thought that the action was a relevant action which ought to be allowed to proceed—apart from that question of caution for expenses—I should have much difficulty in affirming that judgment in the circumstances.

But the question of the relevancy of the action has been raised and argued, and we are entitled to deal with it, and if our view is adverse to the relevancy it is desirable we should so find this to bring the litigation to an end. The objection to the relevancy is that the pursuer avers a case of slander said to be contained in pleadings by the present defender in another action, in which he had to defend himself against the proceedings at the instance of a person named Penny. I think that the pursuer has not stated any ground upon which we could hold that his action is relevant. It is certain that in the ordinary case an averment by a party to a suit in Court cannot, if only it is relevant or pertinent to the action in which it is made, form a good ground for an action of damages for slander, at all events if it is not averred that it was made without probable cause and with malice, and that in such a way as I shall presently allude to. Now, was this averment which is complained of relevant or pertinent? The present defender was being sued by Penny for damages for having wrongfully turned out of a house of which he is the owner this pursuer Selbie, whom Penny alleged he had left there as a caretaker. His defence there included a statement—being that complained of—that Selbie was seldom sober while so employed; that in consequence the premises were not cared for, and goods which were subject to his (the defender's) hypothec were being removed, and that he was therefore justified in acting as he did.

That was a statement which in my opinion is both relevant and pertinent. But it is sufficient if it was pertinent, and that admits of no shadow of doubt. I have therefore no difficulty at all in holding that the pursuer, who now founds his action upon it, has stated no relevant case. He would further require to allege malice and want of probable cause, and it would not be sufficient merely to aver malice. It would be necessary further to aver specific facts from which the malice might be inferred. The law to that effect is now well settled, and although I cannot say I have ever understood the principle upon which that law is based, I am bound to apply the law as it is.

I think this action must be dismissed as irrelevant.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

The Court recalled the interlocutors of the Sheriffs and dismissed the actions.

Counsel for the Pursuer—Watt—Kemp. Agent—Charles George, S.S.C.

Counsel for the Defender—Ure—MacWatt. Agents—Smith & Mason, S.S.C.

Saturday, November 8.

FIRST DIVISION.

[Junior Lord Ordinary.

DEWAR *v.* DEWAR.

Incapacity — Partial Insanity — Curator Bonis—Appointment on Petition—Necessity of Cognition.

In a petition at the instance of a wife for the appointment of a *curator bonis* to her husband A, who was a medical man of considerable property, and at the time was confined in an asylum under warrant of the Sheriff, it was proved by medical certificates that A had a clear and intelligent comprehension of business matters, and in particular of his own financial affairs, but that he suffered from delusions with regard to spiritualism, and entertained groundless feelings of mistrust regarding members of his own family, which might affect the propriety of his directions respecting the management of his own property. *Held* (1), following the case of *Bryce* v. *Graham*, that the appointment by the Court of a *curator bonis* upon petition was competent; and (2) that it was expedient in the circumstances, with a view to the preservation and management of the estate.

The facts of this case are concisely summarised in the opinion of the Lord Ordinary (KINCAIRNEY) subjoined—

"This petition by Mrs Dewar for the appointment of a *curator bonis* to her husband Dr Dewar, at present an inmate of Saughton Hall Asylum, was presented on 10th June last.

"On 2nd July answers were lodged for Dr Dewar, which are referred to.

"From the petition and answers it appears that Dr Dewar had been removed to Saughton Hall Asylum under warrant of the Sheriff on 3rd April 1890; that on 20th May he was, on the instructions of the petitioner's agents, visited by Dr Grainger Stewart and Dr Heron Watson; on 28th May by Dr George W. Balfour, and on 31st May by Dr Littlejohn, whose certificates are appended to the petition, and that on 28th June he was visited by Dr Clouston and Dr Byrom Bramwell, whose certificate is appended to the answers.

"The certificates of these gentlemen disclose some difference of opinion about Dr Dewar's mental condition. Dr Grainger Stewart and Dr Heron Watson state that they felt it impossible, at the date of their examination on 20th May, to grant a certificate for the appointment of a *curator bonis*. They recommended delay and a further examination after the lapse of a month or six weeks for the purpose of deciding upon the necessity of appointing a curator.

"Drs Balfour and Littlejohn express the opinion in general but unqualified terms that Dr Dewar was of unsound mind, and incapable of managing or of giving directions for the management of his affairs.

"Drs Clouston and Bramwell state that on their visit they found Dr Dewar coherent and acute in regard to business matters, but taking into account the whole of the facts elicited at a prolonged examination of his mental condition, they felt unable to give a certificate that he was yet fit to manage his affairs or give directions for their management.

"Dr Dewar's estate is of considerable amount. It consists of personal estate variously invested, and amounts I understand to £40,000 or thereby.

"The case was debated before me, and the respondent's counsel moved that I should make a remit to the Sheriff to direct an inquiry as to Dr Dewar's state of mind, and report.

"I considered the case so delicate and important that I should then have reported it to the Inner House, but I thought, considering the differences in the medical certificates, that the case was hardly prepared to be submitted to their Lordships.

"I rather understand that the course of making a remit to the Sheriff suggested by the respondent's counsel has not of late years been regarded very favourably, and I considered that I had hardly a right to devolve on the Sheriff a duty which appeared to be my own, and ultimately I came to think that the safest step I could take was to make a remit to a medical gentleman who had not been employed by either party, and whose opinion I could regard as of weight and authority.

"Having ascertained that Sir Arthur Mitchell had not been consulted in the case in such a way as to affect his absolute neutrality, I, on 9th July, remitted to him to examine the petition and answers and productions, and thereafter to visit Dr Dewar, and to report whether in his opinion Dr Dewar was in such a state of mental derangement as to render him incapable of managing or of giving directions for the management of his affairs. Sir Arthur Mitchell has now returned a report, stating his opinion 'without hesitation or difficulty' that Dr Dewar is at present of unsound mind, and as a consequence incapable of managing or of giving directions for the management of his affairs.

"Sir Arthur Mitchell's report is expressed in general terms, but he was good enough to call on me and to explain his views in more detail. It appears that Dr Dewar is, in Sir Arthur's opinion, subject to delusions related to what is known as spiritualism, of such a nature as to render him quite an unsafe guardian of his own property, and which might render him liable to be very readily imposed on by designing people who were aware of his weakness. He entertains, besides, Sir Arthur informs me, feelings of mistrust towards his family which cannot be altogether disregarded.

"There have been submitted to me certain documents which were put in the hands of Sir Arthur Mitchell, and I refer in particular to notes of a seance, held in Dr Dewar's house at Drylaw, written by him, and to three volumes also written by him in pencil, purporting to consist of letters addressed to him, although they are really written by himself. It would not, I think, be convenient to describe these documents in this note, but, to my mind, they thoroughly corroborate Sir Arthur Mitchell's opinion, and indeed, leave no room for doubt about the serious character of Dr Dewar's delusions.

"The agents for Mrs Dewar and for Dr Dewar have been again heard, and it has been strongly pressed, on behalf of Dr Dewar, that he showed an intelligent comprehension of his own affairs—which seems to be true—and that he could safely be trusted with them, and in particular, that he could not, or ought not, to be deprived of the control of his own property without the verdict of a jury obtained on a brieve from Chancery, under the provisions of the 101st section of the Court of Session Act." [This contention was not put forward in the answers originally lodged; but by a minute, lodged in process by the agents of the respondent, the demand was made in accordance with the respondent's own written instructions, dated 12th August].

"I have felt the force of this contention, but what, as it appears to me, I have to consider is, whether it is right and safe that Dr Dewar should be left without control in the meantime, and until the meeting of the Court.

"A brieve from Chancery cannot proceed at present; and while I do not doubt that Dr Dewar has an intelligent knowledge of his own property, as, indeed, he has proved, and is probably a gentleman, in many respects, of ability, still I agree in Sir Arthur Mitchell's view that his considerable property is not safe under his control so long as he remains under the influence of the singular hallucinations which at present possess him.

"I think, therefore, that my duty is to appoint a *curator bonis*. My appointment is, of necessity, substantially, though not nominally, an interim one, if it shall hereafter appear to the Court that the condition of Dr Dewar's mind should be submitted to the consideration of a jury. It rather appears to me, however, to be better for Dr Dewar that a *curator bonis* should be appointed than that his present state of mind should be submitted to a jury. For should he shortly recover—and I have not heard anything which precludes that hope—it will be much easier to restore to him the full control of his affairs than it would be if he were found by a jury to be insane.

"I need not say that of course either of the gentlemen suggested by the parties is perfectly qualified for the office of curator; but as matters stand I am precluded from availing myself of the assistance of either.

"The following authorities were referred to—*Spiers*, 4th July 1851, 23 Jurist, 610; *Henderson*, 17th July 1851, 23 Jurist, 668; *Forsyth*, 19th July 1862, 24 D. 1435; *Irving* v. *Swan*, 7th November 1868, 7 Macph. 86; *Downs* v. *Downs*, Shand's Practice, ii. 1008.

"I do not think that cases bearing on the testamentary capacity of persons alleged to be of unsound mind are applicable."

Accordingly on 15th August the Lord Ordinary appointed Mr Harry Cheyne, W.S., to be *curator bonis* to the respondent, and *eodem die* a reclaiming-note against this interlocutor was presented.

In anticipation of the discussion upon the reclaiming-note two additional medical opinions were obtained at the instance of the respondent's agents.

The first of these was given jointly by Drs Howden and Ferguson upon 23rd October, and *inter alia* contained the following passage—"We found him calm and self-possessed in manner, of a high degree of intelligence, with a mind widely and accurately informed, and able to reason on many subjects in a clear and rational manner. He appeared thoroughly familiar with the condition of his financial affairs, and alive to his interest in regard to them." And the conclusions of these gentlemen upon the question of the respondent's mental condition are summarised thus—"We are of opinion (first) that Dr Dewar is a person of unsound mind; (second) that if at large, Dr Dewar might be dangerous to the persons who are the object of his suspicions, and that the nature of his delusions unfits him to treat with fairness the members of his own family and household, and renders him liable to be biassed in a similar manner against others; (third) that nevertheless he is capable of clearly appreciating his worldly interests in many ways; (fourth) that if management of his affairs includes a just and natural regard to the interests of his family, we do not consider he is worthy of being entrusted with their management; but (fifth) that we are not prepared to say that his mental condition as ascertained by us incapacitates him from administering his affairs in other respects."

The second opinion was that of Dr Yellowlees, who while saying that he found Dr Dewar "acute and intelligent in conversation," concluded as follows—"I believe that Dr Dewar is conversant with his business affairs and investments, and that he could give directions concerning them, but such directions would be influenced or swayed or determined by the presence of delusions as to relatives or others conspiring against him, or desiring to injure him, and might be influenced by insane ideas as to spiritualism and its devotees, supposing Dr Dewar to entertain such delusions and ideas."

Argued for reclaimer—(1) To deprive the respondent of the management of his property it was not enough that medical certificates should be produced in evidence of mental incapacity; he was entitled to retain the management until found incapable by verdict of a jury upon a brieve of cognition issuing from Chancery in terms of section 101 of Court of Session Act 1868. [LORD PRESIDENT—But the right of suing out a brieve from Chancery rests with his relatives alone, and we cannot compel them to institute proceedings with that object. Suppose they will not do so, and the Lord Ordinary is convinced upon the evidence before him that the respondent is incapable of managing his affairs, are we excluded from making an appointment?]—That question was considered in the case of *Bryce* v. *Graham*, 6 Sh. 425, and in House of Lords, 2 W. & S. 481, and 3 W. & S. 323, and although the decision there upon the remit to the Court of Session was adverse to the present contention, that decision was given by a narrow majority. The minority was a strong one, and the decision itself is questioned in Fraser's Parent and Child. In any case the Court of Session Act 1868, sec. 101, now prescribed the procedure, and if there was any reason to suspect that a lunatic was not duly protected the Lord Advocate could interfere under sec. 81 of 20 and 21 Vict. c. 71. [LORD PRESIDENT—The question really was, whether the Lord Ordinary was justified by the evidence before him in making the appointment in this case.] (2) In this case the evidence did not warrant the appointment. The fact that a person was of unsound mind was not enough, for the particular unsoundness may not interfere with an intelligent view of business matters. In *Henderson*, 14 D. 11, the Court on this ground refused, and in *Forsyth*, 24 D. 1435, recalled an appointment. So also in the cases of *Nisbet's Trustees*, 9 Macph. 931, and *Ballantyne* v. *Evans*, 13 R. 652, the wills of persons of partially unsound mind were sustained. Now, in this case, the reports of Drs Balfour and Littlejohn merely alleged unsoundness in general terms, so did that of Sir A. Mitchell, which was further invalidated by the fact that it was based on *ex parte* statements, while all reports agreed that the respondent was exceptionally acute and clear upon all matters of business whatever delusions he may entertain upon spiritualism. The cases of *Laidlaw*, 8 D. 426, and *Lockhart and Ross*, 19 D. 1075, were also referred to.

Argued for the petitioner—No case quoted showed that a curator had been refused by the Court when the person of unsound mind was actually resident in an asylum. Here he was undoubtedly unsound in mind in the sense of sec. 101 of Court of Session Act. The reports of Drs Howden and Ferguson and Dr Yellowlees, which were the most recent, disclosed not a condition of hallucination upon one immaterial point, but a generally diseased condition of mind. The private papers recovered showed this also, and although they were not regularly in evidence they could be proved. But Dr Dewar's delusions in regard to spiritualism were in evidence, and the special danger to his patrimonial interests from this source consisted in the fact that complete mental ascendancy was or might be obtained over him by the "medium" through whom he experienced those spiritualistic manifestations of which he spoke. It would be, therefore, competent enough for his relatives to sue out a brieve of cognition from Chancery under sec. 101 of the Act, but that process the relatives did not desire to adopt. The inquiry before a jury would give both to his relatives and to the respondent much pain, and would probably injuriously affect the latter and delay his recovery, while if he did recover he would again require to have his sanity tried in a

declarator of reconvalescence. This process was also competent, as was authoritatively decided in *Bryce* v. *Graham*, and the expediency of adopting it was obvious in this case, where the respondent was apparently upon the verge of recovery, for the recal of the appointment also was short and expeditious. It is to be noted that the fact of the respondent being in an asylum put an *onus* upon him to prove mental soundness to the extent of managing his affairs, but no medical certificate produced went so far —the most favourable merely counselled delay.

At advising—

LORD PRESIDENT—I do not think it is disputed as a general principle of our law that a man of full age is not to be deprived of the management of his own affairs except by the verdict of a jury finding him incapable of managing them. There has, however, been a practice in observance from very early times of appointing factors or *curators bonis* to persons in an infirm state of mental health where it appeared, or was thought probable, that the infirmity was of a temporary character. I do not say that the statutes, and particularly the last statute, regulating the procedure in cases of cognition of the insane (viz. the Court of Session Act 1868, sec. 101) positively confine the issuing of a brieve from Chancery to the case of a person in permanently bad mental health; but I do say, generally speaking, that that is the kind of case which is with propriety submitted to a jury. Where, on the other hand, there is a case of merely temporary incapacity the appointment of a *curator bonis* is the more expedient and proper remedy, and if there is any doubt as to whether the incapacity is permanent or temporary, I still think the appointment of a *curator bonis* is the more judicious procedure for the parties interested and for the Court to adopt.

The jurisdiction of the Court in appointing such officers existed and was exercised long before the year 1730, but the words of the Act of Sederunt of that year are important as showing the class of cases to which it was intended to apply. It defines the class whose estates factors were appointed to administer as "pupils not having tutors, and persons absent that have not sufficiently empowered persons to act for them, or who are under some incapacity for the time to manage their own estates," and the object of the appointment was "to the end that the estates of such pupils or persons may not suffer in the meantime but be preserved for their behoof, and of all having interest therein." Now, it is to be observed that the Pupils Protection Act of 1849 recites in the preamble the identical words, showing obviously that the intention of the Legislature was to continue the special remedy provided by the Act of Sederunt, and to confine it to the case of pupils or absent persons, or of persons suffering "for the time" from incapacity. It therefore appears to me that the question is whether this ought to be dealt with as a case of permanent or of temporary insanity, and that question depends upon the special circumstances we have before us here.

If it was clear from the papers in the case that this gentleman's condition of incapacity was hopeless, I should be of opinion that the proper course would be to sue out a brieve of cognition from Chancery. But these are not the facts of the present case, for although Dr Dewar appears to labour under delusions of a singular and complicated character which render it very unsafe at present to entrust him with the management of his own affairs, he still retains a considerable amount of mental energy and acumen, and I do not see anything in the medical reports to discourage the hope that his mental capacity may be completely restored. His residence in the asylum has already wrought an improvement in his condition, and that being so it would be a strong proceeding upon the part of his relatives, to whom alone it is competent to sue out a brieve from Chancery, to apply for a brieve with the object of having him cognosced insane and permanently deprived of the administration of his affairs, unless he should be reinstated by a formal declarator of reconvalescence. Everything points to this case as one for the application of a temporary remedy, and the only temporary remedy known to our law is the one asked for in this petition.

As to the expression of Dr Dewar's own opinion in this matter, I confess I do not attach much importance to that. Neither he himself nor his legal advisers thought fit to set forth in the answers to the petition a demand that the question of his mental capacity should be submitted to the judgment of a jury, but on second thoughts Dr Dewar writes to his agents in these terms—"Having to-day seen a copy of Sir A. Mitchell's report, I still maintain that I am perfectly competent to manage my own affairs, and I wish you to insist on the question of my capacity being tried by a jury. I cannot consent to the appointment of a *curator bonis*; still, if one must be appointed, I wish Mr William Mitchell, S.S.C., to be appointed;" and Dr Dewar's agents, in terms of this letter, lodged a minute in process asking that the present petition should be superseded by an inquiry upon a brieve of cognition. Now, if this suggestion had come from anybody else, I would have said it was the suggestion of an enemy, for I cannot conceive anything more likely to retard his recovery than his being exposed to a trial before a jury upon a brieve. If there is one course indeed more than another which would be likely to render him permanently mad, it is the course suggested in that letter and minute.

I see no reason to doubt that in the first place the respondent's condition is such as to render him unfit in the meantime to manage his own affairs; and in the second place, as it is quite possible, if not indeed probable, that he may at some time so far recover as to be restored to the uncontrolled management of his estate, I think the Lord Ordinary has taken the proper course in appointing a *curator bonis*.

LORD ADAM—I agree, and have very little to add. I am of opinion with your Lordship that the proceeding by way of appointment of a *curator bonis* upon the estate of a person of unsound mind is independent of the ordinary process of cognition upon a brieve from Chancery, and is further the more suitable procedure to adopt where the unsoundness of mind is not likely to be enduring, which is the case here. That is my view upon the competency of this petition, and the only remaining question is as to the expediency of the appointment in this instance.

The main matter for consideration is, what is the course most conducive to the benefit of the respondent himself? Now, his case is peculiar in this respect, that he is now in a lunatic asylum, and is admittedly of unsound mind. He does not himself say in the answers that he is of sound mind, but that he is not of unsound mind to the extent of being unfit to manage his own business affairs. But upon the evidence before us in the form of medical certificates—and some of these were obtained at his own instance—it is clear that his mental unsoundness goes further and is not of the partial character contended for by the respondent's counsel. [*After referring to the contents of the medical reports in detail in support of this view his Lordship proceeded*]—The question before us is whether it is right and proper that a person so described should have the management of his affairs in his own hands, and to that question I say no.

LORD M'LAREN—The case has not been argued so much upon the power and jurisdiction of the Court to make the appointment which is here resisted, as upon the expediency of the appointment being made, and whether the matter of the respondent's mental incapacity should not upon his demand be submitted to the verdict of a jury. That is undoubtedly the appropriate mode of trying the question where it is raised on a brieve of cognition proceeding from Chancery, but I should be sorry to give countenance to the supposition that a brieve of cognition is the only method by which such a question can be raised and settled. Alongside of that method there have for centuries subsisted other modes of ensuring protection of the property of the insane. Your Lordship has traced the history of one mode by means of the appointment of factors and *curators bonis*, and there was also another method which consisted in the appointment under the powers exercised by the Court of Session of tutors-dative to insane persons; and although there are not many applications nowadays for this latter appointment—owing probably to the fact that the office is a gratuitous one—still in both these cases the means of inquiry adopted was the same, and we have proceeded upon the reports of professional persons obtained by the parties themselves, or upon the initiative of the Court for its own guidance. I am far from saying there are not cases where a more formal proof should be exacted—it might be, for instance, that an absolute contradiction in point of fact was disclosed in the petition and answers—but we have no such issue in the present case. Here the question raised is merely whether the cerebral disease and mental unsoundness admittedly existing are of so serious a character as to necessitate a temporary withdrawal of the respondent's affairs from his own management. I apprehend this is a matter entirely within our discretion, and while thinking that the right and suitable course of inquiry has been adopted by the Lord Ordinary, I also agree in the propriety of his judgment.

LORD KINNEAR concurred.

The Court confirmed the appointment.

Counsel for the Petitioner—Low—Sandeman. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent — Guthrie Smith — A. S. D. Thomson. Agents — Mitchell & Baxter, W.S.

Saturday, November 8.

SECOND DIVISION.

SOUTER, PETITIONER.

Process — Judicial Factor — Removal of Curator Bonis — Jurisdiction — Pupils Protection Act 1849 (12 *and* 13 *Vict. cap.* 51), *sec.* 31—*Distribution of Business Act* 1857 (20 *and* 21 *Vict. cap.* 56).

Two petitions for the removal of a *curator bonis* to a person of unsound mind, and the appointment of a new *curator bonis* in his room, having been presented to the Court of Session, one before the Junior Lord Ordinary, and the other before the Second Division of the Court—*held* that under the Pupils Protection Act 1849, section 31, and the Distribution of Business Act 1857, sections 4 and 5, such a petition must be brought in the first instance before the Junior Lord Ordinary, subject to review by the Inner House, and that the petition presented before the Second Division was therefore incompetent.

By the Pupils Protection Act 1849 (12 and 13 Vict. chap. 51), section 31, it is enacted "that the Court shall have power on cause shown to remove or accept the resignation of any tutor or curator coming under the provisions of this Act, and to appoint a factor *loco tutoris* or *curator bonis* in his room." By the interpretation clause (sec. 1) it is enacted that the expression "Court" shall mean "either Division of the Court of Session," and the word "curator" shall mean "any person who after the passing of this Act shall be served as curator to any insane person or idiot."

By the Distribution of Business Act 1857 (20 and 21 Vict. cap. 56), section 4, it is enacted—"All summary petitions and applications to the Lords of Council and Session