lated rents, plus certain superadded conditions agreed to by them as conditions of their tenancy, one of which conditions makes the leases terminable on the cessation of their employment.

The Court answered the first question of law in the negative, the third question and both branches of the fourth question in the affirmative, and found it unnecessary to answer the second question.

Counsel for the First Parties—Constable, K.C.—W. H. Stevenson. Agents—John C. Brodie & Sons, W.S.

Counsel for the Second and Third Parties—Hon. Wm. Watson, K.C. — Aitchison. Agents—Ross Smith & Dykes, S.S.C.

Thursday, June 10.

FIRST DIVISION.

MACDONALD'S TRUSTEE *v.* MEDHURST AND OTHERS.

Process — Special Case — Insanity—Application for Appointment of Curator ad litem to Party to a Special Case — Competency.

An application for the appointment of a curator *ad litem* to a party to a special case, who was insane, *refused* as unnecessary in that the insane person was adequately represented by persons who were parties to the case.

Question whether the application was competent.

Observations per Lord Johnston on the practice of the appointment of curators *ad litem* and its competency.

Robert Urquhart, sole surviving trustee acting under an antenuptial contract of marriage entered into between the Reverend William Macdonald and Miss Louisa Hoyes, *first party*, Mrs Norma Gordon Hunter or Medhurst, *second party*, and the said Mrs Norma Gordon Hunter or Medhurst and others, *third parties*, brought a Special Case for the opinion and judgment of the Court. In Single Bills counsel for the first and second parties stated that Dr Donald Macdonald, one of the parties of the second part, was an inmate of a lunatic asylum, and asked the Court to appoint a curator *ad litem* to him.

Counsel referred to *Swan's Trustees* v. *Swan*, 1912 S.C. 273, 49 S.L.R. 222, and *Mackenzie's Trustee* v. *Mackenzie*, 1908 S.C. 995, 45 S.L.R. 785.

At advising—

Lord President—When this Special Case was moved in the Single Bills an application was made to the Court for the appointment of a curator *ad litem* to a Dr Donald George Gordon Macdonald, who is designed as lately at 17 Hamilton Avenue, Aberdeen, presently at the Asylum, Banstead, Surrey.

I am of opinion that the application ought to be refused, on the ground that it is in the circumstances unnecessary, inasmuch as the interest of Dr Macdonald is adequately represented by persons who are parties to this case.

The motion when made was supported by reference to a decision in the Second Division of the Court in the case of *Swan*, 1912 S.C. 273, 49 S.L.R. 222, in 1912. On examination of the authorities it was found that the decision in question was in apparent conflict with a prior decision in the same Division of the Court, and further, that doubts existed regarding the competency of the application.

Now my brother Lord Johnston has been at pains to formulate the doubt and the reasons which have given rise to the doubt, and has expressed them in a written opinion which he would have delivered had he been present with us to-day, and which I shall by-and-by hand to the reporters.

Although his Lordship agrees with me in thinking that the application here is unnecessary, I think it desirable that the profession should know that doubt exists regarding the competency, and that in future a motion such as this will not be granted as a matter of course without discussion, and accordingly I invited Lord Johnston to give expression to his views upon the competency of the application.

For my own part I desire expressly to reserve my opinion on the question of competency. My sole reason for thinking that this application should be refused is that in the circumstances I regard it as unnecessary.

Lord Mackenzie—I agree with your Lordship, and have come to that conclusion after having had an opportunity of reading Lord Johnston's opinion.

Lord Skerrington—I agree with both your Lordships.

Lord Johnston — [*Written Opinion handed to Reporters*]—While I agree with your Lordship that this motion may be disposed of on the specialties of the case, it presents a question which cannot be permanently avoided, and which will one day require the attention of both Divisions, if not of the whole Court. I concur with your Lordship that it is better to postpone it until it arises in a case which compels its decision. But as it is one of wide bearing on the practice of our Courts in the matter of the representation of minors and pupils in contentious litigation, I am, with your Lordship's approval, to lay before the Court a statement showing generally how the matter at present stands, which may possibly be of use to the Court and to the profession when the question again comes before the Court.

The circumstances of the present case are that by her marriage contract in 1880 Miss Louisa Hoyes, afterwards Mrs Louisa Macdonald, conveyed certain securities to trustees for behoof of herself and her husband, the Rev. William Macdonald, in liferent and the issue of the marriage in fee, but with a destination-over, in event of no issue and of Miss Hoyes not entering into a second marriage, in favour of three ladies,

Mrs Louisa A. Gordon or Collie, Mrs Caroline M. Gordon or Smith, and Miss Johanna H. Gordon, afterwards Macdonald, "or their heirs equally, share and share alike."

There was no issue of Mrs Louisa Macdonald's marriage. She survived her husband and died in 1913. She also survived the destinees over named in her marriage contract, viz., Mrs Collie, Mrs Smith, and Mrs Johanna Macdonald. She left a testament in favour of two granddaughters of the said Mrs Smith.

A question has arisen between the heirs of (*a*) Mrs Collie, (*b*) Mrs Smith, and (*c*) Mrs Macdonald on the one part, as second parties to the case, and the executors under the general testament of Mrs Louisa Macdonald on the other part, as third parties to the case, as to whether Mrs Louisa Macdonald's marriage contract or her testament is to rule the succession to the funds settled by her marriage contract. To determine this a Special Case has been presented in which the question of law is — "Do the funds in question fall to be paid (*a*) to the parties of the second part, or (*b*) to the parties of the third part?"

One of Mrs Johanna Macdonald's children, and therefore one of her heirs, is Dr Donald Macdonald. Nothing is specially said about him in the Special Case, in which he is treated as a party of the second part along with his sisters, except that in 1904, when resident in Aberdeen, he assigned any interest he had in Mrs Louisa Macdonald's marriage-contract funds to trustees for the English and Scottish Law Life Assurance Association in security of advances. The trustees for the Association are made parties to the case along with the second parties in respect of their riding claim on Dr Macdonald's interest. But from the partibus appended to the Special Case it appears that Dr Macdonald was when the case was presented, and it is admitted is now, an inmate of a lunatic asylum. No notice of this was taken in the Special Case, which was presented just as if Dr Macdonald was *sui juris* and *capax*.

But the case having been so presented we are now asked by motion in the Single Bills, as if it were in ordinary course, to appoint a curator *ad litem* to Dr Macdonald (who, it is admitted, has not been cognosced, and to whom it is not proposed to apply for a curator in ordinary form). The application was supported on the strength of what was done by the Second Division in the case of *Swan*, 1912 S.C. 273, 49 S.L.R. 222. I respectfully think that the course taken by the Second Division in that case was inconsistent with the judgment of the same Court in the case of *Mackenzie*, 1908 S.C. 995, 45 S.L.R. 785, and the authorities on which that decision proceeded. Having regard to the circumstances that Dr Macdonald is only one of several children all *in pari casu*, and further, that he has assigned his interest in the succession to the English and Scottish Law Life Assurance Association, who are duly represented, I agree with your Lordship that we should refuse the application as unnecessary. There are sufficient contradictors without Dr Macdonald; and the trustees will be sufficiently protected by the judgment in the case though Dr Macdonald be not a party to it, which, as at present advised, I must respectfully hold he is not. But regarding as I do the question as one of principle, if your Lordships found it necessary to proceed on precedent, I should have submitted that the matter called for reconsideration in conjunction with the Judges of the Second Division, and for these reasons—

Special cases were introduced by the Court of Session Act 1868, section 63, and it is worth while to note the terms of that section. It says — "Where any parties interested, whether personally or in some fiduciary or official character, in the decision of a question of law shall be agreed upon the facts, and shall dispute only on the law applicable thereto," it shall be competent for them, without raising action, or at any stage of an action, to present a case signed by their counsel "setting forth the facts upon which they are so agreed, and the question of law thence arising upon which they desire to obtain the opinion of the Court." On such case they may obtain either the opinion of the Court merely (this in practice is never done) or an extractable judgment of the Court. It is also provided that a judgment in a special case may be taken for review to the House of Lords, but that such review may be excluded by consent of parties.

It is plainly evident that agreement is the basis of any such case. Hence the present case properly concludes, "This case adjusted and settled by us, counsel for the parties," and accordingly bears the signatures of counsel. For such signatures counsel *ex hypothesi* hold the mandate of their clients, and a case so adjusted and signed forms, where judgment is asked, as binding a contract upon the parties to refer to the judgment of the Court, on an agreed-on state of facts, a definite question or questions of law, as any submission possibly could be. It is, in fact, a reference to the Court, with statutory provision for an extractable judgment. And one is at once led to ask two questions—First, who authorised Mr Arthur R. Brown, advocate, to sign on behalf of Dr Macdonald, and so to commit him to a reference; and second, what would be the effect of *ex post facto* appointing a curator *ad litem* to Dr Macdonald, even assuming the curator *ad litem* so appointed approved of and adopted the Special Case, as was done in *Swan's* case? I have myself at the outset difficulty in understanding how Mr Brown had any authority to sign the case, and equally, how such approval and adoption by a curator *ad litem* appointed *ex post facto* could make Dr Macdonald a party to an agreement to which it cannot possibly be contended that he is yet a party.

The question raised is not affected by the circumstance that in this particular case there are practically no facts, beyond the terms of two testamentary deeds, on which agreement is required. The question is a general one, applying equally to all special cases.

The difficulty which I have indicated above depends upon my conception of the functions and powers of a curator *ad litem*, as well as upon the recognised legal incapacity of his ward.

I cannot see that the appointment of a curator *ad litem* would be of any avail if the ward is not yet a party to the case, and it seems to me that a curator *ad litem*, if he approve and adopt the special case on behalf of the ward, would be without authority homologating an incomplete and invalid contract, and one which *ex hypothesi* cannot be homolgated by the act of the ward himself—that is, he would be without authority contracting on behalf of his ward. Now my conception of the function of a curator *ad litem* is that he is appointed to watch the interest of his ward in a particular litigation, and see that his case is properly conducted, but that he does not represent his ward and has no power to contract on his behalf. It is possibly a good test of the situation to ask, Could a curator *ad litem* effectually and irrevocably compromise his ward's case beyond redress? It is only another illustration of the situation which would be created by the appointment craved, to point out that the curator *ad litem* might find himself binding his ward to accept the judgment of this Court and renounce his right of appeal to the House of Lords, if that was the footing on which the case was presented, or might be prevented taking an appeal on behalf of his ward, though advised to do so, if the view expressed by Lord Dunedin in *Crum Ewing's* case, 1910 S.C. 484 and 994, 47 S.L.R. 439 and 876, is well founded, provided only this Court is unanimous and the curator *ad litem* is without funds to prosecute such an appeal.

I therefore desire respectfully to examine the judgment of the Second Division in the case of *Swan* (*supra*), and the cases to which their Lordships were referred, and on which it must be assumed that they proceeded. These were *Christie*, 1873, 1 R. 237; *Ross*, 1877, 5 R. 182, 15 S.L.R. 109; *Wallace*, 1830, 9 S. 40; *Mitchell*, 1864, 3 M. 229; *Walker*, 1867, 5 M. 358; *Anderson*, 1871, 8 S.L.R. 325; *Mackenzie*, 1845, 7 D. 283; *Rossie*, 6 S.L.R. 357; *Park*, 1876, 3 R. 850, 13 S.L.R. 550; *Crum Ewing* (*supra*); *Scott*, 1908 S.C. 1124, 45 S.L.R. 839.

On noting the cases cited it is at once apparent that the recent and important decision of the Second Division in *Mackenzie's Trustees* (*supra*) was not brought under the notice of the Court, whose composition had almost entirely changed since 1908. This materially affects the authority of the procedure adopted in *Swan's* case, and relieves me of any hesitation in calling its propriety in question.

I think that it must be admitted that there is both absence of principle and inconsistency in much that has been said and done in the matter of actions both at the instance of and against parties under incapacity. I may have to make reference to some such cases. Personally I do not think that any different principle applies to them and to special cases. But so far as the practical question is concerned I confine myself for the present to procedure by special case. Until the special case is in Court, and the Court seised of it, it is not even suggested that a curator *ad litem* can be competently appointed. In all contested litigation by ordinary action there is in theory the contract of litiscontestation entered into, not at the first presentation of the case to the Court, but at a subsequent and definite point of procedure. In the matter of the special case, on the other hand, the question of contract arises sharply at a point before the case is presented to the Court at all, and affects the question of the competency of the special case itself the moment it is presented to the Court. To make a special case competent therefore there must be a complete and effective contract between the parties to it before the case comes into Court. If an essential party is *incapax* and is not represented by a legal guardian he cannot bind himself by the necessary contract to refer and a competent special case becomes impossible. If he is not an essential party—that is to say, if the same interest, as is the case here, is amply represented—there is no reason that I can see why a special case should not be presented by the other parties interested and be entertained by the Court. It is true the judgment will not be *res judicata* against the *incapax*, but that does not appear to me to be sufficient reason why others should not have their rights finally ascertained by this simple and inexpensive means, instead of by the multiplepoinding for which it was so frequently the convenient substitute. There is, as I have long thought, a superstition without foundation among practitioners that to make a special case competent, not merely every possible interest must be adequately represented, but every possible individual having such possible interest, in common with it does not matter how many others, must be a party. It is that superstition which I think has suggested application for the appointment of a curator *ad litem*, which I fully admit has occasionally been granted by the Court without, I think, adverting to the question of competency. I venture to repeat it—there must precede the presentation to the Court of a special case an agreement between the parties to it. To such an agreement a person *incapax* and unrepresented cannot himself be a party; he has not therefore competently come into Court; the jurisdiction of the Court is not competently appealed to by him, though the matter at issue may be one in which he is concerned; and the situation has not, I think, arisen in which the Court has either power or duty to protect him. If after the case is in Court, with the *incapax* nominally a party to it, the Court appoints a curator *ad litem* to him, who thereafter assumes to adopt on behalf of his ward the special case, what does that amount to? Why, as I have already indicated to the Court, assuming the power to appoint a curator to the *incapax ad hunc effectum* only, and on the motion of his adversary, who shall not merely see that his interest is properly attended to and his case properly pleaded, which is, I think,

the sole function of a curator *ad litem*, but who shall have power to contract for him. Adoption by the curator *ad litem*, who is not his administrator-at-law or his *curator bonis*, or factor *loco tutoris*, *ex hypothesi* places the ward in the same position as if he had validly become a party to the case *ab initio*. The appointment *ex post facto*, if it is to have any effect, must be accepted as the precise equivalent of an appointment *a priori*. And it is not suggested that the Court has the power, or has ever considerately assumed and exercised the power, on the motion of a hostile party, *ab ante* to appoint a *curator bonis*, under the guise of a curator *ad litem*, for the limited purpose of a proposed litigation—*cf. Wallace* (*supra*).

As there has been assumed to be some grounds for saying that a practice has arisen of making such appointments, I shall now examine the traces which there are to be found of such in the books.

I may add in passing that I think some looseness of reasoning in the matter has arisen from the practice of always referring to the official as a curator *ad litem* and not regarding that in many cases he is really tutor *ad litem*.

In *Christie* (*supra*) a curator *ad litem* was appointed to an orphan family ostensibly parties to a special case, one of whom was a minor and the rest pupils. This is said to have initiated a practice. The reporters must have thought so, or they would hardly have given their note of the case. But there is nothing to indicate that it received the consideration of the Court as it would have done had it been intended to initiate such practice.

But three years later a case occurred (*Park*, *supra*) which required the question to be considered on principle, and which appears to me to destroy the case of *Christie* as an authority. The parties were Park's trustees, William Park, and the special tutors to William Park's children. Between each combination of two there were antagonistic interests. It so happened that the testator had made his trustees, what I may call for shortness, tutors *ad hoc* to W. Park's children. As Park's trustees they could not, having a conflicting interest, contract with themselves as tutors to W. Park's children, and the Court did not make the appointment of a special curator *ad litem*, but on the contrary refused to entertain the special case, Lord President Inglis, who had sat in *Christie's* case, adding this pertinent statement—"The effect of this special case, which is necessarily a contract, is to bind the pupil children through these tutors to a certain statement of facts. We cannot entertain a special case between parties who are not entitled to contract. If it is necessary to have the question decided at present the parties must resort to the ordinary form of a declarator." I do not think that this statement can be gainsaid, and it appears to me to exactly cover the present case, for Dr Macdonald is at present *in pari casu* with a pupil who has no tutors.

The next case in order of date (*Ross*, *supra*) bears to be distinguished, and to an effect which shows that though a curator was appointed, the law of *Park's* case (*supra*) was accepted.

X had provided by his settlement for the children of A B, who was alive. A B had children in minority and pupilarity, some born before and some after the death of X. The conflict of interest was between the *ante nati* and the *post nati*. The trustees of X and A B, who had himself no personal interest, acting as tutor and curator at law for both classes of his children, adjusted and presented a special case. The Court held that as the father A B was the legal curator of his minor child and the legal tutor of his pupil children, the case was competently presented. But as A B happened to be resident in New Zealand they thought it proper to appoint a curator *ad litem* to his children for the conduct of the case. The case of *Christie*, now said to have initiated a practice, was not adverted to, but that of *Park* was, and was on principle distinguished.

Among the cases cited in *Swan's* case the only one other bearing on a special case is that of *Crum Ewing* v. *Bayley* (*supra*). The question at issue was one between the children and grandchildren of Mrs Bayley, who were the third, fourth, and fifth parties. I am not now in a position fully to explain the position of the repective parties; but I find that in my own opinion (p. 491) I state the case to involve the "demand of the grandchildren of Mrs Bayley that their immediate parents be put to their election whether they will abide by Mrs Bayley's deed of settlement as a whole, or if they reject," &c., forfeit their right, &c. The fifth parties were grandchildren of Mrs Bayley and were in minority and pupilarity. From the words I have quoted it seems pretty clear that they had surviving parents, between whom and them there were conflicting interests in regard to the subject-matter of the case.

A case was presented to the Court for determination of the question at issue, to which the fifth parties were ostensibly parties, and I assume with their respective parents as their administrators-at-law. Having regard to the conflicting interests of the parent and children a motion was made after the case was in Court for the appointment of a curator *ad litem* to the fifth parties. Had the matter been considered and authorities referred to, it would, I think, have been apparent that on the authority of *Park's* case (*supra*) the case was not completely before the Court—so far, at least, as the grandchildren in pupilarity were concerned. But as one of the Court I can say that the only thing that was present to our minds was that the parents, though administrators-at-law, had a hostile interest to their children, and that therefore the latter's interest should be protected by the appointment of a curator *ad litem*, and this was made without any further reflection. I do not think that we adverted to the fact that some of them were minors and some in pupilarity, and were possibly misled by the common use of the term curator *ad litem*. In any view I question the competency of

what was done, though I admit that I was myself a party to it. The matter of the appointment does not appear directly in the report but only incidentally by reason of a subsequent question arising. The judgment of the majority of the Court being in favour of the parents and against the children, the curator *ad litem* was advised by counsel that the case ought to be appealed, but he had no funds and accordingly applied to the Court to direct that funds should be supplied to him out of the estate. It is only thus that attention is drawn to the fact that a curator *ad litem* had been appointed. The sequel bears, I think, pertinently on the present question. The Court directed that funds should be supplied; but Lord Dunedin towards the end of his judgment indicated that he was materially influenced in granting the application by the fact that there was a difference of opinion on the Bench, as well as by the fact that the curator had been advised to appeal. I was certainly a party to granting the application, but I must disclaim being moved thereto by the consideration advanced by Lord Dunedin, which I feel sure was expressed by his Lordship without fully realising its effect. It at once illustrates the grave impropriety at least, if not incompetency, of making pupils parties to a special case by a side-wind act of the Court. The judgment in the case of *Crum Ewing* was, as it happens, reversed by the House of Lords, Had the judgment of this Court been unanimous and funds for taking an appeal been refused to the curator, the result would have been that the interest of the pupils would have been sacrificed by the result of the act of the Court in appointing to them a so-called curator, really a tutor *ad litem—cf.* also *Studds'* case, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566.

Before leaving the case I must refer to a further passage in Lord Dunedin's opinion where it appears to me that he has inadvertently fallen into error and is in conflict with Lord President Inglis in *Park's* case (*supra*) and with the judgment of the Second Division in *Mackenzie's* case (*supra*). His Lordship says—"Had there been no such process as a special case, the parents, if they had raised the question by ordinary action in which the minor children were called as defenders and did not appear to defend, could only have got a decree in absence. The fact that there was such a process as a special case enabled the parents to get a decree *in foro*, because, having as guardians of their minor children compelled them to be parties to the special case, as soon as the dissentient interest emerged to the cognisance of the Court a curator *ad litem* was of course appointed. Accordingly I think it is not in the parents' mouths to complain if he is put in funds to fight the case to the end." The dissentient interest of the parents only came to the cognisance of the Court when the case was presented. But it existed when the case was prepared, adjusted, and signed, and when therefore the contract which a special case imports was made. Having that hostile interest the parents were as much precluded from legally contracting both for and with their children, as they were precluded from prosecuting the special case after it was presented. Unless the authority of *Park's* case (*supra*) is to be discarded the special case was incompetent *ab initio* and should have been refused.

The remaining cases cited to the Judges of the Second Division in *Swan's* case did not relate to special cases, and only indirectly touch the present question. But I think it right to refer to one of them, viz., *Scott's* case, as its procedure does not altogether conform to the decision in the subsequent case of *Mackenzie* (*supra*). A deserted wife raised an action of divorce after her husband had become insane. Four years' desertion had elapsed before insanity intervened. On the raising of the action a curator *ad litem* was appointed to the husband, who had no *curator bonis*, and the action proceeded to determine *in initialibus* the very important question whether, as maintained by the curator *ad litem*, the action of divorce could not proceed after the insanity of the offending spouse, or whether, as maintained by the pursuer, the lapse of four years gave her an absolute right to divorce. The Court rejected the contention of the curator *ad litem* and sent the case to proof. This was tantamount to compelling a party who was *non compos mentis* to appear, with the effect of enabling the pursuer to obtain a judgment *in foro* and *causa cognita*.

Now this is exactly what in the case of *Mackenzie* (*supra*) the same Division held that the Court could not competently do. But it must be noted that the appointment of a curator *ad litem* in *Scott's* case only appears *narrative* as an incident in the report. It received no special consideration, and no doubt it was made on an *ex parte* motion for the pursuer. At the same time it may fairly be referred to as a case of the appointment of a curator *ad litem* to a defender who could not be a party personally appearing in the case because he had no capacity to act, and who had not *de facto* appeared.

In *Mackenzie's* case (*supra*), occurring some six months later, the matter was accidentally brought sharply before the same Division who made the appointment in *Swan's* case, and it became necessary to consider the question on principle. The action was a multiplepoinding for distribution. Pupil and minor children were beneficially interested. For a considerable time after the action was initiated their father was alive, and therefore they had an administrator-at-law. During his life there was no appearance for the children, as their interest was sufficiently protected by the trustee on the estate. But in 1906 their father died without appointing tutors and curators to his children, and under emerging circumstances their interests (they were then minors) became more pronounced. In consequence the trustee, partly to relieve himself of responsibility, and partly in the interest, as he thought, of the minors, asked the Court to appoint a curator *ad litem* to them. I was myself the Lord Ordinary in the cause, but in consequence of my absence

from Court my motion roll was called before Lord Salvesen, who treated the motion as an unopposed motion and granted it *simpliciter*. The peculiar development of the case was this—The second child had become major shortly after the appointment was made. The youngest of the children remained a minor. Before the appointment I had pronounced a judgment disposing of the merits of the case, leaving over merely a question of accounting. The curator was advised that he ought to reclaim. But after a very full explanation the youngest of the children, who was still a minor, and who, like those who had attained majority, had not entered appearance, positively refused to give his name to a reclaiming note. The curator accordingly tendered a resignation of his office. I was of opinion that a curator *ad litem* ought not to have been appointed, but I felt that as Lord Ordinary I could not go back on what had been done really on my behalf, and was placed in the awkward position of having to make another futile appointment. I therefore reported the matter to the Inner House.

In coming to the conclusion that a curator *ad litem* ought not to have been appointed I was led by the decision of the whole Court in the cases of *Sinclair*, 1828, 6 S. 336, and by the subsequent cases of *M'Conochie*, 1847, 9 D. 791, and *Dingwall*, 1871, 9 Macph. 582, 8 S.L.R. 385. The Second Division, after a full hearing of the matter, determined that the Court had no power to appoint a curator *ad litem* to a minor defender who was without a curator and who did not appear, and it follows, I think, *a fortiori* to a pupil defender without tutor, or to a defender *non compos mentis* without a *curator bonis*, neither of whom could appear on their own account.

If the judgment in *Mackenzie's* case was sound, it appears to me that its principle must apply *mutatis mutandis* in the matter of special cases, if indeed the principle ought not to apply *a fortiori* in that form of procedure, by reason of the presentation of a special case of necessity being preceded by an agreement. But taking it on a lower ground, what is a party to a special case whose interest in a trust fund is at stake but a defender and claimant in a conventional multiplepoinding?

I do not think that I can properly submit to the Court the propriety of having this matter dealt with on the first convenient occasion by an authoritative judgment without drawing attention to the fact that there is not wanting evidence of some inconsistency, if not of some confusion of mind, on the part of practitioners, and even on the part of the Court, regarding the whole matter of the initiation and defence of actions on behalf of parties who are not *sui juris* or are *incapax*. There are, in fact, signs that the "next friend" of English practice has sometimes been allowed, though without overt appearance or recognition, to bestir himself in Scottish litigation. There may be occasional cases where there might be some practical convenience in this, but how far it is necessary, or can be openly recognised on principle, is a different question.

That some confusion exists, even in the judicial mind, on the general aspect of the subject is, I think, evident from the leading case of *Sinclair* (*supra*), on which the decision in *Mackenzie's* case largely proceeds.

In the end of the eighteenth century, after a charge and action of constitution, an action of adjudication was raised against Sinclair, a pupil without tutors. As was to be supposed, no appearance was made for him, and decree was obtained. A charter of adjudication was expede, titles were made up, possession followed, and the property passed through several hands. In due time a declarator of expiry of the legal was raised. The pupil having long since died, his sisters intervened, and having obtained themselves served heirs to his father and himself, raised an action of reduction of the decrees in absence and all that had followed upon them, on the ground that they had been obtained against a pupil without tutors, and without the appointment of a curator *ad litem*. The Lord Ordinary reduced. On a reclaiming petition the Second Division were equally divided on the question whether the decrees were null and void or only liable to be opened up as decrees in absence, and accordingly they directed the opinion of the other Judges to be taken on these questions—First, are the decrees in question and all that has followed on them *funditus* null and void? and if they are, ought the defender to be immediately decerned to remove? second, ought the decrees to be considered merely as decrees in absence? or third, ought they to be opened up, to the effect that the defender must, as *in petitorio*, instruct the debts for which the decree of constitution was taken, and cede possession on being paid the balance which on a fair accounting shall appear still due?

The nature of the case of course made the technical point of the most crucial importance. But its value as an authority on the question with which I am concerned arises from the line of argument necessarily pursued by the parties respectively. The pursuers of the reduction maintained that it was the duty of the pursuer of an action against a pupil to crave the appointment of a tutor *ad litem*, who might judge whether he would make compearance for the pupil, and that this course having been neglected in the case in question, the decrees were null. The argument in support of this contention is best found in the judgment of the four members of the Court who were in the minority.

They drew a proper distinction between the position of a minor and a pupil. The latter has no *persona* in law; he cannot act or pursue; even an action for his benefit being raised in the tutors' name *qua* tutors. The pupil cannot assent or dissent; he does nothing, everything being done in the name of his tutors. They then proceed; decrees in absence can proceed on one of two grounds alone, viz., that by not appearing the defender acknowledges the debt to be just;

or that by non-appearance he is held to be contumacious . . . a minor in pupilarity, that is, a pupil, cannot act; he has no *persona standi;* he cannot admit a debt to be just, and cannot possibly be held to be contumacious, and consequently the very principle on which a decree in absence can be granted is totally awanting in such a case. A decree against him therefore, if he has no tutor, is "a decree against nobody in law." Now this is, I think, quite a fair statement of the position. But it seems to me to be an entire *non sequitur* that it involves the necessity and the competency of the judge appointing a tutor *ad litem* to a pupil without tutors, or imposes a duty on the pursuer to make such application in his own interest. Yet the minority Judges say—"In the course of daily practice a pursuer has repeatedly demanded the appointment of a curator, which is always granted by the Lord Ordinary." And they defend the practice by this strange reasoning, viz., that it imposes no hardship upon the pupil, because if no defence is put in by the curator, the decree is held to be in absence. For although "a curator *ad litem* be appointed by the judge, it is not necessary for him to put in a defence. The present practice in the Outer House is to appoint the curator, to take his oath *de fideli*, and allow him to see the process. Defences are then either put in, or none are offered; in which latter case decree passes in absence, and will be a decree for this plain reason that it is known to the judge that the pupil has a tutor who is aware of the process, who may therefore be held in law to confess the debt to be just; or, in the other view, decree may go out against him as in contumacy." I have referred at length to the view of the minority judges for two reasons:—First, because I think that an there be such a practice as their Lordships premise, and I agree that there is evidence of it in the books, and that a belief in it still more than lingers in the profession, else we should not have such a case as *Studd (infra)* reported, nor should we have had the present motion made, yet I am persuaded that the very statement of their Lordships' views in support of the practice discloses ample room in its inconsistency for doubting its soundness. Second, because I think that it and its soundness or unsoundness has a material bearing upon the position of a pupil, who being without proper tutors is attempted to be made not a defender but a pursuer.

It does not appear to me to follow in reason or in law that the practice described by the minority Judges is sound, and I have difficulty in regarding it as defensible, because, given that a pupil has no *persona standi*, that he can neither consent nor dissent, that everything must be done for him by his tutors and in their own name, how does it follow that a judge has either power or duty to appoint a tutor *ad litem* to supply the want of tutors where there is no *lis pendens*, as there cannot be until the defender enters appearance and joins issue, or that a tutor *ad litem* if appointed has the power to act as if he were a tutor at law against whom the action had been served. It has never, so far as I know, been supposed that a tutor *ad litem* can act for the pupil so as to bind him; that when appointed he becomes a party to the case; that on his intervention decree can go out against him, as it would against a tutor-at-law, which will bind the pupil. A little reflection will, I think, show that there is really no such thing known to the law of Scotland as a tutor *ad litem;* the phrase is curator *ad litem*, and not merely the phrase but what the phrase conveys is inapplicable to the case of a pupil.

The defenders in the case of *Sinclair* maintained, on the other hand, that the course appointed by law for bringing a pupil into Court was to serve on himself and his tutors if known personally, or, if not known, to serve on himself personally, and edictally on his tutors if he any has; that on such service a decree would be obtained which, though it might be in absence, and would not therefore create a *res judicata*, would be equally valid with any other decree in absence; that the course appointed by law for calling tutors into the field had in the case in question been complied with, and that it was incompetent for the Court to appoint a curator or rather tutor *ad litem* till there was actually a *lis* subsisting by appearance of the party.

The majority of the Court (ten to four, or including the Lord Ordinary eleven to four) endorsed this contention, and particularly the latter part, viz., that it was incompetent for the Court to appoint a tutor *ad litem* until there was a subsisting *lis* by appearance of the defender, and that where he is suing a pupil who has no tutors or whose tutors do not appear "the pursuer has no remedy but to take decree (*i.e.*, decree in absence) *valeat quantum.*" Hence they held that the decrees in question must be treated as decrees in absence. But while so deciding, and establishing the law as afterwards applied in *Mackenzie's* case (*supra*), the judges in the majority do two things which I think justify my suggestion above that there is a good deal of confusion of mind on this whole subject, even on the Bench. They first assume that a curator *ad litem* when first appointed to a defender is necessarily the nominee of the pursuer and under his influence, which is certainly not the case nowadays, and I should doubt if it ever was, and they give this as a reason, as unnecessary as it is fallacious, for the Court not interposing to make the appointment; and second, having accurately stated the law and practice as to citing a pupil with or without known tutors, they launch into a distinction between what is expedient and prudent and what is legal, which involves an *obiter dictum* which I cannot think as sound, and was certainly not necessary for their judgment. They say:—"No prudent man, who is either called into Court by a pupil or minor, or who calls such as a defender, but will take care that such party is properly authorised, so that the proceedings may not be afterwards subjected to challenge." Confusion is introduced by attempting to speak comprehen-

sively of pupil and minor in the same breath. But confining attention to the pupil, which was the *de quo quaeriter* in the case, while it has already been shown how a pursuer can legally call a pupil into Court where he has no tutors or where his tutors decline to appear, though the result can only be a decree in absence, it is difficult to see how, consistently with the views expressed either by the majority or the minority, a person can be legally called into Court by a pupil without tutors, or how the putative defender is to take care that his party is "properly authorised." Such a so-called pursuer has no *persona* to come into Court by himself, any more as a pursuer than as a defender. He is not in Court though someone has called a summons in his name without tutors. If the judge cannot appoint a tutor *ad litem* to a pupil defender who is without tutors because he has no *persona* to appear and defend, and therefore there is no *lis*, neither for the same reason, one would naturally conclude, can a judge appoint a tutor *ad litem* to his so-called pupil pursuer without tutors. He is a pupil, but he is not a pursuer. Yet the majority Judges say—"A pupil or minor may be either pursuer or defender. If he is a pursuer, and either his guardians do not concur, or he has none at all, then the defender is entitled to object *in limine* to the procedure till the guardians concur or a curator *ad litem* is appointed, and which must be done by the judge, and if the fact appears *in judicio*, it is perhaps *pars judicis* to apply the remedy." This is quite true of the minor. I cannot but think that the majority Judges, by attempting a comprehensive statement applicable to pupil and minor, have fallen into the error of not regarding the distinction between them, which is justly pointed out by the minority Judges. If the statement on the other hand were sound it would practically approve the intervention of the "next friend" or other unauthorised person, who might compromise the position of the pupil by first instructing an action to be raised in his name, and by then leaving the defender to require a tutor *ad litem* to be appointed to him. The result would be that whereas the pupil's interests may not be compromised as defender they may be so as pursuer.

It may be said that though inconsistent with principle the Court has in the interest of pupils without tutors condoned irregularity, and finding a nominal pursuer before them have turned a blind eye to the fact that he is a pupil, who cannot effectively raise an action by himself, and have accordingly assumed that there is a process and, on the defender appearing, a *lis*, and finding the nominal pursuer to be a pupil have protected him by the appointment of a tutor *ad litem*, and so glossed over an irregularity. If so, I question whether the irregularity is not an incompetency. But I cannot think that the Court has ever *tota re perspecta* sanctioned this course. The "next friend" may be recognised in England. But he must come within a certain category. And he assumes certain responsibilities. But there is no such recognition in Scotland. The result, which the passage I have quoted contemplates, might be arrived at on the intervention of an irresponsible nobody who chose to interfere in the pupil's affairs, or who did so in private concert with the defender.

I demur further to there being any necessity for the tacit acceptance of the course of practice indicated in the interest either of the pupil pursuer or of the pupil defender. If he has rights to vindicate or to protect which require immediate action to be taken, and has no tutors, there is such a thing as a factor *loco tutoris* known to the law, and the application for such an appointment is not subject to the same objections as that for the appointment of a tutor *ad litem*. A factor *loco tutoris* represents the pupil as a tutor, and has not merely the functions of curator *ad litem*.

The whole Court case of *Sinclair* (*supra*), though I have thought it proper to deal with it thus at length, reduces to this short proposition, viz., that before there can be a curator *ad litem* appointed there must be a pending *lis*, and where a pupil is either nominally pursuer or is called as defender, and has no tutors or his tutors do not appear, there can be no pending *lis*, and therefore there can be no tutors *ad litem*. And that was the principle, apparently somewhat forgotten in the interim, which was brought back again, and re-applied 80 years afterwards in *Mackenzie's* case (*supra*).

The report in *Sinclair's* case (*supra*) is somewhat faulty in respect that it does not indicate the answer of the consulted Judges to the third query put to them, or show what position the Court considered the parties must hold towards the decree in absence, but the judgment was followed in the same year in the case of *Dick* v. *M'Ilwham*, 1828, 6 S. 798, and 1829, 7 S. 364, where a decree of irritancy of a contract of sale was obtained, after erection of buildings on the subjects, against, *inter alios*, a pupil without tutors. In a reduction raised by the pupil on attaining majority, the Court held that he was "entitled to be reponed against the decreet of irritancy . . . in the same way as if the same had been *ex facie* a decreet in absence, and that all parties should be restored to the state at which they stood at the time the decreet was pronounced."

I give the following note of three or four other cases bearing on the subject:—

1. *Wallace*, 1830, 9 S. 40. The Court refused to appoint a curator *ad litem* to a party fatuous, when action not yet raised. The report does not make it clear whether the lunatic would have been pursuer or defender.

2. *Mackenzie*, 1846, 8 D. 964. Father died leaving a pupil son, Sir Kenneth Mackenzie, of his first marriage, and a widow and her pupil son, Osgood Mackenzie, of his second marriage. Action was raised by the tutor of Osgood Mackenzie and the trustees of his father's and mother's marriage contract against the tutors of Sir Kenneth. After the Lord Ordinary had pronounced judgment, and Sir Kenneth had become a *minor*

pubes, Inglis (afterwards Lord President) for Sir Kenneth proposed to sist him now with a curator *ad litem*. This the Court regarded as necessary and proper, and allowed to be done.

3. *M'Conochie*, 1847, 9 D. 791. A minor raised action, without the concurrence of her father as her administrator-at-law, which had been refused. It was held that as the minor was entitled to have her case brought before the Court, and her father refused to protect her interest, a curator *ad litem* should be appointed.

4. *Mitchell*, 1864, 3 Macph. 229, and *Walker*, 1867, 5 Macph. 858. A pursuer after having raised action and reclaimed became insane before the reclaiming note was heard. On the defender's motion a curator *ad litem* was appointed, and in *Walker's* case this was followed by the appointment of a *curator bonis* after the action was concluded.

5. *Dingwall*, 1871, 9 Macph. 582, 8 S.L.R. 385. Illustrates the position in which a pupil who has no tutor ought to find himself when he becomes major, where he has been cited as defender in an action, and which would be interfered with by the appointment of a tutor *ad litem*, at the instance of a pursuer or *quasi* next friend.

6. *Studd*, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566. In this case an English landed proprietor had also a heritable estate in Scotland. He executed a settlement in strict entail in English form of his English estate, but included also under general terms his Scottish estate. After his death his son and heir under the English deed raised action in the Scottish Courts against his own pupil son, who was the next heir, to have it declared that the English deed was inept to affect with fetters the Scottish heritage. On the case being brought into Court, application was made to the Second Division for the appointment of a curator *ad litem* to the pupil defender. While this application was granted, and funds supplied by order of the Court, both in this Court and in the House of Lords, to the curator *ad litem* to enable him to maintain the pupil's defence, I can say, as counsel in the case, that the propriety of appointing a so-called curator *ad litem* to a pupil defender was never brought before or considered by the Court.

7. Reference may also be made to the Entail Acts. The Rutherfurd Act of 1848, section 31, makes *special* provision for the appointment in petitions for disentail, &c., of a tutor or curator *ad litem*, or *curator bonis*, or other guardian to any party under age or subject to legal incapacity, whose consent is required, who shall be charged with the interest of such party in reference to such application, and shall be entitled, with or without consideration, to act and give consent on behalf of such party. See also the Entail Acts of 1853, section 18, and 1882, sections 12 and 13. It was thus evidently considered that such tutor or curator *ad litem* required special statutory authority to act on behalf of and so as to bind his ward.

I cannot conceal that I have myself, having been brought in contact with the question as counsel and judge from *Studd's* case onwards, come to hold the opinion that there is something not merely anomalous, but radically inconsistent in our law and practice in this matter, and I submit to your Lordship the propriety of having it practically reconsidered when occasion occurs. It may be that the correction of the inconsistency and the bringing the law and practice as regards pupils in line with that as regards minors may best be attained by raising the tutor *ad litem* into the position of a factor *loco tutoris ad hoc*, though the question would then arise, have the Court *ex nobili officio* power to do so.

The Court refused the motion.

Counsel for the First and Second Parties—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Saturday, June 12.

FIRST DIVISION.

[Sheriff Court at Glasgow.

GRACIE *v.* CLYDE SPINNING COMPANY, LIMITED, *et e contra.*

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule II* (15)—*Remit by Arbiter to Medical Referee—Evidence Insufficient on Matter Material to a Question Arising in the Arbitration—Report by Referee beyond Terms of Remit—Statutory Rules and Orders, 27th June* 1907, *Part V* (20).

In an arbitration under the Workmen's Compensation Act 1906, in which the employers sought to have the weekly payments ended or diminished on the ground that incapacity was due, not to the injury, but to the unreasonable conduct of the workman in refusing to undergo an operation, the arbiter, after hearing medical evidence on the condition of the workman, the nature of the suggested operation, and its probable results, found that there was no evidence as to whether or not there was any special risk to the workman in the use of anæsthetics, and remitted to a medical referee to examine the workman and report on this point. The referee in his report, after dealing with the question of anæsthetics, stated that he thought "an operation would be of little benefit, and that the injury to the hand is permanent."

Held (1) that the remit was competent, as the point as to anæsthetics was not a separate question, but an insufficiency of the medical evidence on a material matter, and (2) that the arbiter must consider the whole report, and was not entitled to disregard the referee's expressed opinion on the benefit of an operation.