

"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." The facts, as appearing from the proceedings which we are told were before the Vice-Chancellor, are as nearly as possible precisely the reverse of what is here represented. The pupil was allowed to remain under the charge of the Respondent, Lady Elizabeth Moore, during the autumn vacation of the Court, because, when the matter was brought before us in July last, there were no means of making a different arrangement; and no person whatever either did propose, or could propose, to make any provision for the custody or residence of the pupil, except under the sanction of the Court; and therefore, so far from the arrangement for the pupil living with the Earl of Galloway being accomplished without the aid of this Court, it proceeded directly from the Court, and formed the subject of a very special and detailed Order pronounced by your Lordships on the 23rd November last. It was under the authority of this Order, and of this Order alone, that the custody of the pupil was transferred from Lady Elizabeth Moore to the Earl of Galloway. The pupil is now under his Lordship's custody in terms of our Order, and the noble Earl is answerable to this Court alone for the discharge of the trust which this Court has reposed in him.

It is further out of the question to receive as accurate a report which ascribes to the learned Judge such a statement as this, that the Great Seal of Great Britain "is as much the Great Seal of Scotland as of England," for such a statement would imply ignorance of the terms of the Treaty of Union, which makes it perfectly clear (in Article 24) that the Great Seal of Great Britain represents the whole United Kingdom of Great Britain in so far as regards all treaties and public acts, but has power within England alone "in all other matters," while the Great Seal of Scotland is to have effect in Scotland in all matters other than treaties and public acts of the United Kingdom (*a*).

(*a*) The 24th article of the Treaty of Union is in these terms:—"That from and after the union there shall be one Great Seal for the United Kingdom of Great Britain, which shall be different from the Great Seal now used in either kingdom; and that in the meantime the Great Seal of England be used as the Great Seal of the United Kingdom, and that the Great Seal of the United Kingdom be used for sealing writs to elect and summon the Parliament of Great Britain, and for sealing all treaties with foreign princes and states, and all publick acts, instruments, and orders of State, which concern the whole United Kingdom, and in all other matters relating to England as the Great Seal of England is now used and that a seal in Scotland after the union be always kept and made use of in all things relating to private rights or grants, which

Remarks of the Lord Justice-Clerk, 19th Feb. 1861.

For the reasons now stated, we disregard altogether the report laid before us of the observations of the Vice-Chancellor in giving judgment on the motion for Injunction. I think we should be doing great injustice to the learned Judge if we took any other course.

We have, then, nothing before us but the terms of the Injunction, the motion of the Respondents, and the assurance of the tutor-at-law that it is his intention and desire to discharge his undoubted duty, by appearing as Respondent in the intended Appeals to the House of Lords, and defending the proceedings which he has himself taken under the sanction of the Court, and the Orders of the Court in the matter of these Petitions. We are not prepared to indicate, nor do we feel, the slightest want of confidence in the tutor-at-law. He holds his office subject to the control of the Court; for any dereliction or neglect of duty he is liable to be removed from office by the Court; and he must, of course, be well aware that his protection of the pupil's interests under the Appeals is just as much part of his official duty as the management of his estates in Scotland.

If a conflict has taken place, as seems to be represented, between this Court and the Court of Chancery, it is much to be regretted; but it is not of your Lordships' seeking. We have done nothing but what in the discharge of our duty we were bound to do on the application of the parties to these proceedings. The pupil being under the guardianship of the Petitioner, as tutor-at-law, before any proceedings were taken in England for the appointment of General Stuart and Lady Elizabeth Moore, it is difficult to see how we could allow any such subsequent appointment to derogate from the powers or diminish the duties of the Petitioner as guardian in this country. But we did not refuse to entertain General Stuart's petition; his allegations, in fact, were denied by the Respondents, and we allowed him a proof. We have not disposed, and cannot dispose, of his petition till the facts are ascertained. When they are, we shall pay all the respect to the decrees of the Court of Chancery which I am sure we feel, and which is consistent with our duty in exercising our own jurisdiction. Meantime, the Court see no sufficient ground for appointing a *tutor ad litem*, or interfering in any way with the administratio of his office by the tutor-at-law.

have usually passed the Great Seal of Scotland, and which only concern offices, grants, commissions, and private rights within that kingdom."

Does the education of a British Peer and Lord of Parliament "concern the whole United Kingdom," or only a part? Sir Joseph Jekyll, *suprà*, p. 40, says it is a matter in which "the *public* is interested."