

LORD TRAYNER—I think that the second question put to us in this case should be answered in the affirmative. The Cessnock Dock, where the appellant was injured in the course of his employment, comes within the definition of “factory,” as given in the Workmen’s Compensation Act 1897 and Factory and Workshops Act 1895. That the respondents were the occupiers of the “factory” I do not doubt. They were occupying and using it, or such part of it as was required by them, for the purpose of executing their contract. It was as much in their occupation for the time being (so far as their work was concerned) as if it had been their own shipbuilding yard.

If necessary, I should answer the first question in the negative.

LORD MONCREIFF—It is somewhat startling to be told that Cessnock or Prince’s Dock at Glasgow is a “factory” occupied by Port-Glasgow shipbuilders, but such appears to be its legal position according to the series of statutory provisions and definitions to which we were referred. I am therefore of opinion that the second question put to us, viz., “2. Whether the respondents were, within the meaning of section 7 of the said Act, occupiers of the said Cessnock or Prince’s Dock as a factory, which is a shipbuilding yard, on the occasion libelled?” should be answered in the affirmative.

The matter seems to stand thus. The Workmen’s Compensation Act of 1897 applies, *inter alia*, to a “factory,” section 7 (1). By section 7 (2), “Factory” is thus defined:—“Factory has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshops Act 1895, and every laundry worked by steam, water, or other mechanical power.”

Under 41 Vict. cap. 16 (1878), 4th Schedule, section 24, “shipbuilding yards” are defined to mean “Any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired.”

By section 23 of 58 and 59 Vict. c. 27 (1895) it is provided that certain of the provisions of the earlier Factory and Workshop Acts should apply, *inter alia*, to every “dock, wharf, and quay;” “and for the purpose of the enforcement of those sections the persons having actual use or occupation of a dock, wharf, or quay . . . shall be deemed to be the occupier of a factory.”

Thus a dock is a “factory” in the sense of the Workmen’s Compensation Act, and it is also a “shipbuilding yard” in the sense of the Act of 1878, “being premises in which ships, boats, or vessels are made, finished, or repaired.”

Now, for the purpose of getting the engines fitted into the vessel “*Craig-neuk*,” which Rodger & Company, the respondents, had undertaken to construct and supply with engines and machinery, they sent it from their own shipbuilding yard at Port-Glasgow to Cessnock or Prince’s Dock at Glasgow, where the acci-

dent to the appellant occurred. Therefore under section 23 of the Factory and Workshop Act of 1895 the respondents at the time of the accident were the occupiers of the dock, and therefore occupiers of a “factory” in the sense of the Act, and they were the “undertakers” in the sense of the 4th section of the Act of 1897.

On these grounds I think the Sheriff-Substitute was wrong in dismissing the action, and that we should answer the second question in the affirmative and remit to him to proceed.

The Court pronounced this interlocutor—

“The Lords having heard counsel for the parties to the stated case, Answer the second question therein stated in the affirmative: Find it unnecessary to answer the other questions therein stated: Find and declare accordingly, and decern: Remit to the arbitrator to proceed in the arbitration: Find the appellant entitled to the expenses of his appeal, and remit,” &c.

Counsel for the Claimant—Younger—Chree. Agent—Harry H. Macbean, W.S.

Counsel for the Respondents—Sol.-Gen. Dickson, Q.C.—John Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Thursday, July 6.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

MACQUEEN (WHARTON DUFF’S
CURATOR BONIS) v. TOD.

(*Ante*, May 18, 1899, p. 469).

Judicial Factor—Curator Bonis—Special Powers—Power to Cut Timber on Entailed Estate of Ward.

“The most general principle of the law of guardianship is that the curator of an insane person is there to preserve the estate. He is to do so in the spirit of one whose ward may at any time come back to his full legal rights. He is therefore to keep things going rather than to change; he is to do nothing that is irretrievable unless in case of necessity; and he is to preserve as far [as possible] such options as are open in the management of the estate, preserving them for his ward if he convalesces, or, if not, then for his heirs. Moreover, one of his specific duties is not by any voluntary act to change the succession of the ward. The policy of the guardian will be specially conservative where the ward is of great age.”—*Per Lord President.*

The *curator bonis* of the imbecile heir in possession of an entailed estate presented a note for power to cut all the timber on the property which was mature and ready for market, excepting

such as might be necessary for preserving the amenity of the mansion-house. The ward was 85 years of age; her moveable estate amounted to over £20,000, and the net annual rental of the entailed property amounted to about £1300. In the course of the administration of the estate by the ward's predecessors, the woods had never been dealt with as a commercial subject; they formed a prominent feature of the estate; and according to the unanimous testimony of men of skill were in first-rate condition. The application was opposed by the next heir of entail.

The Court, applying the principles above set forth, *refused* the application.

Rules, deducible from those principles, which should govern the action of a curator with regard to wood on the entailed estate of his ward, laid down *per* Lord President.

Entail—Judicial Factor—Curator Bonis—Petition to Charge Entailed Estate of Ward with Permanent Improvement Expenditure—Entail Act 1882 (45 and 46 Vict. c. 53), sec. 11—“Benefit” of Heir.

The *curator bonis* of the imbecile heir in possession of an entailed estate presented a petition under the Entail Acts shortly after his appointment for authority to charge upon the entailed estate the balance of certain permanent improvement expenditure incurred during the preceding twenty years by his predecessor in the office of curator. The latter had obtained the approval of the Accountant of Court and the authority of the Court itself for the expenditure in question, and had charged only a portion thereof upon the estate, his accounts being duly passed by the Accountant every year. In the course of his administration, which lasted for twenty-four years, the ward's moveable estate had increased from £19,000 to over £22,000. The gross annual rental of the entailed estate amounted to £1700, and the nett rental to about £1300. The ward was 85 years of age.

Held (rev. judgment of Lord Pearson) that the petition must be refused on the ground that the *curator bonis* had failed to satisfy the Court, in terms of sec. 11 of the Entail Act 1882, that his application for authority to charge was for the benefit of the ward.

Miss Anne Jane Wharton Duff, who was born in 1813, succeeded as heiress of entail to the estates of Orton and Barmuckity, situated in the county of Elgin, in 1874. The deed of entail under which she succeeded to and held these estates contained no special provisions which need be adverted to, with the exception of a prohibition against cutting wood within the policy attached to the mansion-house “unless in the course of necessary management and thinning, except such trees as have begun to decay.”

The gross rental of the properties

was about £1700 a-year, the net rental between £1300 and £1400. The moveable estate of the ward at the time of her succession amounted to £18,927. It should be added that Barmuckity, though held under the same deed of entail, was a separate estate from Orton, and seven miles distant therefrom.

On 14th March 1874 Colonel James Duff of Knockleith House was appointed *curator bonis* to Miss Wharton Duff, who laboured under mental incapacity. He entered upon office and administered the estate until his death on 5th February 1898. At that date the ward's moveable estate amounted to £22,151. On 5th April 1898 John Otto Macqueen, S.S.C., Aberdeen, was appointed *curator bonis* to Miss Wharton Duff in succession to Colonel Duff, upon an application for the appointment of a new curator and the discharge of Colonel Duff, to which the parties were John Wharton Tod, next heir of entail entitled to succeed to the estates of Orton and Barmuckity, Mrs Anne Helen Tod or Chancellor being along with Mr Tod the ward's heir *in mobilibus*, and Colonel Duff's representatives.

In this petition Mrs Chancellor lodged a minute opposing the discharge of Colonel Duff on the grounds (1) that he had omitted to charge certain improvement expenditure incurred by him on the entailed estate, and (2) that he had mismanaged the woods on the estate and failed to crop them properly.

After sundry procedure the Lord Ordinary (PEARSON) remitted to Mr Macqueen, the new curator, to inquire into the points raised by Mrs Chancellor in her minute. The curator presented an *interim* report in which he stated that improvements to the extent of over £3000 had not been charged on the estate, which he now proposed to charge, and further that he proposed to cut and sell timber to the extent of at least £10,000. He therefore recommended that the discharge of the late curator should not be granted in the meantime. Upon this report Lord Pearson superseded consideration of the petition for Colonel Duff's discharge *in hoc statu*.

On 7th November 1898 the curator presented a petition to the Court for authority to charge the entailed estates of Orton and Barmuckity with improvement expenditure to the extent of £3340.

The petitioner averred that between 1878 and the date of his death the late curator, apart from certain expenditure on Barmuckity which had already been charged on the estate to the extent of £1570, had expended in permanent improvements sums amounting to £4581. Of this amount, sums amounting to £3017 were expended with the authority and approval of the Court, obtained in applications presented by the late curator under sec. 7 of the Pupils Protection Act. The cost of certain of these improvements, to the extent of £800, was charged by the late curator on the estate, leaving a balance of £3781 still uncharged. “The said improvements are, as at the date of this application, of a

substantial and permanent nature. The petitioner is advised by a man of skill whom he has consulted that these improvements are beneficial to the entailed estates to the extent of at least the sum of £3340 over and above the sum of £800 already charged upon the estate as aforesaid, conform to report by Mr George Gordon Jenkins, C.E., and valuator, Aberdeen, herewith produced."

Answers were lodged by Mr John Wharton Tod, the next heir of entail, in which, *inter alia*, he submitted, under reference to the Entail Acts, and in particular to sec. 11 of the Entail Act of 1882, "that the petitioner's averments in support of the present application are irrelevant, and that the petition should accordingly be dismissed. The petitioner nowhere avers that the application is for the benefit of the ward on whose behalf it is made, and the respondent denies that it is for the benefit of the ward."

A minute was also lodged by Mrs Chancellor, in which she stated that she approved generally of the prayer of the petition.

The Entail Act 1882 (45 and 46 Vict. cap. 53), sec. 11, enacts that "in every case in which it is competent for an heir in possession of an entailed estate being of full age and not subject to any legal incapacity to make an application to the Court under the Entail Acts, it shall hereafter be competent for an heir in possession, though a minor, with consent of his curators, or for the tutors of an heir in possession if he is a pupil, or for his curator or other administrator if he is otherwise incapacitated, to make such application, not being an application for authority to disentail the entailed estate or any part thereof, and to execute or carry into effect any authority which may be given by the Court. Provided that the Court shall not grant such application unless they are satisfied that it is for the benefit of the heir by whom or on whose behalf it is made."

On 7th December 1898 the Lord Ordinary (PEARSON) pronounced an interlocutor making the usual remits to a man of business and a man of skill.

Opinion.—"In this case the ward, who is an old lady of eighty-six, has been under curatory since 1874. The late curator having died in February 1898, it was found by his successor, the present petitioner, that a large amount of money had been expended on improvements upon the estate of Orton, of which the ward is heir of entail in possession. Part of it was charged on the estate, and in this petition the curator seeks to charge the balance to the extent of £3340, 6s. 7d.

"The application is made under section 11 of the Entail Act 1882, which empowers (among others) the curator of an heir in possession who is incapacitated to present any petition under the Entail Acts which would have been competent to an heir of entail in possession, being of full age and not subject to any legal incapacity, except petitions for disentail. But the power is conferred subject to this proviso—'Provided that the Court shall not grant such

application unless they are satisfied that it is for the benefit of the heir by whom or on whose behalf it is made.'

"The petition is opposed by the heir of entail next called to the succession. He maintains that the petition is irrelevant, because it nowhere avers that the application is for the benefit of the ward. The petitioner, however, explains that his case under the proviso does not rest on any specialty, but on the general proposition that even where there is ample moveable estate, as there is here, it is for the benefit of the ward, within the meaning of the statute, that her disposable estate should be increased by charging the expenditure on the entailed estate. I think the admitted facts are sufficient to raise this question, which was fully argued.

"The actual expenditure on the improvements was defrayed out of the ward's moveable estate, the curator being authorised thereto by warrants of the Court granted under the first part of section 7 of the Pupils Protection Act 1849. That section further empowers the Court, in the case of an entailed estate, to authorise the curator to take proceedings for charging the improvement expenditure under the Montgomery Act or the Rutherford Act up to one-half the amount with which the heir in possession could have charged the estate if he had not been under incapacity. I understand that no part of the expenditure founded on in the petition has been so charged.

"The late curator did charge certain improvement money on the estate, and the respondent avers that he arrived at the sum to be charged 'after careful and deliberate consideration of the special circumstances of each application, and after obtaining the approval of the Accountant of Court.' I see nothing in this which should hinder the new curator from now charging the undercharged expenditure under his wider powers provided he can show that the improvements on which he founds are beneficial to the estate as at the date of this application to the extent sought to be charged, and also that the application is for the benefit of the ward. The former will be cleared up by remit in the usual way. The latter I have now to consider.

"It is urged on the part of the next heir that this not being an act of ordinary administration, the curator must make out a case—if not of necessity, at least of high expediency. It is pointed out that there is ample moveable estate, and that it has substantially increased during the curatory, and that no case is attempted to be made out of personal benefit to the ward. The kind of case contemplated by the proviso of section 11 was (it is suggested) where the ward's own subsistence or comfort or health is concerned, and where the maintenance of the income could not be secured except by such expenditure (on farm-steadings for example) as the moveable estate was insufficient to meet. In this case all that can be said is that the application will result in increasing the

disposable estate of a person not competent to dispose.

“As I have said, section 11 is not confined to petitions to charge, but extends to all petitions competent under the Entail Acts, except for disentail. And I do not doubt that with reference to each application it is the duty of the Court to ascertain whether it is truly for the benefit of the heir.

“But I cannot give those words so narrow a meaning as is contended for by the respondent. I think the augmentation of the ward's estate as a whole is to be regarded as a benefit within the proviso. This is not the mere transference of a burden from the moveable to the heritable estate in order to recoup the one for improvements on the other. That might be so if the heritage were held in fee-simple. But the condition of section 11 is that there is an entailed estate, which in the case of improvement expenditure, will go to the succeeding heir without this burden unless it is charged now. And altogether, apart from considerations touching the curator's duty not to alter the quality of the ward's succession, which might have place if the heritage had been hers in fee-simple, the fact that her disposable estate will be materially increased is, in my opinion, sufficient to satisfy the proviso. The ward may convalesce, or she may leave a valid will; and in either case it would, in the ordinary sense of the term, be for her benefit that her estate should be as large as possible, just as it would be to her loss or disadvantage if it were diminished. It is true that in one sense the *universitas* of her succession is neither increased or diminished by the operation; for the entailed estate goes to the heir of provision, as the fee-simple heritage to the heir of line, and the moveables to the heirs *in mobilibus*. But, regarded practically, the petition results in her being better off than she was before to the extent of the sum charged.

“I therefore make the usual remits to a man of business and a man of skill. It will be distinctly understood that all questions as to the amount to be charged, and the quality and value of the improvements, are reserved for discussion on the report.”

The reporters having presented their reports, the Lord Ordinary, on 25th April 1899, found that the improvements mentioned in the petition were as at the date of the application of a permanent and substantial character and beneficial to the estate to the extent of £3056, and granted warrant to and authorised the petitioner to charge the entailed estates of Orton to the extent of that sum.

On 21st March 1899 the curator presented a note under sec. 7 of the Pupils Protection Act 1849, craving the Court “to grant warrant to and authorise the *curator bonis* to sell for cutting such portions as in the opinion of a man of skill, to be appointed by your Lordships, are matured and ready for market of the following woods—[*Here followed an enumeration of the woods*—and further to grant warrant to and authorise the *curator bonis* to thin the wood in the policies of Orton at the sight of such man

of skill to be appointed by your Lordships.”

The curator averred—“That the *curator bonis* has ascertained that a considerable portion of the woods on the said estates consists of matured timber, which has for some time been ready for market, and which should now be sold for cutting; that the value of such matured and marketable wood is estimated at from £10,000 to £16,000, and that a large part of such wood will deteriorate and lessen in value if left uncut. He has further ascertained that the trees within the policies require to be thinned for the proper development of the best of the standard trees therein. The *curator bonis* has obtained reports, which are herewith produced and referred to, from Mr C. Y. Michie, since deceased, who was forester to the Countess of Seafield at Cullen House, and Mr John Clark, forester to the Earl of Aberdeen at Haddo House. In the circumstances above stated the curator finds it necessary to apply to the Court for special powers. In terms of the 7th section of the Pupils Protection Act, the *curator bonis* lodged with the Accountant of Court a report narrating at length the whole circumstances of the case, and stating that he desired to obtain the authority of the Court to sell for cutting such timber on the entailed estates as was matured and ready for market, and to thin the wood in the policy, all in terms of said forester's reports. Said report by the curator and the Accountant's opinion, with the curator's remarks thereon, and also a report obtained by the Accountant from Mr William Gilchrist, forester on the Banffshire estates of the Duke of Fife, are appended and referred to. The *curator bonis* regrets that he cannot, consistently with what he believes to be his duty to his ward, limit his application in the manner suggested by the Accountant; but in deference to the Accountant's opinion, and in order to avoid any possibility of injury to the amenity of the estate of Orton generally, including the prospect from the mansion-house of Orton as a residence, he is willing to limit his application to the effect of craving authority to sell for cutting such portions lying without the policy of Orton House of the woods after mentioned, with the exceptions there stated, as in the opinion of a man of skill to be selected by the Court are matured and ready for market, viz.—[*Here followed an enumeration of the woods*]. The *curator bonis* further, but without prejudice to his right to thin at his own hand such other woods and plantations on the estates as may require it in the proper management thereof, desires authority to thin the woods in the policies at the sight of a man of skill to be appointed by the Court.”

In the report previously submitted by the curator to the Accountant of Court the following passages occurred:—“The *curator bonis* has now obtained separate reports from these practical men, which he produces herewith. The substance of these reports may be stated as follows, viz.—That the woods on the estates extend approximately to about 500 acres, and are

of the estimated value of at least from £15,000 to £20,000. That the trees are healthy, none having been cut that should have stood, and few trees (dead or dying) standing that should have been cut. That there is a large quantity of fully matured wood, which has been for some time ready for market, and which should be sold now for cutting. That the value, in the opinion of both reporters, of such fully matured and marketable wood is not under £10,000, while, in the opinion of Mr Michie, wood to the value of over £6000 beyond this £10,000 is matured and should now be sold. That the wood which should thus be sold, being outside of the policy, does not fall under the limitation in the deed of entail of the powers of the heirs of entail to cut trees within the policy only for the purpose of management and thinning. That the trees within the policy require to be thinned for the proper development of the best of the standard trees. Both of the experts recommend the curator to have the sale of the matured wood above referred to forthwith carried out, as the present is a favourable time for selling advantageously owing to the state of the timber market, making it probable that good prices would be obtained. In consequence of the reports from the foresters, the *curator bonis* conceives it to be his duty to exercise the powers possessed by the ward as heiress of entail of cutting and selling the ripe timber other than wood in the policy and of thinning the trees within the policy as an ordinary act of management for the proper development of the trees therein. He accordingly proposes to sell for cutting, as fully matured timber ready for market, the trees forming lots Nos. 1 to 9 inclusive of the tabular list forming pages 8 and 9 of Mr Michie's report, herewith produced, but excepting therefrom the trees mentioned in lot 4 under the title of 'policies,' and which latter are of the estimated value of £101, 9s. The value of the trees so proposed to be cut is estimated by Mr Michie to be £16,188, 0s. 6d. The curator proposed also to thin the woods in the policy for the preservation and improvement of the remaining trees therein, all in terms of the report by Mr C. Y. Michie before referred to. . . . The curator thinks it proper to submit for the consideration of the Accountant or of the Court the somewhat conflicting views entertained by himself and expressed to him by the heir of entail on the subject of cutting and selling wood on the estate. The curator conceives it to be his duty to exercise the right pertaining to the ward of cutting and selling such plantations and trees outside of the policy as are ready for market, which in the curator's opinion is the course which would be followed by a prudent and careful proprietor, and that he as curator is not entitled to leave this right of the ward unexercised during her life, and thereby forfeit the permanent money benefit which can be secured for her estate. The heir of entail, on the other hand, urges that in the time of the predecessors of Miss Wharton Duff on the Orton estate the administra-

tion of the woods on said estate has never been conducted in a commercial spirit and in order to secure a money return from them, but, on the contrary, was prompted by the desire to continue and enhance the amenity of the Orton estate, and of the district in which the mansion-house of Orton is situated, by preserving all timber growing on the estate so long as the trees will stand. As the proposal, however, involves extensive operations and affects so materially the respective and conflicting interests of the heir in moveables and the next heir of entail, he considers that the act may not be considered an ordinary act of administration, but one of a nature which requires the authority of the Court, and he accordingly proposes to make application to the Court for such authority. The *curator bonis* therefore begs to bring the matter under the consideration of the Accountant of Court, and requests his approval of the proposal to sell for cutting such timber on the said entailed estates as may be fully matured and ready for market, and to thin the wood in the policy, all in terms of the report by the said Mr C. Y. Michie."

The Accountant, upon the curator's report, remitted to Mr William Gilchrist, forester to the Duke of Fife, to report upon the woods. Upon receiving Mr Gilchrist's report, the Accountant issued an opinion in which he thus summarised the facts relating to the woods on the estate—"It will be seen from the maps produced that the prominent feature of the Orton estate is the finely wooded nature of its grounds. The soil seems specially adapted for timber growth, and the amenity of the estate largely depends upon the preservation of the woods. During the lifetime of the father of the present liferentrix, and of her brother, who succeeded him, a period of over sixty years, the course of wood management appears to have been devoted to the preservation of this salient feature. There was no actual cutting for sale, only a careful thinning out of the weak and decaying trees. The late curator, who acted for twenty-four years, followed the same course of management, and the same judicious thinning, with the result that all the experts recently employed agree that the woods are in first-rate condition. Since the death of the late curator questions have been raised, partly with reference to his management of the woods, but chiefly as to how far it is incumbent on a curator to cut and sell timber, when, as in the present case, he manages an estate for a liferentrix upon whose death the heritable estate goes one way and the moveable estate another. The Accountant holds that the past management has been beneficial, and he is humbly of opinion that the future management should be on the same lines of judicious thinning, coupled with the gradual cutting down of such timber alone as is reported from time to time to be fully ripe and deteriorating in value." The Accountant's recommendations amounted in substance to this, that certain woods should be cut and thinned at once to the extent of £3412,

and that certain other timber amounting in value to £5503 might be cut at a later date upon a renewed application by the curator.

The curator issued remarks on the Accountant's report, in which he expressed his intention of modifying his original proposals to some extent in deference to the Accountant's views, and with a view to safeguarding the amenity of the mansion-house. He averred that according to this modified course only 30,000 trees would be cut out of a total of 52,000. He explained that, conceiving thinning to be within his ordinary powers of administration, he only proposed to ask authority to thin in the policies, and that "the power for which the curator is to ask the Court is power to cut those woods which have reached maturity, and the proceeds of which should be *in bonis* of the ward." All these documents, together with the reports by the foresters Michie, Clark, and Gilchrist, were printed and submitted for the consideration of the Court.

Mr John Wharton Tod lodged answers to the note for the curator, in which, after pointing out the increase in the ward's moveable estate since 1874, he averred—"The ward's income is more than sufficient for her comfortable maintenance. The present application is presented not in the interests of the ward, who would strongly object to the destruction of her family estates by denuding them of trees as proposed by the curator, but in the interests of one of the ward's next-of-kin Mrs Chancellor, who has intimated that she holds the late curator liable in damages for not having cut and sold the timber on the estates. The curator proposes, without any necessity and without any advantage to the ward, to inflict an irreparable injury upon the estates, which the ward inherited from her father and brother, and for no reason except to convert a portion of the estate from heritable into moveable. Even if such an object were legitimate, the injury to the value of the heritable estate would greatly exceed the gain to the moveable estate.

"The respondent refers to the opinion of the Accountant of Court and to Mr Gilchrist's report, as demonstrating that the curator's proposals are absolutely unjustifiable according to the rules of sound curatorial administration. . . .

"The trees which the curator asks authority to cut down are in good condition and are not deteriorating. These trees were planted for the purpose of shelter and amenity, and they have admirably fulfilled that purpose during the lifetime of the ward and her predecessors. They have never been regarded as a subject of commerce, and could not be so treated consistently with maintaining the residential character of the estate. It would not be an act of prudent administration on the part of the proprietor of the said estates to denude them of timber by cutting down a large proportion of the trees on them. He could not do so without spoiling the beauty and amenity of the estates, and indeed of

the whole district in which they are situated. The money obtained by the sale of the timber would not be equal to the diminution in the selling and letting value of the estates, while the use and value of the property for residential and sporting purposes would be destroyed for several generations. . . .

"While the respondent agrees generally with the views expressed by the Accountant of Court, he submits that the Accountant has gone wrong in recommending the sale of certain portions of the timber. Even if it be the fact that the timber referred to is ripe, that is no reason for cutting it down if it adds to the beauty and so to the value of the estate.

"With reference to the woods which the Accountant of Court recommends for cutting, the respondent begs to submit the following observations:—1. *Barmuckity Wood and Waulkmill Belt*.—Barmuckity is a separate estate from Orton though held under the same entail. It is situated two miles from Elgin and seven miles from Orton. The wood which it is proposed to cut down is practically the whole timber on the estate, and while if cut it might yield about £650, its destruction would cause far more than £650 of loss to the estate, for without the wood the value and amenity of the property would be enormously depreciated. The dwelling-house on Barmuckity is superior to an ordinary farm-house, and is really the mansion-house of the estate. The woods are situated on knolls, and add greatly to the beauty and amenity of the estate, besides giving much-needed shelter. The estate as it stands forms a very desirable small residential property. Without the timber it would become a bare bleak farm of no residential value, and depreciated in value even as a farm from want of proper shelter. 2. *Faith Wood*.—The objection to cutting down Faith Wood is that it would deprive of shelter all the arable land lying along its edge." . . .

On 4th May 1899 the Lord Ordinary (PEARSON) granted warrant to and authorised the *curator bonis* at the sight of Mr Gilchrist (first) to sell for cutting such portions of the following woods as are mature and ready for market, viz.—(a) Barmuckity Wood; (b) the Scotch fir and larch portion of Waulkmill Belt; and (c) Faith Wood: And (second) to thin the wood in the policies of Orton.

Opinion.—"The ward, who is over eighty-five years of age, is heiress of entail in possession of the entailed estates of Orton and Barmuckity, which lie about seven miles apart. The estates are well wooded. In particular, Orton has extensive woods, which contribute largely to its value, both in amenity and shelter. These woods have been carefully managed both since 1874 (when the curatory began) and previously. The result is that a considerable amount of the timber is now mature and ready for cutting.

"So far as the wood is within the policy attached to the mansion-house, the entail prohibits the cutting of it 'unless in the

course of necessary management and thinning, except such trees as have begun to decay.' So far as the policies are concerned, the curator now asks authority to thin the woods therein at the sight of a man of skill, to be appointed by the Court. A large amount of the remainder of the woods might properly be thinned; but the curator does not ask for any authority as to that, on the ground that it is within his ordinary powers of management. The authority is asked as to the policies only because it is desirable to avoid questions as to whether the prohibition contained in the deed of entail has been contravened.

"The main question raised is as to the extent to which the curator should now be authorised to sell the mature timber for cutting. The curator, before submitting the matter to the Accountant of Court, obtained reports from two men of skill—Mr Michie, forester at Cullen, and Mr Clark, forester at Haddo. These gentlemen differed considerably in their view as to what timber was fully matured. Mr Michie included a good deal more than Mr Clark, who reported that lots 5, 7, and 8 of Mr Michie's list were not ripe for cutting.

"The Accountant, when the matter was submitted for his opinion, obtained an independent report from a third gentleman, Mr Gilchrist, forester on the Banffshire estates of the Duke of Fife. Mr Gilchrist, while not differing very much from Mr Clark's results, took a still more moderate view of the amount that should be cut; and he further advised that the sales should be spread over several years. He at first suggested four biennial sales, extending over a period of six or eight years, from £2000 to £3000 worth of timber being offered at each sale; but he afterwards fell in (to a certain extent) with the Accountant's suggestion that there should be two sales.

"The Accountant reports his opinion (1) that the curator may now be authorised to sell three lots of the estimated value of £2224, 4s. 6d.; (2) that other five lots should be well thinned, the estimated value produced being £1188, 11s. 4d.; and (3) that after this is done the curator should approach the Court as to the advisability of cutting portions of the remaining four lots, as recommended by Mr Gilchrist. These proposals of the Accountant fall considerably short of the extent to which the curator now seeks authority to cut and sell the timber; while the heir-presumptive, who has lodged answers, maintains that even the Accountant goes too far in his recommendations, and that the note should be refused.

"The difference is to a certain extent one of principle, depending on the view taken of the duty of a *curator bonis* in such circumstances towards the ward, and towards the estate under his charge.

"As regards the ward personally, it seems to be agreed that so long as she remains under curatory it will make no difference to her whether her moveable estate is increased by the sale of timber or not. She lives at Orton House, and the income avail-

able for her maintenance was stated to be about £2000 a-year. The net rental of the landed estate is about £1400, and the remainder is made up by the interest of the moveable estate, which amounts to about £22,000. From this point of view, therefore, there is no demand, either of necessity or expediency, for the proposed sales of timber.

"As regards the curator's duty to the estate, the views of parties are widely divergent.

"It is maintained for the next heir that the curator's sole duty is preservation. He refers to the words of Lord Mure in the case of *Morison's Curator* (1880, 8 R. 213)—'I have always understood it to be a general rule in regard to the management of a lunatic's estate, that when a curator was appointed it was his duty to preserve the estate in substantially the same condition in which it was at the time of the appointment; so that if the party should recover, the estate should be handed over in as nearly the same condition as it was when the curator was appointed to manage it.'

"If the ward here were proprietrix in fee-simple, this rule (in the absence of special circumstances) might apply against authorising the sale of any timber which was not actually deteriorating. The sales of timber would in that case not augment the sum of her disposable estate (except to the extent of the interest on the price realised), and the rule would operate undisturbed by any such consideration. But here the ward's 'estate' consists in part of her interest as heir of entail in possession of timbered land; and it is argued that the duty to preserve the 'estate' is qualified by a duty to enlarge it as occasion offers, by putting the woods judiciously on the market. It is true that in so far as the wood is realised by the curator the ward, if she should convalesce, will be deprived of her option to leave it uncut; while if she should not convalesce, the estate will turn out to have been enlarged for the personal benefit of her heirs and not for herself. But I must recognise it to be part of the duty of a *curator bonis* to administer the estate to the best advantage on prudent and judicious lines; and I cannot hold that where an opportunity offers of so enlarging the disposable estate of the ward he should refrain because of the rule as to the preservation of the estate.

"On the other hand, the argument of the *curator bonis* seems to me to err in the opposite direction. It really amounts to this—that as it is the right of an heir of entail in possession to cut and sell all mature timber which is not required for the reasonable enjoyment of the mansion-house (*Boyd*, 1870, 8 R. 637), this right becomes a duty as soon as the heir in possession comes under curatory, and the *curator bonis* should be empowered to fulfil that duty. I do not say that the powers craved are quite so extensive as that, but I think this view is at the foundation of the curator's arguments. Thus the curator, in his remarks appended to the note, describes the power which he seeks as a power to cut

the woods which have reached maturity, 'and the proceeds of which should be *in bonis* of the ward.' And so in the argument before me the cutting of mature wood by the curator was likened to the reaping of crops or the gathering of fruits,—an analogy which would be apt to lead too far. I am not prepared to affirm the existence of any such duty in general terms—I mean the duty on the part of the *curator bonis* (on entering office and obtaining authority) to exercise the full rights of an heir of entail in possession in the matter of cutting timber. I think the statement of the duty would require to be qualified in several particulars. For one thing, regard must be had to the state of the timber market (see *Threipland*, 1848, 10 D. 1234, 20 Jurist, 450), though that is at the present moment favourable. Further, I think that some account should be taken of the character and the practice of the estate, as determining the probable action of an heir of entail in possession in the matter of cutting ripe wood, and that it should also be considered with some reference to the ward's pecuniary requirements. If these should demand it, I have no doubt that the full rights might be properly exercised; but if not, this would make it the more probable that these rights would not have been pressed by the heir in possession himself. I do not pursue this further, for it is not in accordance with practice to prescribe the extent to which, or the considerations upon which, the curator is to exercise the powers which he obtains. I have said so much lest it should be supposed that in granting authority to cut wood not actually deteriorating I intend to affirm to the full extent the argument urged for the curator.

"As to the extent to which the powers asked should now be granted, I have been guided mainly, though not entirely, by Mr Gilchrist's report as modified by the Accountant. I think the Accountant applies a somewhat severe test (owing perhaps to his viewing the ward as 'a liferentrix') when he describes the wood to be cut as 'such timber alone as is reported from time to time to be fully ripe and deteriorating in value.' No doubt all the woods of which that can be predicated should be cut at once (subject to the state of the market). But I think there must be a stage of maturity, short of actual deterioration, which would warrant the power being given; and after a careful examination of the reports I arrive at the conclusion that the authority should extend at this stage to the Barmuckity Wood proper, and so much of the Waulkmill Belt as is not hardwood; and also to Faith Wood, on the estate of Orton. I exclude Maryhill Wood *hoc statu*, because, although the Accountant includes it in his proposed first sale, Mr Gilchrist (while saying it is thoroughly matured and may be cut at any time) postpones it to the fourth sale,—six years hence; while Mr Michie and Mr Clark appear to exclude this plantation, or the bulk of it, from the timber which should be cut. This question of cutting down

Maryhill Wood requires to be further cleared up; but it is enough for the present purpose to point to Mr Gilchrist's reason for postponing its realisation, namely, 'That a large proportion of the trees are more thriving and vigorous, and would yield a better return if allowed to remain for a few years.' With regard to Blackhill Wood, the curator points out that in Mr Gilchrist's opinion all old trees standing amongst young growing ones should be immediately cut and removed,' and that the Accountant has not made any provision for this being done. Looking, however, to Mr Gilchrist's description of Blackhill Wood, I think all he means is that for the sake of improving the younger trees the older ones should be taken out. In so far as this imports merely thinning, the curator does not ask for authority to do it. Beyond that it may either await a further application as to Blackhill generally, or may be the subject of motion in this note, should the curator, upon advising with Mr Gilchrist, consider it to be urgent.

"I have not thought it desirable in the circumstances to tie the curator to a particular course of realisation by suggesting that future sales should be biennial or otherwise, or that the woods should be taken in a certain order. I think the proper course is to grant powers for the present to the extent expressed in the interlocutor, and to continue the note, that the curator may avail himself of it for future applications if so advised."

The curator reclaimed against this interlocutor. Mr Tod also reclaimed against this interlocutor, and likewise against the interlocutor of 25th April pronounced in the petition to charge. The reclaiming-notes in the note and the petition were heard together.

Argued for the respondent Mr Tod.—I. *On the Note for Power to Cut Wood, &c.*—The note should be refused, in respect that the curator had made no relevant averment in support of his application. The sole ground upon which he based his application was that the trees were mature and ready for market; and it was an unsound proposition that mere maturity would entitle a curator to cut timber. The curator's case rested upon the assumption that trees were not *partes soli*, but ordinary fruits like corn; but such a view was negatived by Stair, ii, 1, 2; Ersk. Inst., ii, 2, 4; and *Paul v. Cuthbertson*, July 3, 1840, 2 D. 1286, *per* Lord Moncreiff at 1305. *Esto* that an heir of entail in possession who was *sui juris* could cut all the ripe timber on his estate, it by no means followed that if he were insane or a minor his curator or tutor was entitled to do so. This was a case upon the law of curatory, not upon the law of entail. Cutting and selling wood—the conversion of heritage into moveables—was outwith the ordinary course of curatorial administration—Ersk. Inst., i, 7, 16, 17; Stair, i., 6, 8; Mackenzie's Observations, p. 157; and to entitle a curator to extraordinary powers he must make out a case of necessity, or at all events of high expediency.—Fraser, P. and C. 492; *Somer-*

ville's Factor, February 6, 1836, 14 S. 451; Pupils Protection Act, 1849, sec. 7. No such case had been attempted to be made out here. The ward was in perfectly comfortable circumstances, she required no addition to her income, and the only possible purpose or result of the application must be the aggrandisement of her moveable property at the expense of her heritage. If the ward had been a fee-simple proprietor the power asked for here would never be granted. Why should it be granted because she was a proprietrix under an entail? The true principle of curatorial administration was to preserve as far as possible the *status quo*.—*Morison's Curator Bonis v. Morison's Trustees*, December 3, 1880, 8 R. 205, per Lord Mure, 213. The matter might have been very different if the curator had been in a position to aver that the timber was in imminent risk of serious deterioration. But he made no such averment, and the reports of the curator's own men of skill were perfectly consistent with the view that the timber would last out the ward's lifetime without appreciable deterioration. Again, the matter might have been different if the curator had been able to say that this was a "timber-estate," that is to say, an estate where timber was systematically grown and cut for the sake of revenue—(*Honywood v. Honnywood*, 1874, L.R., 18 Eq. 306, per Jessel, M.R.). But the very contrary was the case, as the report of the Accountant showed. The practice of the estate was not to treat the woods as a subject of commerce. *Threipland's case*, June 7, 1848, 10 D. 1234, was really an application for authority to thin. II. *On the Petition for Authority to Charge*.—At common law the curator of a ward who was the proprietor either of a fee-simple or of an entailed estate must establish necessity, or at least very high expediency, before the Court would grant authority to him to sell or burden his ward's heritage—*Coll's Tutor*, 1800, M. Tutor, App. 1; *Vere v. Dale*, 1804, M. 16, 389; *Finlaysons*, December 22, 1810, F.C.; *Boyle*, February 19, 1853, 15 D. 420; *Maconochie*, February 3, 1857, 19 D. 366, per L. P. McNeill 368, Lord Deas 369, Lord Neaves 373; *Lawson v. Lawson*, February 20, 1863, 1 Macph. 424, per L. J.-C. Inglis, 429, 430. Section 7 of the Pupils Protection Act 1849 proceeded on the same principle. Section 11 of the Entail Act of 1882 had undoubtedly enlarged the powers of curators of entailed proprietors, but it had not dispensed with the conditions attached by the common law to the granting to curators of extraordinary powers. On the contrary, the proviso at the end of the section practically incorporated the common law rule. Here the curator did not even aver that the proposal to charge was for the benefit of the ward, and the Lord Ordinary was wrong in interpreting the proviso as he had done. To increase the ward's disposable estate was not to benefit the ward. The ward was in perfectly comfortable circumstances and the addition of £3000 to her moveable estate could in no way benefit her.

Argued for the curator—I. *On the Note*

for Powers to Cut, &c.—It was established by a long series of decisions—*Cathcart*, M. 15,403; *Hamilton*, M. 15,408; *Gordon*, January 24, 1811 (F.C.); *Mackenzie*, March 1, 1824, 2 S. 643; *Bontine*, November 17, 1827, 6 S. 73; and *Boyd v. Boyd*, March 2, 1870, 8 Macph. 637—and indeed was conceded by the respondent—that an heir of entail in possession was entitled to cut ripe timber. What the curator proposed to do here was to exercise the option which the ward would have had if she had been *sui juris*, and to exercise it according to the standard of a prudent, enlightened, and fair-minded proprietor. The curator had limited his proposals so as carefully to preserve the amenity of the mansion-house. In his view a prudent proprietor would proceed to cut and sell the rest of the timber on the estate. It was admitted to be fully mature; only mature trees would be cut; and what was to be cut would not improve if allowed to stand. It was a curator's duty to increase his ward's estate, and he truly did so when he added to that portion of it of which if *sui juris* she would have an unrestricted power of disposal. The judgment in *Morison's Curator Bonis*, *ut sup.*, proceeded upon the footing that if the ward there could not exercise her option between a legal and a testamentary provision it would be open to her representatives at her death to exercise that option. That view could not possibly apply here. The option of cutting timber could never be exercised at all if not during the ward's life. The fact that an heir of entail was entitled to cut timber showed that timber was regarded as a crop, and therefore that the separation of timber from the soil was not an alienation of heritage or an alteration of the character of the ward's succession. II. *On the Petition to Charge*—The object of this application was to redress the balance between the ward's heritable and moveable estate which had been disturbed by paying for permanent improvements on the heritage out of the movable funds to the extent of £3000. It was not therefore an attempt to alter the character of the ward's succession, but an attempt to undo such an alteration. The Lord Ordinary was correct in his view of what the statute meant by "benefit" of the ward. Any proposal which would have the effect of enlarging that part of her estate which but for her mental incapacity would have been at her disposal must necessarily be for her benefit.

At advising—

LORD PRESIDENT—I. *On the Note*—We have had a pretty general discussion of the law relating to trees, but although none of it was alien to the question before us, many of the cases cited have only an indirect bearing on it.

For present purposes it is assumed that the ward, who is an heiress of entail, would have right if *sui juris* to cut all the trees about which questions have been raised. But this application is by her curator, she herself being insane, and the question is, not what are the lady's own powers, but how much of those powers shall be exer-

cised by her guardian. The region of law in which we are is therefore the law of guardianship, and we are to apply to the woods of the ward's estate the general principles of that law.

Now, the most general of these principles is that the curator of an insane person is there to preserve the estate. He is to do so in the spirit of one whose ward may at any time come back to her full legal rights. He is therefore to keep things going rather than to change; he is to do nothing that is irretrievable unless in case of necessity; and he is to preserve as far as possible such options as are open in the management of the estate, reserving them for his ward if she convalesce, or if not, then for her heirs. Moreover, one of his specific duties is not by any voluntary act to change the succession of the ward. With reference to one of the specialties of this case I should say that the policy of the guardian will be especially conservative where the ward is of great age.

These general principles seem to me to carry us a long way towards the solution of the questions in dispute. They undoubtedly negative certain views which are stated in the papers before us. First of all, they prevent us from acceding to the doctrine that it is the duty of the curator to enlarge "the disposable estate of the ward" (by taking from the entailed estate). This seems to me entirely opposed to principle, and it would lead to intolerable consequences. The curator not only has no duty to divert from the next heir of entail what, apart from such interference, would naturally go to him; but, on the contrary, his duty is to be slow to do anything involving such a diversion. The contrary view would set the curator to work to pillage an entailed estate in order to augment the disposable estate of the ward, and would involve a chronic state of war with the next heir of entail.

The principles of the law of guardianship to which I have appealed are readily applicable to the case of the wood of an entailed estate, and I shall state what seem to me some of the rules which should govern the action of the petitioner as curator of a ward whose pecuniary circumstances are affluent.

1. On some estates wood is grown and cut systematically, one plantation being ready for cutting this year, and another next year, so that there is a regular rotation. On an estate of this character, and especially where this merchandise has been established or carried on by the ward before his disability, it would be natural that it should be continued. But I mention this case for the purpose of saying that Orton woods are not in this situation.

2. On an ordinary estate the fact that the timber in a particular wood is mature is not of itself a good reason for the curator cutting down that wood. Those trees may remain stationary as regards health and value for years to come. It is only when deterioration begins that the question of cutting has to be considered.

3. Even deterioration is not necessarily a reason for cutting. Some trees after they begin to go back remain for a long time comparatively vigorous, and do not in the meantime lose much in value.

4. But further, it is a mistake to consider each wood separately as an article of merchandise, and to determine its fate accordingly. Regard must be had to the character of the estate generally, and to the effect which the cutting of each wood might have on the estate as a whole. If the cutting of a wood directly or indirectly affects injuriously the amenity of the estate, this must be weighed against the pecuniary loss involved in a postponement of the sale of the wood. Unless the scale is clearly in favour of cutting, the wood should be let alone.

5. The history of the administration of the woods of the particular estate in regard to cutting should be regarded, and nothing should be done to invert the general policy which has hitherto been pursued, so far as that is applicable to the present time.

When we turn to the circumstances of the estate of Orton the facts are pretty plain. The general conditions of things is distinctly summed up by the Accountant of Court in the print—"It will be seen from the maps produced that the prominent feature of the Orton estate is the finely wooded nature of its grounds. The soil seems specially adapted for timber growth, and the amenity of the estate largely depends upon the preservation of the woods.

"During the lifetime of the father of the present life-rentrix, and of her brother who succeeded him, a period of over sixty years, the course of wood management appears to have been devoted to the preservation of this salient feature.

"There was no actual cutting for sale, only a careful thinning out of the weak and decaying trees. The late curator, who acted for twenty-four years, followed the same course of management, and the same judicious thinning, with the result that all the experts recently employed agree that the woods are in first-rate condition."

That I take to be the description of an estate where, *prima facie*, the general duty of the curator of the lunatic heiress, aged 86, would seem to be to let well alone, to watch the woods, and to thin where thinning is needed.

Of the specific proposals of the curator, so far as they exceed the allowance of the Lord Ordinary, I shall say no more than that they do not fall within the principles which I have indicated. But I must say also that I cannot go as far as the Lord Ordinary has done, although this is perhaps the less surprising that I do not agree with some of the general views adopted by his Lordship. My objections, however, to having the particular woods cut which are mentioned in the interlocutor are specific. Barmuckity forms a separate estate, and the present proprietrix or her successor might quite well desire to treat it as a separate estate. It is plain that if all the wood is cut down, the estate of Barmuckity stands in a different position and is less

available than if the wood stands. This option should be kept open to the ward or her heir, unless for good reasons. Now, all that is said against Barmuckity wood is very weak. At worst the timber is only entering the stage of deterioration. The same applies to the Waulkmill Belt, which is on the estate of Barmuckity.

The reasons for cutting Faith Wood are also in my opinion inadequate.

I am for adhering to the Lord Ordinary's interlocutor in so far as it authorises thinning, and *quoad ultra* recalling it and refusing the note.

II. *On the Petition.*—This is a petition for authority to charge Miss Duff's entailed estate with moneys about which it is historically true that they were in their several times spent upon the entailed estate and did improve it. The expenditure took place at various periods within the last twenty years and during the administration of a former curator. This former curator paid for the expenditure out of accumulated funds in his hands, and he never proposed to charge the entailed estate. In applying to the Court under the Pupils Protection Act for authority to spend these monies, he never suggested that he was going to apply for authority to charge the entailed estates. In some of his several applications he explains that he has accumulated funds in his hands, and in one of them he expressly asks leave to pay the expenditure out of accumulated funds. In point of fact the moveable estate of the ward increased during the late curator's administration from £18,000 to £22,000, even after paying the expenditure now in question. Now, a new curator having come into office reviews the situation and proposes to make all this expenditure a charge on the entailed estate.

The statute which authorises the curator of a lunatic to petition the Court for authority to charge her estate with improvement expenditure only allows it to be done if the Court are satisfied that it is for the benefit of the lunatic. In thus stating the law I am applying to the specific case of a lunatic words which have a more general application, and am applying to the specific case of a petition to charge words which comprehend all manner of entail petitions. Not the less is this an accurate statement of the rule which is prescribed to us in the matter in hand. We cannot grant this petition unless we are satisfied that it would be for the benefit of the lunatic. What, then, is the benefit to her?

Curiously enough the curator gives this question the go-bye. He ignores the proviso in the Act and makes no averment on the subject.

The Lord Ordinary comes to his rescue, and solves the problem on a very general ground. Everything, says the Lord Ordinary, is for the benefit of the lunatic which enlarges her disposable estate. I am quite unable to see the validity of this answer. First of all, in her present condition of disability, and if regard be had to that in the first place, to charge this money on her entailed estate does not affect her personal

happiness or comfort in the slightest degree. Again, supposing her to convalesce tomorrow, she can judge for herself whether she will charge the estate or not. If she chooses to charge the estate she can do so; if she prefers to leave things as they are, again she can do so. On the other hand, if she thought that the *status quo* as we now find it was more according to her wishes, she would have to undo what we are now asked to do by clearing off the debt we had put on.

Accordingly, I can find no benefit to the lunatic in what is proposed. Let it be observed that we are not now considering the question as it would have arisen had it been proposed as part of the plan of expenditure to find the money by borrowing and burdening the entailed estate. I can quite understand that a question might have arisen as to whether it was the better administration to pay for this expenditure out of an increasing moveable estate or to burden the estate. But the curator, with the sanction of the Accountant and the Court, practically solved that question at the time. He decided to pay it out of funds in hand. And what we are now asked to do is *ex intervallo* to upset that decision for the purpose of redressing the balance between the heritable and the moveable estates. This is the sole justification of the present petition. But it seems to me to prove that what we are asked to do is neither more nor less than to alter the succession to a part of the ward's estate. I hold that to be illegitimate, and I am therefore for recalling the Lord Ordinary's interlocutor and refusing the prayer of the petition.

LORD ADAM—I. *As to Cutting Wood*—In the first of these cases I have been struck on reading the statement of Mr Macqueen as to the conflicting views entertained by himself and expressed to him by the heir of entail as to the proposed cutting of wood being for the benefit of the entailed estate, and indeed it is clear from what he says in his note that that is not his motive for applying for these special powers. What he says in his note is this—"The curator conceives it to be his duty to exercise the right pertaining to the ward of cutting and selling such plantations and trees outside of the policy as are ready for market, which in the curator's opinion is the course which would be followed by a prudent and careful proprietor, and that he as curator is not entitled to leave this right of the ward unexercised during her life and thereby forfeit the permanent money benefit which can be secured for her estate," and then, to emphasise the matter he concludes with these words—"In view of the great age of the ward, the curator desires to proceed on that matter with all expedition." Now as I read that, it simply comes to this, that the curator considers it his duty to get as much money as he can out of the entailed estate and to convert that into the ward's estate. That is really what he brings forward as his object in presenting this application; and we see that, if

he had had his way in this matter, the result would have been that he would have considered it right to clear off about three-fourths of the whole wood on the estate, to turn that into money, and to leave the estate depreciated to certainly one-half of the value of the estate. These are really the motives which actuated the curator in applying for the special powers.

Now, for myself, I can see no reason whatever why this entailed estate which is under his charge should not be treated exactly as if it were fee-simple estate. I think the curator is bound to do the best for the estate in the one case as in the other, but that is not his view; for his view is, as I have said, that the entailed estate is to be depreciated for the benefit, the money benefit as he says, of his ward. Now, I agree with your Lordship that nothing should be done to interfere with this entailed estate without necessity, and so far as I can see there is no necessity in this case. It is clearly not necessary for the ward, for she has ample funds and everything that can be desired for her welfare without converting any of this entailed estate into money. So far as I can see the only benefit that would accrue from this proceeding is benefit to heirs who, when this lady died, would reap much larger benefit. Now, on that matter I think the curator has misapprehended his rights. I agree with Lord Mure in what he says in the case of *Morison's Trustees*, that the duty of a curator to a lunatic is to preserve the estate substantially as it was at the date of his appointment as far as that may be possible. I think that is a correct view of the law. Now, the age of the ward here is not, although the curator seems to think that it is, a reason why these matters should be carried through, as he says, with expedition in order that this money may be secured to the estate. Now, I agree with your Lordship that if it be, as he seems to think, more or less imminent that his curatory should cease in consequence of the great age of his ward, that is all the more reason for his taking no steps in the matter; for, as your Lordship has pointed out, it is the duty of the curator to make as little change as possible so as not to alter the succession to the estate under his charge. On these general grounds I am of opinion with your Lordship that this note should be refused with the exception of what your Lordship has pointed out. I do not think it necessary to go into the details of this particular case. In all that your Lordship has said on these points I agree, and therefore I agree with your Lordship that in so far as power is granted by the Lord Ordinary to cut wood in Barmuckity and other woods, that should be refused.

II. *As to Charging Improvement Expenditure.*—Now, with reference to the other case, the expenditure, as your Lordship has pointed out, was made a great many years ago and when the ward was much younger and might at any time recover her health. Now, we know the curator had ample funds in his hands not only to give every comfort to the ward but also to meet this expendi-

ture—about that there is no question—and the question therefore, it appears to me, that was before the curator was whether it was right and proper of him to borrow money—for that is what it comes to—for the whole expenditure, and to charge this entailed estate with the whole of the sum. That was the question before him, and I have no doubt that that was a question carefully considered by him and his advisers at the time. That was one question, and the other question was whether it would be more prudent and proper simply to pay the expenditure. Well, he, with the advice of the Accountant of Court, came to the conclusion that the proper and wise course was to borrow a portion of the sum and charge the estate with that, and to leave the remainder uncharged, so that if this lady recovered her health she might dispose of that surplus by charging it if she pleased, or leaving it uncharged if she pleased. Now, in that state of matters I am very far from being satisfied, as the petitioner is, that it would have been for the benefit of the ward that the whole of that sum should be charged on the entailed estate. I am not at all certain of that; I think that it is rather the other way, or is the other way. Well, then, if that be so, the question comes to be, whether there is any benefit to the ward?

Now, it seems to me that it is quite clear that it would not be for her benefit. The only effect, as it appears to me, would be this, that the entailed estate would be burdened with this amount, and the moveable estate would be to the same extent increased. I do not say that there would be any duty upon her to restore to the estate what was taken from it, as your Lordship has pointed out. That is not a consideration at present before us. The consideration which we have before us at present is this, Whether or no the proposed charging on this estate would be for the benefit of the ward. Unless the curator satisfies the Court that it would be for the benefit of the ward that this charge should be made, the Court will not make it. All I can say is that the petitioner has not satisfied me that it is for the benefit of the ward that the estate should be charged as proposed.

LORD M'LAREN—I. *As to Cutting Wood*—I agree with the statement made by your Lordship in the chair in exposition of the principles which govern this chapter of the law of administration, and also in the application of these principles to the case of these two petitions. If I add anything it is only to say that I think the fundamental rule underlying the decisions regarding curatorial administration is that the Court should consider first the interest of the ward, secondly, the interest of the estate, and thirdly, the conservation of the estate in its existing condition of moveable or immoveable so far as consistent with the primary requisites. There may be cases where it is necessary to diminish the estate. If the income, for example, be insufficient for the maintenance of the ward, there may be cases where it is necessary to convert

heritable estate into moveable if the ward can only be maintained by means of selling or burdening of an heritable estate. But in the present case I see no reason which would justify any interference with the distribution of the estate in which the heirs and executors of the ward are interested. In the first case we have an estate containing a large amount of valuable timber which it has not been the practice of the administrators of the estate to cut. Now, considering that the ward is at an advanced age, in the first place it is not necessary for her benefit that the wood should be cut, because her income is more than sufficient to maintain her. Next, I think it is impossible to maintain that it is for the benefit of the estate as a whole that this timber should be cut, because there is no suggestion that within any time to which the ward may look forward, the value of the estate would be sensibly diminished by leaving it uncut, and the proposal is that on an occasion unconnected either with the interests of the ward or the estate as a whole, a valuable portion of the entailed estate shall be converted into money by cutting down the timber for the benefit of the executors. I agree with your Lordship that such a proceeding is altogether inadmissible in view of any sound principle of administration.

II. *As to Charging Improvement Expenditure*—Then with regard to the proposal to add to the improvement debt, I think that in most cases it would probably be regarded as sound administration that improvement debt should be charged upon the estate, because it is the habit of heirs of entail when improvements of the kind contemplated by the Entail Statutes are necessary to take advantage of the powers to charge, but it may very well be that in administering the estate of an insane person, who does not require the whole of the income of the estate for his or her maintenance, there may be surplus rents which may reasonably be applied towards payment of part of the improvement debt, and that it may be for the benefit of the ward that they be so applied, so that in the event of the ward's convalescence the estate may not be burdened more than is necessary. We do not know what were the facts which came before the Lord Ordinary when a portion only of this improvement debt was charged on the estate, but we must assume that the considerations were carefully weighed, and that so much only as it was thought necessary in the interest of the estate was charged upon it. On this subject also I am clearly of opinion with your Lordships that it would not be in accordance with proper administration *ex intervallo* to alter what has been already decided for the purpose of enlarging the estate which would eventually go to the executors of this lady.

LORD KINNEAR concurred.

I. The Court adhered to the interlocutor of the Lord Ordinary in so far as it authorised the curator to thin the wood in the

policies; *quoad ultra* recalled it and refused the prayer of the note.

II. The Court recalled the interlocutor of the Lord Ordinary and refused the prayer of the petition.

Counsel for the Petitioner—Ure, Q.C.—A. O. M. Mackenzie. Agents—Mackay & Young, W.S.

Counsel for the Respondent—W. Campbell, Q.C.—J. H. Millar. Agents—W. & J. Cook, W.S.

Counsel for the Minuter Mrs Chancellor—Macphail. Agents—Melville & Lindesay, W.S.

Friday, July 7.

FIRST DIVISION.

[Edinburgh Dean of Guild Court.]

DIRECTORS OF ASSEMBLY ROOMS, EDINBURGH v. SOMERVILLE.

Dean of Guild—Procedure—Failure to Hear Parties—Appeal—Competency—Edinburgh and Municipal Police Act 1879 (42 and 43 Vict. cap. cxxxii), sec. 161.

Section 161 of the Edinburgh Municipal and Police Act 1879 provides that "The Dean of Guild Court may, on the application of the burgh engineer, cause every existing building used or to be used as a place of amusement or entertainment . . . to be inspected, and may, after hearing the persons interested, direct such means to be taken for the proper ventilation, or for the providing of proper means of access and exit to such buildings, and for protection from fire and other damages to the public as to the Court shall seem fit."

In a proceeding under this section dealing with the sufficiency in case of fire or panic of the exits from the Music Hall, the respondents (the directors of the hall) at an initial stage applied to the Dean of Guild Court to see the report on which the public authorities had taken action. This was refused. They subsequently moved that the public authorities should state in a condescendence their objections to the existing exits. This was also refused. Thereafter the Court pronounced an order finding that the existing exits were insufficient, and calling upon the respondents to lodge a minute setting forth the remedies they suggested. This minute having been lodged, the Junior Legal Assessor, in the absence of the Court, having refused to hear counsel for the respondents, issued an interlocutor finding the proposals of the respondents insufficient, and a further interlocutor was afterwards pronounced dealing with additional proposals by the respondents.