to review by appeal under this Act." These statutory provisions appear to support conclusively the contention advanced by the respondents.

The rejoinder of the appellant was to the effect that these provisions do not apply where the leading conclusion of the initial writ is, as in the present case, of a declaratory nature. It is plain that the legal argument in the Court below was directed entirely to this declaratory conclusion, and the lengthy note of the Sheriff-Substitute is concerned wholly with that conclusion. All this, however, appears to me to be immaterial where the true purpose of the action is to effect a removing. It was urged by the appellant that the decree of removing was ancillary and subordinate to the decree of declarator. It seems to me, on the contrary, that the decree of declarator is merely the necessary preliminary to the decree of removing, the obtaining of which was the *causa causans* of the *lis*. The statutory provisions, in short, would appear to apply in every case in which the litigation has resulted in the granting of a decree of removing. The enactment of the statute of 1825 refers, not to the conclusions of the summons or petition, but to the terms of the decree, and provides, in effect, that if the decree ordains removing, review can only be by way of suspension. These views seem to be supported by the case of *Campbell's Trustees*, 1911 S.C. 188. The case of *M'Nair* (11 S. 651), relied on by the appellant, is really an authority against him, because it expressly decided that the decree of removing which had been pronounced could not be reviewed by advocation. The action of interdict, however, which had been conjoined with the removing, was treated by the Court of review as a "separate question," and advocation of the interdict was allowed. In the present case it does not appear to me to be competent to dissociate the declarator from the removing and treat it as a "separate question" reviewable by way of appeal. It is to be borne in mind that the objection to competency taken by the respondents is not without real substance. The effect of the statutory procedure is to put the person against whom a decree of removing has been obtained in the position of a vitious intromitter or *mala fide* possessor who may be required, as a condition of having the decree of removing suspended *ad interim*, to find caution for violent profits and expenses. The respondents have thus a real interest to press their objection to competency, which, in my opinion, ought to be sustained.

The Court refused the appeal.

Counsel for the Defender and Appellant —Mackay, K.C.—Patrick. Agent—James Bee, Solicitor.

Counsel for the Pursuers and Respondents — Fleming, K.C.—Hunter. Agents—Laing & Motherwell, W.S.

Tuesday, June 10.

SECOND DIVISION.

[Sheriff Court at Kirkcudbright.

WRIGHT *v.* KESWICK.

Lease — Outgoing — Valuation of Sheep Stock—Arbitration—Basis of Valuation —"Loss Directly Attributable to Quitting the Holding" —Averments—Relevancy—Agricultural Holdings (Scotland) Act 1923 (13 *and* 14 *Geo. V, cap.* 10), *sec.* 12 (6).

The Agricultural Holdings (Scotland) Act 1923, section 12 (6), provides, *inter alia*—"The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his . . . farm stock on or used in connection with the holding. . . ."

The outgoing tenant of a farm whose sheep stock was not bound to the ground went to a farm on which there was a bound stock, and as the proprietor declined to purchase the stock he sold the same by public roup. Having claimed for loss unavoidably incurred by him and directly attributable to his quitting the holding in terms of the Agricultural Holdings (Scotland) Act 1923, section 12 (6), the matter was referred to arbitration. In a condescendence of a record made up in the course of the arbitration the tenant stated his loss as the difference between the going-concern value and the break-up value got at the public roup. The landlord maintained that the statement of loss was irrelevant in respect that the value of the stock must be taken to be its value in the open market as tested at the sale by public roup. *Held* that the tenant had relevantly stated in sufficiently specific terms a claim for loss under the Act.

William Johnston Keswick, Cowhill Tower, Dumfries, proprietor of Glenkiln Farm in the stewartry of Kirkcudbright, *appellant*, being dissatisfied with a decision of David Edgar, farmer, Caerlaverock, arbiter, in a reference between him and Thomas Wright, farmer, the outgoing tenant of Glenkiln Farm, *respondent*, obtained a Stated Case under the Agricultural Holdings (Scotland) Act 1923 for the opinion of the Sheriff.

The Case stated, *inter alia*—"By minute of agreement entered into between Thomas Wright, farmer, Glenkiln Farm, in the parish of Irongray and stewartry of Kirkcudbright, the outgoing tenant of said farm (hereinafter referred to as 'the tenant'), and Major Henry Keswick of Cowhill Tower, Dumfries, guardian for William Johnston Keswick, Cowhill Tower, Dumfries, the proprietor of said farm (hereinafter referred to as 'the landlord'), and the Cowhill Estate Company, Limited, incoming tenants of said farm, and dated 2nd and 12th days of July 1923, the said David Edgar was appointed sole arbiter to ascer-

tain, fix, and determine the sum payable by the landlord and incoming tenants to the tenant in respect of the various matters thereby submitted to the arbiter.

"The arbiter has exhausted the matters so submitted to him with the one exception of the claim by the tenant under section 12 of the Agricultural Holdings (Scotland) Act 1923 (hereinafter referred to as 'the said Act') for compensation for disturbance in consequence of his having had to quit the holding by reason of notice to quit given by the landlord for the term of Candlemas 1923 as to the fallow land, the term of Whitsunday 1923 as to the houses, grass, and pasture, and the separation of the white crop of that year from the ground as to the land under crop. The issue of this claim lies solely between the landlord and tenant, and on an application by the arbiter, with concurrence of these parties, to the Board of Agriculture for Scotland he obtained an extension to 29th February 1924 of the time for making his award upon said claim, conform to order by the said Board dated 14th December 1923.

". . . The rent payable for the holding under the lease was £165, but has subsequently been reduced from time to time; the last reduction, which is to £140, does not seem to have been reduced to writing, but the parties are agreed upon the same.

"The holding is partly arable and partly pastoral, and the stock on the pastoral portion is a black-faced ewe stock with cross-bred lambs. The stock was not bound to the ground, and the lease of the holding contained no provision either obliging or entitling the landlord or incoming tenant to take over the sheep stock from the outgoing tenant at valuation or otherwise. The incoming tenants did not enter into any negotiations with the tenant with a view to taking over the sheep stock, it being unsuitable for their requirements, and the landlord himself did not desire to take over the said sheep stock.

"On leaving Glenkiln the tenant elected to go to the farm of Maxwelltown, Irongray, which was stocked with sheep bound to the ground and which he therefore took over. As the tenant could not in the circumstances move his sheep stock from Glenkiln to Maxwelltown, he disposed of them at a displenishing sale held by him at Glenkiln on 28th May 1923.

"Due intimation was given by the tenant of his intention to claim compensation in respect of disturbance on his quitting the holding, and he also gave the landlord an opportunity of making a valuation of his sheep and other stock; and subsequently the tenant timeously intimated to the landlord a statement of his claim. The amount claimed is £212, 0s. 6d., and is admittedly in excess of one year's nett rent (less rates and taxes), which is the minimum compensation under section 12 of the said Act. On the said statement of claim being intimated, the landlord offered to settle the claim by the payment of one year's nett rent, but this offer the tenant declined, and the arbiter accordingly was called upon to determine the amount due by the landlord to the tenant for disturbance on the latter's quitting the holding.

"The arbiter did not enter upon consideration of the question of compensation for disturbance until 28th November 1923, and after hearing the parties' agents he, under reservation of all pleas competent to the landlord, ordered the tenant to lodge a condescendence of the grounds of his claim, and allowed the landlord to lodge answers thereto, in respect that in the opinion of the arbiter the statement of claim lodged by the tenant did not give the landlord sufficient notice of the line of proof to be followed. A condescendence of his claim by the tenant was lodged on 13th December 1923, *i.e.*, within the period specified by the arbiter, and answers thereto by the landlord were lodged, also within the time specified by the arbiter.

"The arbiter closed the record upon these pleadings and heard parties' agents thereon.

"Primarily it was contended for the landlord that as the sheep were sold by public roup at the tenant's displenishing sale, the prices obtained at the sale were the market prices at the time and represented the value of the stock to the tenant, and that the tenant's statement of claim disclosed no relevant averment of loss directly attributable to the quitting of the holding which the tenant had unavoidably incurred upon or in connection with the sale of his farm stock.

"It was further contended for the landlord under his first plea-in-law that the tenant's condescendence of claim is not relevant and contains no sufficient specification of the grounds upon which the tenant arrived at his loss on the basis of an average overhead rate of 15s. per ewe, as stated in his original claim.

"He further argued regarding the tenant's claim for 'going-concern' value that as the tenant did not explain what that value was in a holding without a bound stock or how it could be arrived at, the claim was irrelevant. . . .

"It was contended on behalf of the tenant to the opposite effect. . . .

"At the hearing, the arbiter was requested to issue judgment upon the various points of law then discussed in order that the parties might consider whether they would ask for a Stated Case prior to the expense of a proof being incurred, and accordingly on 10th January 1924 the arbiter issued an interlocutor in which he repelled the first and fourth pleas stated for the landlord, and found that the value of the sheep stock to the tenant is the 'going-concern' value thereof, and that the basis of assessment of the loss on sale claimed for is the amount by which the nett proceeds received for the stock at the displenishing sale are less than such 'going concern' value.

"On the landlord's first plea-in-law, the arbiter was of opinion that the tenant's condescendence of his claim contains a relevant and sufficient specification of the grounds upon which the tenant arrived at the overhead rate of 15s. per ewe stated in his original claim; that to sell a stock of breeding ewes with their lambs off a farm

at a term of Whitsunday is like 'scrapping' machinery or selling a business at a break-up value; and that the intrinsic value of such a stock is the value of each item in a going business, and not the break-up value thereof, which, in the present case, is represented by the net proceeds received for the same at the displenishing sale."

[The arbiter then dealt with the method by which he proposed to arrive at the going-concern value of an unbound stock.]

The *questions of law* were, *inter alia*—"5. Was the arbiter entitled to hold the condescendence by the tenant as a relevant and sufficiently specific condescendence of unavoidable loss directly attributable to the quitting of the holding? 6. On the tenant's pleadings, was the arbiter entitled to hold that the value of the sheep stock to the tenant is the going-concern value thereof? 8. Is the arbiter right in the methods by which he proposes to arrive at the going-concern value of an unbound stock?"

The statement of claim by the tenant was as follows:—"Loss incurred by Mr Wright through his being required to remove from Glenkiln Farm as at 28th May 1923, and having to sell by public auction his stock of ewes and others, viz.—

(*a*) Loss on sale of 246 ewes and lambs at 15s. per head	£184	10	0
(*b*) Expense of sale—			
Sum paid R. Harrison & Son, Limited, auctioneers	13	0	0
Expense of erecting pens and preparing stock for sale	4	0	0
Expense of luncheon at sale	2	10	6
(*c*) Cost of removal of stock, implements, and others from Glenkiln to Maxwelltown Farm	8	0	0
	£212	0	6"

In the condescendence and answers lodged in the course of the arbitration proceedings the parties averred, *inter alia*—"(Cond. 2) At said roup Mr Wright's stock was sold at break-up value, whereas said stock was worth to him going-concern value, and the difference between these values is the loss to Mr Wright through his having to dispose of said sheep stock by public auction at the term in question—(*Ans.* 2) Denied. In particular it is denied that any 'break-up' value or 'going-concern value' is in question between the parties. It is explained that at said roup the claimant's stock was sold at its value to him, which was the value in the open market, as tested by the said roup."

On 8th April 1924 the Sheriff (MORTON), *inter alia*, answered the fifth, sixth, and eighth questions in the affirmative.

Note.—"5. It seems to me far too narrow a view to take of the tenant's claim that it is irrelevant because it does not expressly say that his loss was unavoidable and directly attributable to his having to quit the holding. I see nothing in the way the claim is framed to suggest that it claims anything other than direct and unavoidable loss, and it will be for the arbiter to determine whether and to what extent that has been made out. 6 and 7. The loss or expense directly attributable to the quitting of the holding, which the tenant may unavoidaby incur and which, suhject to the statutory maximum he is entitled to recover from the landlord can, I think, only be determined by considering what was the value of the farm to the tenant as a going concern, and what he has lost by being dispossessed of it. This is what the arbiter did in the case of *Barbour* v. *M'Dowall* (1914 S.C. 844), and the Court held that the principle applied by him was sound."

The landlord appealed to the Court of Session, and argued—The averments of the tenant were irrelevant as a condescendence of unavoidable loss directly attributable to the quitting of the holding. The value of the stock was clearly the market value as tested by the public roup, and accordingly the arbiter was wrong—*Williamson* v. *Stewart*, 1912 S.C. 235, 49 S.L.R. 170.

Argued for the respondent—The averments were relevant. In the circumstances of the present case the sale was a forced sale, analogous to the break up of a business, and was not a true test of value—*Williamson* v. *Stewart*, 1912 S.C. 235, *per* Lord President Dunedin at p. 241, 49 S.L.R. 170. The true test of the value of the stock was its value as a going concern—*Barbour* v. *M'Dowall*, 1914 S.C. 844, *per* Lord Mackenzie at p. 851, 51 S.L.R. 720.

At advising—

LORD JUSTICE-CLERK (ALNESS)—In this case the appellant gave notice to the respondent to quit his farm. The parties thereupon entered into an agreement referring to an arbiter the task of determining, *inter alia*, the compensation due by the appellant to the respondent in respect of the loss which he suffered by reason of his removal. The amount of that compensation falls to be assessed in accordance with the provisions of the Agricultural Holdings (Scotland) Act 1923, sec. 12, sub-sec. (6). That sub-section, in so far as it bears on the present controvery, is in these terms—"The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce, or farm stock on or used in connection with the holding, and shall include any expenses reasonably incurred by him in the preparation of his claim for compensation." The arbiter considered that the terms of a claim for compensation which was tabled by the respondent were exiguous and did not give fair notice to the appellant of the case which he had to meet, and he accordingly ordered a record to be made up. This was duly done. The respondent thereupon defined his claim with more particularity, and the appellant put in answers which clearly set out his position. The arbiter closed the record, and thereafter the parties met before him and debated

the case. In the result the arbiter at the appellant's request stated a Case for the opinion of the Court. The Case set out a series of eight questions in law, with each of which the Sheriff has dealt. Against his interlocutor the present appeal is taken. The appellant invited us to answer questions 5, 6, and 8 in his favour. With regard to the other questions, he acquiesced in the views expressed by the Sheriff.

Now, with regard to question 5, I do not think that it would be proper to require of a claimant who deems that he has a case under section 12, sub-section (6), of the statute that his averments should be subjected to the rigid scrutiny which is properly applied to pleadings in this Court. All that can reasonably be required of him is that he should give his landlord fair notice of the claim which he makes in order that the landlord may prepare to meet it. Now here, as I have said, the arbiter thought that the informal claim tabled by the respondent was too bare, and ordered him to lodge a formal condescendence. This the respondent did, and the arbiter now thinks, with the expert knowledge which he possesses regarding what in essence is a practical matter, that the claim is sufficiently definite.

The appellant argued that the respondent's claim was bad, because the value of his stock to him must be taken to be what it fetched at the roup—no less and no more. The respondent on the other hand avers that the stock had a value to him as a going concern, and that he is entitled to the difference between that figure and the figure at which it was sold at break-up value as representing the loss which he sustained by removal, and for which he is entitled to compensation under the subsection. Now it appears to me that the position of parties *vis-a-vis* of that question is set out articulately and relevantly in condescendence 2 and answer 2. "Going concern" is not of course a *nomen juris*, but it appears to be a phrase which is familiar in the agricultural world. A somewhat similar controversy to the present arose in *Williamson* v. *Stewart* (1912 S.C. 235), which, however, differing from the case in hand, was one in which the problem of acclimatisation value was involved. We have not the pleadings in that case before us, but it is plain that the difference between the parties there was that the landlord claimed, as here, that the value of the tenant's stock as sold in the open market was conclusive, while the tenant claimed that the standard known as "use and wont"—meaning thereby the addition to market value, as representing acclimatisation value, of a certain percentage—should be applied. The Court rejected both contentions. The decision in that case warrants us in refusing to sustain the contention of the appellant that the market price of the tenant's stock is necessarily conclusive of the controversy. While the respondent's pleadings are not beyond criticism, they are in my judgment sufficient, judged by the standard which may reasonably be applied to such proceedings as these. "Going concern" *versus* "break-up value" are the respective criteria which the parties seek to apply, and I do not think that they are likely to be misunderstood by a practical man.

The appellant also argued that the claim by the respondent was irrelevant because the loss, if any, which he suffered was due, not to his removal but to his tenure—that, to be more precise, it was due to his failure to have secured from the appellant a "hefting clause" in the lease which he signed. I do not agree. The cause of the loss to the respondent in my opinion was his removal from the farm. The quality of his tenure may be a remote cause, but it is not in my judgment the proximate cause of his loss. Apart from that, however, the concepts are not of equal content and interchangeable. The respondent may have, and indeed probably has, suffered other loss than that incidental to the absence of a hefting clause from the lease, *e.g.*, by reason of the date at which the sale took place, and he should not in my opinion be denied an opportunity of proving that loss if he can. The Sheriff agrees with the arbiter on the question of relevancy, and I agree with the Sheriff. [*His Lordship then dealt with matters with which this report is not concerned.*]

I propose to your Lordships that we should answer question 5 in the affirmative, that we should in the meantime supersede consideration of the other questions, and that we should remit to the arbiter to proceed.

LORD ORMIDALE—The appellant did not challenge the decision of the Sheriff on the first four questions raised in the Stated Case.

With regard to question 5, he maintained that the averments of the respondent were irrelevant in that they were lacking in specification, that they inferred no loss in respect that the value of the stock must be taken to be what it fetched at the public roup, and lastly, because the loss condescended on was not a loss, as the statute requires it to be, directly attributable to the quitting of the holding and unavoidably incurred by the tenant,

It appears to me that the averments are stated with sufficient precision to satisfy the provisions of the statute. I agree with what the Sheriff says on that point. I am also of opinion that they are sufficient to raise sharply and clearly what, after all, is the true matter at issue between the parties whether "break-up value" or "going-concern value" is, in the circumstances, the true standard by which to test the quality and amount of the loss suffered by the respondent, and, further, that the loss suffered by the respondent was directly attributable to the quitting of his holding.

The sheep stock on the respondents' farm of Glenkiln was not bound to the ground, but the sheep stock on the farm which he secured after receiving notice to quit was so bound. In these circumstances, he says, as the proprietor of Glenkiln declined to purchase the stock on that farm he had to dispose of it by public roup at the immediately ensuing Whitsunday term. The difference between

the "break-up" value so obtained and "going-concern" value represents, he says, the unavoidable loss incurred by him and is directly attributable to the quitting of his holding. The appellant's answer is that "at said roup the claimant's stock was sold at its value to him, which was the value in the open market as tested by the said roup." To give effect to the appellant's contention would be to go counter to what was said and determined in *Williamson* v. *Stewart* (1912 S.C. 235), viz., that, as explained by the Lord President, it is not the duty of the arbiter to value a sheep stock upon the basis of market value only in the narrower sense of that term. While it is true that in that case the sheep stock was bound to the ground, and it was with reference to such a stock that the opinion of the Court was expressed, that distinction does not appear to me to warrant the inference that the respondent's claim is irrelevant. The respondent did not voluntarily terminate his tenancy, nor did it come to an end by efflux of time. Under the tenure resulting to him from statutory provisions, he was entitled, and he was willing, to sit on, and he says that if he had been permitted so to do, his stock would have given him a higher return than what resulted from the Whitsunday roup. He further says (and in my opinion he is right) that the direct and sole cause of his being compelled to put his stock into the market was his receiving notice to quit his holding. It is quite true that, if he had had a hefting clause in his lease, no question might have arisen, but the fact that he had not such a clause appears to me to be irrelevant in respect that its absence did not create the necessity of a forced realisation of the stock. That was due to the action of the appellant with the consequent loss to the respondent, if his facts be well founded, of the higher return which he would have reaped if he had been allowed to carry on. I think therefore that the respondent is entitled to an opportunity of proving what the value of the stock to him was at the time when his occupancy was terminated. Question 5 accordingly falls to be answered in the affirmative. [*His Lordship then dealt with other matters with which this report is not concerned.*]

LORD HUNTER—[*After dealing with certain matters which are not the subject of this report, continued*]—The appellant did not maintain before us that the claim of the respondent did not contain relevant and sufficient specific particulars within the meaning of section 15 of the Agricultural Holdings (Scotland) Act 1923. He argued, however, that the condescendence by the tenant, lodged in obedience to an order of the arbiter, did not contain a relevant statement of loss directly attributable to the quitting of the holding. The sheep stock on the farm was not bound to the ground; but the tenant removed to a farm where the stock was so bound. He had in consequence to sell his stock at break-up value at Whitsunday 1923. He alleges that the amount which he seeks to recover is the difference between this sum and the amount he ought to have realised for the stock as a going concern. This loss he attributes to the circumstance that he was forced to quit the farm at the time when he did, and he contends it is recoverable in so far as not in excess of the maximum fixed by the Act. The position of the appellant, as explained in his answer to the second article of the respondent's condescendence, is that "at the roup the claimant's stock was sold at its value to him, which was the value in the open market, as tested by the said roup." This contention appears to amount to this that if a tenant does not have a clause in his lease binding the landlord or incoming tenant to take over his stock, he cannot recover anything from the landlord in consequence of having to sell his stock at a disadvantageous time and at a break-up value. I do not think that there is any warrant for construing the clause in the Act in this sense. The right of the tenant whose tenancy has been terminated by a notice to quit given by the landlord, is to claim compensation for disturbance, the measure of the amount payable being a sum representing such loss or expense directly attributable to the quitting of the holding as he may unavoidably incur. According to the respondent's case, but for being forced to quit the holding he would not have sold his stock when he did, but would have realised much better prices for it as part of a going concern. I see no reason for rejecting such a claim as irrelevant or refusing the tenant an opportunity of establishing the amount of the loss which he alleges he has sustained. In the case of *Williamson* (1912 S.C. 235) the Lord President said—"If the stock was simply taken off the ground at Whitsunday, and, so to speak, forceably conveyed to a mart and there sold, it is obvious that it would yield very little. It would be like 'scrapping' machinery, or selling a business at a break-up value. On the other hand, there is a market value which has an obvious bearing on the question. . . . The prices that are, so to speak, reigning in the market must affect the arbiter's view of the value of each component item of the stock. The value is the value of each item in a going business, not a break-up value." In the later case of *Barbour* v. *M'Dowall* (1914 S.C. 844) it was observed with reference to a claim for disturbance under the provisions of section 10 of the Agricultural Holdings (Scotland) Act 1908, that where there is a displenishing sale, what the tenant is entitled to as compensation under the section includes not merely the expense of the sale but also the loss through deterioration of the stock upon a sale.

In my opinion we ought to affirm the Sheriff in answering the question as to the relevancy of the respondent's claim adversely to the appellant, and remit the case to the arbiter to proceed with the valuation.

LORD ANDERSON—[*After dealing with matters which are not the subject of this report*]—The argument of the appellant on

the point of relevancy was to the effect that the respondent in his condescendence of claim had not averred loss in connection with the sale of his sheep stock which was directly attributable to the notice to quit. If there was loss, it was said, this was due to the fact that the tenant had chosen to go to a farm on which there was a bound stock. The argument, presumably, would have been the same had he elected to go to a farm which was wholly arable. This contention in my opinion is untenable. Again it was argued that the tenant's averments negative the notion of loss sustained because they show that he had obtained for his stock its full value in open market. The tenant, however, avers that this was not the real or full value of the flock. If, for example, the incoming tenant had purchased the sheep stock as a flock at a valuation to be fixed by arbitration, a higher price would doubtless have been got. The price received was break-up value; the price which might have been obtained in the way suggested or by disposing of the stock by more advantageous methods than by a forced sale is described as "going-concern" value. The tenant relevantly pleads that these two values are recognised, and that he is entitled to the difference between the two as loss sustained by reason of the notice to quit. The case of *Williamson* (1912 S.C. 235) recognises that a tenant who has received notice to quit is not bound to be satisfied with the break-up value of his sheep stock, but may competently claim more as loss directly attributable to his removal. I am therefore satisfied that the tenant's condescendence of claim is relevantly stated, and that question 5 should be answered in the affirmative. [*His Lordship then dealt with other matters with which this report is not concerned.*]

The Court answered question 5 in the affirmative, superseded consideration of the other questions, and remitted to the arbiter to proceed.

Counsel for the Appellant — Moncrieff, K.C.—Carmont. Agents—Webster, Will, & Company, W.S.

Counsel for the Respondent—Wark, K.C. —Guild. Agents—Scott & Glover, W.S.

Saturday, June 14.

FIRST DIVISION.

DICK *v.* DOUGLAS.

Judicial Factor—Tutor-Dative—Incapax—Custody of Person — Appointment of Nearest Male Agnate—Prior Appointment of Curator Bonis.

In a petition by the eldest son and two other children of a widow *incapax*, who had been removed without their consent by another of the children to her (the latter's) own house, and into her exclusive charge, and on whose estate a *curator bonis* had been appointed, for the appointment of the eldest son as tutor-dative, the Court *granted* the petition under reservation, of consent, of the prior appointment of the *curator bonis*.

Robert Dick, Glasgow, the eldest son, and Thomas Dick, Glasgow, and Mrs Janet Somerville Dick or Brown, children of Mrs Janet Somerville Young or Dick, *petitioners*, presented a petition for the appointment of a tutor-dative to Mrs Dick, in which Mrs Mary Wylie Dick or Douglas, the only other child of Mrs Dick, and Charles J. Munro, C.A., Edinburgh, *curator bonis* to Mrs Dick, were *respondents*. The petition prayed the Court "to appoint the said Robert Dick or such other person as to your Lordships shall seem proper to be tutor-dative of the said Mrs Janet Somerville Young or Dick, or, alternatively, to appoint the said Robert Dick or other suitable person to have the care and custody of the said Mrs Dick until further order of Court; and to ordain the said Mrs Mary Wylie Dick or Douglas forthwith to surrender the person of the said Mrs Dick into the custody of the person so appointed."

Mrs Dick, who was seventy years of age and a widow, had for some time prior to 1917 carried on business in Glasgow. In 1919 she purchased a house in Crieff and went to live there with her husband, who died in 1921. After that she lived for five months with the petitioner Mrs Brown, and then returned to Crieff and lived at her house there along with a cousin, Mrs Fraser, who acted as housekeeper. In December 1922 the respondent Mrs Douglas, without consulting any member of the family, removed Mrs Dick to a house in Glasgow where she (Mrs Douglas) resided with her husband, and thereafter presented a petition for and obtained the appointment of Mr Munro as *curator bonis* on Mrs Dick's estate, which was valued at £12,000. From the medical certificates it appeared that Mrs Dick was suffering from senile decay, and unfit to look after herself and her affairs.

The grounds of the petition were, *inter alia*, that the arrangement by which the *curator bonis* had the control of Mrs Dick's estate and Mrs Douglas the control of her person was bad, and not conducive to Mrs Dick's health and comfort, nor to efficient and beneficial administration; and that as Mrs Dick's estate was sufficient to enable her to live in comfort in her house in Crieff, which was more suitable as a residence for her from the point of view of her health and welfare, and as affording reasonable access to the members of her family, than was Mrs Douglas's house, the petitioners were desirous that she should reside there. With regard to the appointment desired, they averred—"9. The petitioner Robert Dick, being legally entitled to the office of tutor-at-law to his said mother, has been advised that by adopting the prescribed procedure he could have the appointment of the *curator bonis* superseded. He is, however, anxious to avoid the unpleasantness and expense involved, and in any event is reluctant to interfere with the present arrangement for adminis-