Saturday, October 19.

FIRST DIVISION.

[Lord Low—Bill Chamber.

ALSTON AND OTHERS, PETITIONERS.

Judicial Factor — Process — Petition for Appointment of Curator Bonis to Lunatic —Denial of Insanity.

A petition was presented, accompanied by the usual medical certificates, for the appointment of a *curator bonis* to a person alleged to be of unsound mind. He lodged answers in which he admitted having for a short time been an inmate of a private asylum, but he denied that he was of unsound mind.

Held that in face of such denial a *curator* ought not to be appointed without inquiry.

A petition was presented by John Stirling Alston, Thinacre, Ayr, and others, in which they craved the Court to appoint a *curator bonis* to Harry Ritchie Alston, at that time an inmate of a private asylum near London. The petition was presented by all the brothers and by the sister of Harry Ritchie Alston. They averred that he was of unsound mind and incapable of managing his own affairs, or giving directions for the management thereof, and produced certificates to that effect from two medical men who had examined him.

Answers were lodged by Harry Ritchie Alston, and by his wife, in which they admitted that the pursuer had for a short time been and still was resident at the "Priory," Rockhampton. They also averred that the same respondent was not a domiciled Scotsman, or subject to the jurisdiction of the Scotch Courts, and further, that he was not of unsound mind or incapable of managing his own affairs, or giving directions for their management. They accordingly submitted that the petition should be refused with expenses.

On 20th July 1895 Lord Low, without ordering an inquiry, pronounced an interlocutor by which he appointed Mr John M. Macleod, C.A., Glasgow, to be *curator bonis* to the respondent Harry Ritchie Alston.

The respondents reclaimed, but before the reclaiming-note came before the Division for hearing, the respondent Harry Ritchie Alston died, and the only question left to be decided was that of expenses, there being no objection to the recal of the *curator's* appointment.

Argued for reclaimers—The Lord Ordinary had been wrong in making the appointment without ordering an inquiry, as the alleged lunatic denied that he was insane. The Lord Ordinary acted as he did on the ground that the respondents had produced no medical certificates to support this denial, but this omission was owing to their straitened circumstances—*A B* v. *C D*, November 8, 1890, 18 R. 90, where the necessity for an inquiry in certain cases was admitted In *Yule* v. *Yule*, November 29, 1881, 19 S.L.R. 140, where the alleged lunatic denied his insanity, a proof was ordered by the Lord Ordinary (M'Laren). In *Macfarlane* v. *Macfarlane*, November 12, 1847, 10 D. 38, under circumstances similar to the present case, further inquiry was ordered. (2) The respondent was domiciled in England. Though this would not absolutely exclude the jurisdiction of the Scotch Courts, if there were moveable estate in Scotland in danger of perishing, there were no averments to that effect here, and the petitioners had recognised this by presenting a petition in England also. Accordingly, the Lord Ordinary had been wrong in deciding both these points without inquiry, and the reclaimer was entitled to the expenses of her reclaiming-note.

Argued for respondents—No *prima facie* case had been stated against the appointment, and the Lord Ordinary was therefore right in refusing an inquiry. To obtain such it was necessary to produce something to challenge the *prima facie* evidence of the petitioners, and mere statements in denial were not enough—*A B* v. *C D*, 18 R. 90.

At advising—

LORD PRESIDENT—All parties are agreed that the appointment of curator must be recalled, Mr Alston having died, but the first question is, can the Lord Ordinary's judgment be maintained? In a word, I think he went too fast, because the answers contain a distinct and articulate denial of the essential allegation of insanity. There is also a question of domicile. Accordingly, the Lord Ordinary was not in a position to disregard the answers as he did. Mr Cook's client, therefore, was justified in presenting a reclaiming-note, and accordingly she is entitled to expenses from the date of the interlocutor reclaimed against.

Then as regards the period anterior to that, we have really no means of coming to a conclusion—we have no material for deciding who was right and who was wrong—and the parties do not propose a proof. We shall therefore find no expenses due to or by any of the parties prior to the date of the interlocutor reclaimed against.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the interlocutor reclaimed against, and found the reclaimer entitled to expenses since its date.

Counsel for the Petitioners and Respondents—Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondent and Reclaimer —Cook. Agents—A. P. Purves & Aitken, W.S.