Friday, December 2.

FIRST DIVISION.

SOUTER (M'ADAM'S EXECUTOR) *v.* SOUTERS.

Succession—Heritable or Moveable—Conversion by Curator—Sale of Heritage of Ward by Curator—Sale Necessary for the Maintenance of Ward.

The curator of a lunatic, who was proprietrix of a small heritable estate, the income from which was not sufficient for her maintenance, expended in course of time the whole moveable estate of the ward on her maintenance, and thereafter, on the advice of the Accountant of Court, and by authority of the Sheriff, sold her heritable property, and out of the price continued to maintain her until her death.

Held that the balance of the ward's estate remaining at her death fell to be dealt with as moveable estate *quoad* succession, in respect that the sale of the heritable property by the curator was in the circumstances necessary.

Miss Mary Souter or M'Adam, widow of Alexander M'Adam, inspector of works, Aberdeen, was in August 1896 committed to the Royal Lunatic Asylum, Aberdeen, as a person of unsound mind. On 12th September 1896 Alexander Simpson, accountant in the Aberdeen Savings Bank, was, upon the application of her husband's testamentary trustees, appointed by the Sheriff of Aberdeen, Kincardine, and Banff, her *curator bonis*. Mrs M'Adam remained permanently insane from the date of her commitment to the asylum till her death. She died upon the 9th day of September 1903 intestate, survived by two brothers and the children of deceased brothers and sisters.

At the date of the appointment of the *curator bonis* the estate of Mrs M'Adam consisted of house property situated in Aberdeen. The gross annual rental of the said property when fully let amounted at that date to £30, 19s. or thereby, and the net rental to £19 or thereby. Mrs M'Adam was at the time duly infeft in the said subjects. Under the trust-disposition and settlement of her husband, Mrs M'Adam was entitled to the free annual income of her husband's estate, which amounted to about £7 per annum. Her income being at the time insufficient to support her in the asylum, her *curator bonis* on or about 14th November 1896 brought the circumstances before the Accountant of Court in a report submitted to him, in which he craved authority to sell the heritable property of his ward with the view of providing sufficient funds for her maintenance. The cost of boarding Mrs M'Adam in the asylum amounted, exclusive of clothing, to £30 per annum or thereby, and her annual income from all sources, as above stated, amounted to £26 or thereby. The Accountant of Court, after consideration of said report, expressed the view that the ward's heritable property should not then be sold, but that the curator should claim, on behalf of his ward, her legal rights in her husband's estate. This the curator did, and on behalf of his ward received from the testamentary trustees of her deceased husband £109, 16s. 1d. in full of her rights in her husband's estate.

On 14th February 1901 the *curator bonis* submitted a further report to the Accountant of Court, setting forth, what was in point of fact true, that the whole of his ward's moveable estate, being the fund derived from her husband's trustees, was practically exhausted, having been expended for her maintenance and board and the expenses connected with the appointment of curator and the expenses of the curatory, and that it would be necessary to sell the heritable property of his ward in order to obtain a fund for her maintenance, the income derived from the rental of her heritable property being insufficient for that purpose. The Accountant, after consideration of the circumstances, was of opinion that it had become necessary either to borrow on the security of the property or to sell the same. He accordingly advised that the same might be sold by public roup at the upset price of £600. Upon 14th March 1901 the *curator bonis* was, following upon the said report by the Accountant of Court, authorised by the said Sheriff of Aberdeen, Kincardine, and Banff, to sell the said heritable property. The subjects were accordingly realised at the sum of £576, and the *curator bonis* continued to aliment his ward out of the proceeds thereof until her death. The sum of £400, being part of the proceeds of said sale, was immediately after the sale invested upon a heritable bond over subjects in Aberdeen. The remainder was deposited in bank.

At the death of Mrs M'Adam the balance of funds remaining in the hands of her curator amounted to £452, 4s. 1d., consisting of the before-mentioned heritable bond for £400, and a sum of £52, 4s. 1d. in bank.

Questions having arisen as to whether Mrs M'Adam's estate was to be considered heritable or moveable *quoad* succession, this special case was brought.

The parties to the special case were (1) Alexander Souter, Mrs M'Adam's executor-dative, first party; (2) the said Alexander Souter, as her heir-at-law second party; and (3) William Souter and others, her whole next-of-kin and representatives *in mobilibus*, third parties.

The questions of law were:—"(1) Was the estate left by the deceased Mrs Mary Souter or M'Adam heritable *quoad* succession at the date of her death? or (2) Was the said estate moveable *quoad* succession, and does it fall to be divided among the parties of the third part?

Argued for the first and third parties — The estate of the deceased was moveable property *quoad* succession. There was here, in the circumstances, an absolute necessity on the curator to sell the estate. The ward could not have been maintained otherwise. Accordingly the sale was equivalent

to an act by the ward herself, and had the effect of converting the heritable estate into a sum of money, which on her death fell to be divided among her heirs *in mobilibus*—*Kennedy* v. *Kennedy*, November 15, 1843, 6 D. 40; *Macfarlane* v. *Greig*, February 26, 1895, 22 R. 405. 32 S.L.R. 299.

Argued for the second parties—The mere fact that by the act of the curator the heritable property had been sold and converted into money did not alter its character *quoad* succession. It was a mere act of administration of the curator, and a curator had no authority to alter the succession of the person whose estate he administered—*per* Lord M'Laren, *Macfarlane* v. *Greig*, Feb. 26, 1895, 22 R. 405, at p. 409, 32 S.L.R. 299. This sale was not a "necessary" act of administration, though it might have been a beneficial act. The word "necessary" in the cases on this matter meant "inevitable in point of law," and here the curator, instead of selling, might have raised money by borrowing on the security of the heritable property. The present case was indistinguishable in principle from *Moncrieff* v. *Miln*, July 16, 1856, 18 D. 1286, and the price was, in the circumstances, simply a *surrogatum* for the subjects.

LORD ADAM—This is a case presented by the executor-dative, the heir-at-law, and the heirs *in mobilibus* of the deceased Mrs Mary Souter or M'Adam. For some years Mrs M'Adam was confined in a lunatic asylum, and in 1896 a *curator bonis* was appointed to her. At the date of his appointment there was available for her support the net rental of certain houses, amounting to £19 annually, and the interest on a sum of £109, 16s. 1d. The cost of maintaining her in the asylum amounted, exclusive of clothing, to £30 annually. That being so, her means were not sufficient for her maintenance. During the course of years the *curator bonis* expended, first, the moveable estate, and that becoming exhausted, and there being nothing left but the heritage, he went to the Accountant of Court to take his advice as to the proper course of administration. The Accountant of Court advised that the proper course was not to borrow on the security of the heritable subjects but to sell these subjects. Having got that advice, the matter was laid before the Sheriff of Aberdeen, who granted authority to sell the heritable subjects, and they were sold for £576. Out of this sum the *curator bonis* continued to maintain Mrs M'Adam until her death, when there remained a sum of £452. Of this balance the sum of £400 was invested on a heritable bond and the remainder was in bank.

The question is whether this estate left by the deceased is heritable or moveable *quoad* succession. Now, at the date of the ward's death the estate was, in the first instance, to be treated as moveable property, but that presumption may be displaced by showing that the money was the result of the conversion of heritable estate in circumstances insufficient to alter its character *quoad* succession. It may not be enough to show that it was an act of wise administration. The duty of a *curator bonis* is to preserve intact, so far as may be, the estate of the ward. His duty is to do his best in the interest of his ward. It is no function of his to change the character of the estate from heritable to moveable, even though the Accountant of Court and Sheriff thought the realisation of the heritage a necessary act. That alone would not be enough. But, then, the facts here show that the change was inevitable. This woman had to be maintained, and for that purpose it was necessary that money should be got, and it could be got in no other way than by the sale of the heritage. The facts are, in my opinion, sufficient to show that this change was necessary, and accordingly, I think the whole estate falls to be dealt with as moveable estate.

LORD M'LAREN—The questions that arise out of acts of administration by a legal guardian, such as a *factor loco tutoris* or a *curator bonis*, are not the same as we are familiar with in connection with trust administration. There is this notable distinction that a trustee sells on his own responsibility, while a judicial factor can in general only do so with the authority of the Court of Session upon the report of the Accountant of Court. Now, I agree with Lord Adam that the primary duty of a *curator bonis* is to preserve the estate in the same form and condition in which it comes into his hands for the benefit of the ward. The ward may recover if it is a case of mental incapacity, or may attain majority in the case of a pupil, and will then come into the possession of his estate, and it ought to be preserved unaltered for his use in that event. Out of this duty of preservation there has been developed the principle that the curator cannot by any act of administration alter the succession to the estate. Now, there are two rules which are applicable to the consideration of such a question—one is that the succession cannot be affected by any act of ordinary administration, but only by an act done of necessity, and to that, as far as I know, there is no exception. But there is this further rule, that everything must be presumed in favour of honest administration. Here the curator had represented to the Court that this sale was an act of necessity, and therefore the onus is on the other party to convince us to the contrary. I can find nothing set forth in this case to convince me that the curator was wrong in the view that he has taken as to the necessity of a sale, and I can well understand that, in view of the expense and difficulty of borrowing on the security of a small heritable property, the curator may have had no choice but to have recourse to a sale. If it was practically necessary, that is sufficient for the decision of the case, because the estate has been turned into money for the benefit of the ward, and conversion has taken place in fact and in law.

LORD KINNEAR—I think the rule of law in this case is clear. The rule is that succession must be regulated by the condi-

tion of the property at the death of the deceased, and in the present case the property left by the ward consisted of money and not of land. But it is said that it must still be treated as heritage, because the curator had no power to convert land into money except in case of necessity, and there was no legal necessity in the present case. I confess I do not understand the distinction between what is called legal and practical necessity. But then a sale may be necessary for one purpose and not for another; and the question in the particular case must be whether the purpose for which a curator thought it necessary to sell is one which the law recognises as a sufficient justification for converting land into money. Now, in the present case the necessity was to provide for the maintenance of the ward, because she could not be maintained without money, and the curator accordingly applied for and obtained the sanction of the Court to sell the heritage. It is said that the curator could have borrowed money on the property, but it is not so stated in the case, and we must take the case as containing a correct and exhaustive statement of all the facts which the parties have agreed are to form the basis of the judgment, and I am afraid therefore that any statement of fact which is not made in the case must be assumed to be either irrelevant or inaccurate. I therefore agree that the property in question must be treated as moveable.

The LORD PRESIDENT concurred.

The Court answered the first question in the negative aud the second question in the affirmative.

Counsel for the First and Third Parties— — Hon. P. Balfour. Agent — H. Hume M'Gregor, S.S.C.

Counsel for the Second Party — W. Mitchell. Agent—James F. Mackay, W.S.

Tuesday, December 6.

SECOND DIVISION.

[Sheriff-Substitute at Kirkcaldy.

ANDERSON *v.* LOCHGELLY IRON AND COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7—*Mine—Colliery Siding—"On or in or About a Mine"—Accident on Private Railway at Drumhouse,* 800 *Yards from Pithead.*

A workman was employed by the proprietors of a colliery as an engine-driver in charge of an engine which conveyed waggons from the pithead to a drumhouse 800 yards distant. From the drumhouse to the point where the line joined the North British Railway about 1140 yards from the pithead, the gradient was too steep for a locomotive, and the waggons were lowered by a wire rope passed round a regulating drum in the drumhouse and empty waggons were at the same time hauled up the incline. It was part of the engine-driver's duty to "sprag" the empty waggons as they reached the top of the incline, and while engaged in this work he was caught by the wire rope and received injuries of which he died. There were sidings at the pithead and also at the drumhouse and beside the North British Railway The whole of the railway from the pithead to the junction with the North British Railway, including the drumhouse, was owned and worked by the proprietors of the colliery.

Held (*diss.* Lord Justice-Clerk) that the accident arose out of and in the course of the deceased's employment on or in or about a mine within the meaning of the Workmen's Compensation Act 1897, section 7, and that the employers were liable in compensation.

By section 7 (1) of the Workmen's Compensation Act it is enacted that the Act "shall apply only to employment by the undertakers . . . on or in or about," *inter alia*, "a mine." By section 7 (2) it is declared that "mine" means a "mine to which the Coal Mines Regulations Act 1887 applies." By section 75 of that Act it is declared that "mine" includes "all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine."

This was an appeal upon a stated case from the Sheriff Court at Kirkcaldy in an arbitration under the Workmen's Compensation Act 1897, in which Mrs Margaret Wright or Anderson, widow, residing at No. 31 High Street, Lochgelly, appellant, claimed from the Lochgelly Iron and Coal Company, Limited, respondents, compensation in respect of the death of her son John Anderson through injuries sustained by him on 11th November 1903 while in their employment.

The following facts were found proved by the Sheriff-Substitute (HAY SHENNAN):—"(4) That the respondents are owners or occupiers of two pits situated at Lochgelly, known as the Melgund and the Jenny Gray pits. These are connected by a line of railway with the North British Railway system. The total length of this line from the Melgund Pit (the more distant) to its junction with the North British Railway is about a mile and a quarter. The Jenny Gray Pit is nearly a quarter-of-a-mile from the Melgund Pit. This line of railway takes the following course—from the Melgund Pit it runs past the Jenny Gray Pit to a drumhouse situated about 800 yards from the Jenny Gray Pit, crossing on its way a public road by a level-crossing. Over that portion of its course the line is sufficiently level to be worked by a locomotive. From a point near the drumhouse the line for about 340 yards runs down a steep incline (about 1 in 9) known as a wheelbrae, and over that portion the haulage is worked by a wire rope (passed round a regulating drum in the drumhouse), of which one end