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The Court answered question 5 in the affirmative, superseded consideration of the other questions, and remitted to the arbiter to proceed.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

tration, to which in itself none of the petitioners take exception. They submit, however, that efficient and beneficial administration is impossible until other provision than the present is made for the custody and care of Mrs Dick. The said Robert Dick has offered to provide for her in his own home in Glasgow, and is willing to do this or to make arrangements for her to reside under Mrs Fraser's care at her own house in Crieff. The latter arrangement seems to the petitioners to be better both as regards the health of Mrs Dick and the interests of the members of her family, all of whom desire facilities for access to her. The petitioners submit that it is necessary and in the interest of their said mother that the Court should now appoint some suitable person as tutor-dative, or alternatively, should appoint such suitable person to have the care and custody of Mrs Dick. The said Robert Dick is willing, if the Court thinks fit to appoint him, to undertake the responsibilities of legal guardian, either as tutor-dative to her or under other order of Court. Failing the appointment of the said Robert Dick, which would be approved of by all the petitioners, the petitioners respectfully submit that the said Mrs Elizabeth Paton or Fraser would be a suitable guardian. She is willing to undertake the duties and to attend on Mrs Dick at her house in Crieff, so long as that arrangement may appear suitable."

The petitioners produced a medical certificate to the effect that it would be to the advantage of Mrs Dick's health to live in Crieff instead of in the house occupied by Mrs Douglas in Glasgow. Mrs Douglas and the *curator bonis* both lodged answers and produced medical certificates to the effect that Mrs Dick should remain in charge of Mrs Douglas. The *curator bonis* stated that he had satisfied himself by a personal visit that Mrs Dick was being properly looked after, and that in view of the medical opinion obtained by him, he did not consider that he was warranted in suggesting the removal of Mrs Dick from Mrs Douglas's house.

Argued for the petitioners—The petitioner Robert Dick should be appointed tutor-dative. It was necessary to have someone to take charge of the *incapax*. The Court had power to make such an appointment—Exchequer Court (Scotland) Act 1856 (19 and 20 Vict. cap. 56), secs. 1, 2, and 19; Clerk & Scrope, Court of Exchequer Forms, p. 227—and always did so where there was an *incapax* and a request made for such an appointment—*Urquhart*, 1860, 22 D. 932; *Simpson*, 1861, 23 D. 1292; Fraser on Parent and Child (3rd ed.), pp. 668, 670, 671. As eldest son Robert Dick was the most natural and suitable person for the appointment, and there was no reason why he should not be appointed. As nearest male agnate he could have been appointed tutor-at-law and displaced the *curator bonis*, and would have had full control, except so far as excluded as heir-at-law from the custody of the person of the *incapax*—Ersk. Inst. i, 7, 45. That he was the heir-at-law was merely a technical objection in the present case, and was no ground for opposing his appointment as tutor-dative. The fact that he was nearest agnate was no bar—*Urquhart* (*cit.*); *Simpson* (*cit.*); *Bryce*, 6 S. 425, *per* Lord Balgray at p. 436; *Stuart* v. *Moore*, 1860, 22 D. 1504, *per* the Lord Justice-Clerk at p. 1512—and his appointment need not displace the *curator bonis* in the control of the estate. *Graham*, 1881, 8 R. 996, was also referred to.

Argued for the respondent Mrs Douglas—There was no authority for appointing a tutor-dative where there was already a *curator bonis*. The cases referred to by the petitioners were all cases where it was necessary to place someone in charge of the estate. The chief consideration was the benefit of the ward, and the matter was wholly in the discretion of the Court—*Gardiner*, 1869, 7 Macph. 1130. Here the ward was being properly looked after, and there was no ground for altering the position. Further, the old rule was against appointing an heir-at-law to the custody of the person of an *incapax*—Bankton Inst. i, 7, 8.

No argument was presented for the *curator bonis*.

At advising—

LORD PRESIDENT (CLYDE)—This is an unusual application—for the appointment of a tutor-dative to a person mentally *incapax*. The *incapax* is the mother of the three petitioners and of the respondent (Mrs Douglas). She is advanced in years and suffers from senile decay to an extent which renders her incapable of looking after herself in any way and even of controlling her ordinary bodily functions. Her case is thus an eminently appropriate one for responsible guardianship. A peculiarity of the case is that she already has a curator duly appointed by the Court to manage her property, which consists of a villa in Crieff and moveable investments amounting to about £12,000. The petitioners, while desirous of having a tutor appointed to their mother's *person*, do not wish, if it can be helped, to disturb the curator's administration of her *estate*, and if an appointment of a tutor-dative is to be made, the respondent Mrs Douglas also wishes the curatory to be maintained. The petioners suggest one of themselves, namely, the eldest son of the *incapax* for appointment as tutor-dative. As the nearest male agnate he would be entitled to have himself served as tutor-at-law, 1585 C. 18.

Prior to December 1922 the *incapax* lived at her house in Crieff accompanied by a female cousin (a widow of 52) who looked after her. There she was visited from time to time by her daughters. But in that month the respondent Mrs Douglas—moved (as she says) by the progressively weak state of her mother's health, but (unfortunately) without giving any intimation of her plans to any other member of the family—suddenly removed her mother to her own house in Glasgow (a house of two rooms and kitchen occupied by herself, her husband, and her son), and having shut up the villa in Crieff took immediate steps to have a *curator bonis* appointed on her mother's

estate. Since these events the respondent appears to have given her mother the services of a dutiful daughter, but even now no intelligible explanation is forthcoming of the haste and privacy with which she took her mother into her exclusive charge; and it is not to be wondered at that the petitioners regard the change in their mother's circumstances (involved in her removal from her own house to inferior surroundings) as detrimental and inconsistent with the amount of their mother's means available through the curator for her care and treatment. The respondent Mrs Douglas is no doubt honestly convinced that the *de facto* guardianship she has acquired of her mother's person is all for the best—and it may be so. But she has no right, any more than any of her brothers and sister who might have in like manner obtained possession of the mother's person, simply to override the opinions and wishes of the others in the matter. It seems to me therefore that the appointment of an official guardian to the person of the *incapax* is the only solution of a difficulty for which the respondent's hasty action is at least in some measure responsible. Such a guardian will be responsible to the Court for the proper discharge of his duties.

But the petition was attacked at the debate as incompetent. It was said that the proper course was for the nearest male agnate (the eldest son) to proceed by cognition and service as tutor-at-law, and no doubt that would be a perfectly competent, if painful and costly, proceeding. It is settled, however, that this is not a conclusive objection to the appointment of the nearest male agnate as tutor-dative under the jurisdiction which was transferred to the Court of Session from the Court of Exchequer—*Urquhart*, 1860 22 D. 932; see also *Wilson*, 1857 19 D. 286, and *Simpson*, 1861, 23 D. 1292. It is true that the nearest male agnate if served tutor-at-law would be debarred from actual custody of the ward's person on account of the old suspicion attaching to him as the ward's heir (Ersk. i. 7, 7), though he would be entitled to see that the ward was properly looked after and managed—while this disability does not attach to him as tutor-dative. But this is hardly a consideration to which force can be attached in these days. Cognition was not, at any rate latterly, a necessary preliminary to the appointment of a tutor-dative to an *incapax* by the King through the Court of Exchequer (*cf.* Ersk. i, 7, 51; *Colquhoun* v. *Wardrop*, 1628, M. 6277, Spottiswood's Report; *Stewart* v. *Sproul*, 1663, M. 6279. The history of the Exchequer Court's jurisdiction is referred to in Fraser on Parent and Child at p. 259. It happens that there was a cognition in the recent case of *Graham*, 1881, 8 R. 996, but the practice applicable to procedure by summary petition in this Court is satisfied by such medical certificates as we have here, and no point was made on this head at the debate.

A more delicate question is raised by the existence of the curatory. The service of a tutor-at-law would supersede it (*Young* v. *Rose*, 1839, 1 D. 1242) just as it would supersede an appointment of tutor-dative, Ersk. i, 7. 51. The right of the tutor-at-law naturally has precedence over appointments which are essentially temporary in their character, for these appointments are made precisely because in the meantime the legal guardian does not come forward to claim and exercise his legal rights. But no reason occurs to me for holding it incompetent to appoint a tutor-dative to the ward's person while allowing the management of his estate by a *curator bonis* to continue. There is no necessary or legal inconsistency between two such appointments, and though the circumstances which would make the co-existence of them convenient or expedient must be rare and are little likely to arise except upon the consent of parties, I see nothing which is necessarily incompetent in appointing a tutor-dative under reservation of the prior appointment of a *curator bonis*. In the present case all the parties consent, if an appointment is made, to such a reservation. In any arrangements which the tutor-dative may find it his duty to make for the proper care of the ward's person he will have available to him the free income of the estate under the curator's charge, and it will be for him to determine how that free income can best be expended for the care of the ward's person. If difficulties should arise it may be necessary to bring them before the Court, but I do not see that any need arise.

I think therefore that we should appoint the eldest son tutor-dative to his mother subject to a reservation, which will proceed on consent, of the appointment of the *curator bonis*. We are not asked to do more than this; in particular we were not asked to make any order for the immediate surrender of the ward's person to the tutor-dative, and no such order will be pronounced in this petition. It will be for him as the official guardian responsible to this Court to consider carefully, on proper expert advice given on a full disclosure of the ward's circumstances and of her available means, what is the best plan for her care and treatment. The respondent Mrs Douglas has produced a medical certificate, in very strong terms, favourable to the maintenance of the *incapax* under her care, notwithstanding the somewhat limited accommodation and facilities available in her domestic establishment. On the other hand, the representatives of the Board of Control, while expressing their appreciation of Mrs Douglas's filial services, have indicated that the somewhat limited accommodation available in Mrs Douglas's domestic establishment are not all that could be desired; and it may well be that, having regard to the ward's means and estate, a better arrangement than at present prevails could be devised and executed in her interests.

LORD SKERRINGTON, LORD CULLEN, and LORD SANDS concurred.

The Court appointed the petitioner Robert Dick to be tutor-dative, subject, of consent, to the reservation of the prior appointment of the *curator bonis*.

Counsel for the Petitioners—Robertson, K.C.—J. Stevenson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent Mrs Douglas—Gentles, K.C.—Gilchrist. Agents—Gray, Muirhead, & Carmichael, S.S.C.

Counsel for the Respondent C. J. Munro—Maconochie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, June 14.

FIRST DIVISION.

SOCIETY OF WRITERS TO HIS MAJESTY'S SIGNET *v.* MACKERSY.

Administration of Justice—Law Agent—Misconduct—False Claim of Damages—Suspension—Law Agents (Scotland) Act 1873 (36 *and* 37 *Vict. cap.* 63), *sec.* 22.

An action for damages in respect of physical injuries was raised in the Court of Session and proceeded for trial before a Judge and jury. At the conclusion of the pursuer's case the Judge, on the motion of counsel for the defenders, withdrew the case from the jury in respect that there was no evidence to support it.

In view of the facts disclosed and his Lordship's remarks with regard to the action, the Society, of which the pursuer's agent was a member, presented a petition under the 22nd section of the Law Agents Act 1873, praying the Court to find that he had been guilty of misconduct in respect, *inter alia*, that he had raised the action solely on information (which he took no steps to verify) received from an inquiry agent of unsatisfactory character and antecedents. In answer the respondent stated that he had raised the action in good faith on a mandate duly granted by the pursuer; that the inquiry agent was a competent person to take precognitions, and that he had no reason to doubt the information thus received; and that in any event his conduct in the matter did not amount to more than negligence. After a proof the Court *found* that the respondent was guilty of misconduct as a law agent in respect of the reckless disregard of the duty incumbent upon him to satisfy himself that the claim of damages in question was a genuine one and not a false one, and *suspended* him from practising as a law agent for one year.

The Society of Writers to His Majesty's Signet, and the Keeper and Deputy-Keeper of the Signet, and the office-bearers of the Society, presented a petition to the First Division in which they moved the Court to find that William Robert Mackersy had been guilty of misconduct as a law agent in the matters therein referred to, or one or more of them, and thereupon to do therein as shall be just.

The petition stated—"2. William Robert Mackersy, residing at 12 Gayfield Square, Edinburgh, was admitted a member of the said Society on 17th January 1888, and enrolled a law agent under the Law Agents (Scotland) Act 1873 on 9th March 1888, and also enrolled by the clerk to the Lord President as an agent practising in the Court of Session in terms of section 12 of the said Act, and duly subscribed the roll on 20th March 1888. 3. The said William Robert Mackersy acted as agent for the pursuer in an action for damages nominally at the instance of Mrs Mary Elder or Lynch, 74 Causewayside, Edinburgh, against William Sinclair Allan, builder and contractor, 60 Gilmore Place, Edinburgh, the summons being signeted on 8th November 1922. The summons was called before Lord Murray on 18th November 1922. The record was closed on 19th December 1922, and the cause was thereafter transferred to Lord Blackburn, before whom and a jury the trial proceeded on 1st February 1923. At the conclusion of the pursuer's case counsel for the defender moved his Lordship to withdraw the case from the jury. His Lordship granted the motion, and in doing so said—'It is not a practice that I am very fond of following, that of withdrawing a case from the jury, and I have never done so yet, but on this occasion I have no hesitation whatever in saying that this case ought never to have been brought, and I think it is a perfect scandal that a man who was in no way to blame should be made the victim of an action of this sort, the record containing a tissue of lies which there is not a scrap of evidence to support in the case. I think it is a scandal to the profession and a disgrace to whoever was responsible for raising the action.' 4. His Lordship's remarks were published, and the case was made the subject of adverse comment in the press. The matter was consequently brought to the notice of the petitioners, who held an inquiry into the conduct of the said William Robert Mackersy in relation to the said case. The petitioners have, in the course of their inquiry, obtained the following information—(1) The said Mrs Lynch is an old and illiterate woman in poor circumstances. On 2nd November 1922 she was crossing a street in Edinburgh when she negligently ran in front of a motor car, which was moving at a very slow speed. She came in contact with the car and fell. The car at once stopped. She suffered no serious injury. She was, however, driven in the said car to the Royal Infirmary, where she was examined by Dr Brewster and found not to need medical treatment. She was then driven to her home in the said car. (2) On the following day Mrs Lynch was called upon by a Mr Isaac Scott. The said Isaac Scott is not a law agent or qualified practitioner, nor is he a clerk in the employment of Mr Mackersy. He is, in fact, a person who lies in wait for legal claims, and who advertises in the newspapers for business in connection with accident and compensation claims, divorce inquiries, and marriage. The said Isaac Scott has, it is believed and averred, acted for Mr Mackersy for many years as a procurer of mandates and of evidence for the purpose