Appellants' Authorities.—Bannatyne, June 25, 1624. (12769.)—2 Ersk. 3. 23.—Lord Aboyne, Nov. 16, 1814. (F. C.)—2 Ersk. 9. 59.—2 Stair, 6. 4.—Manwood, p. 143.—1 Coke, 536.—3 Ersk. 7. 4.—2 Stair, 12. 16.—3 Ersk. 7. 10. and 12.—Forbes, Jan. 31, 1822. (1 Shaw and Ball, No. 322.) May 26, 1826.

Respondent's Authorities.—King's Advocate, (2 Dict. 102.)—Lord Kennet, Mar 1, 1769. (10781.)

A. MUNDELL—SPOTTISWOODE and ROBERTSON, *Solicitors.*

JAMES BRYCE, Appellant—*Keay—Campbell.* No. 36.

JOHN DICKSON and Others, Interdictors of JAMES BRYCE; and ANDREW STEELE, his Agent, Appellants—*Shadwell—Abercromby.*

WALTER GRAHAM, Respondent—*Warren—Miller.*

Idiotry and Furiosity.—Tutor and Curator.—The Court of Session having appointed a curator bonis to a party alleged to be fatuous; and on an application by him and his interdictors having refused to recall the appointment, and repelled an objection that his fatuity could only be ascertained by the verdict of a Jury; and having found both his interdictors and agent liable in expenses to the curator,—the House of Lords remitted to review the judgments on the merits, reserving the question of expenses.

DAVID BRYCE, merchant in Edinburgh, died possessed of heritable and moveable property, amounting in value to several thousand pounds. He left a brother, the appellant, James Bryce, (who was a Student of Divinity, and had been admitted to trials, but rejected), and a sister Mary, who was married to the respondent, Walter Graham, residing near Edinburgh. In 1816, and soon after David's death, Mary Bryce, with concurrence of her husband, presented a petition, under the act of sederunt 13th February 1730, to the Court of Session, setting forth that James was in such a state of mental imbecility as disabled him from attending to his affairs; and this was supported by the certificate of Mr Abercromby, a medical gentleman, who had been for several years acquainted with him; not on oath, but simply on soul and conscience. The petition was intimated, in common form, by affixing copies on the walls of the Outer and Inner-House—but not to James Bryce personally. No appearance being made by him, the Court appointed Walter Graham to be his curator bonis, in terms of the prayer of the petition. Graham then found caution according to the act of sede- May 26, 1826. 1ST DIVISION.

May 26, 1826. runt, took possession of the whole effects, collated the heritage (which was inferior in value to the moveables), and received Bryce as an inmate in his family. In 1818, Bryce granted a bond of interdiction in favour of John Dickson, Esq. advocate, Andrew Steele, W. S., and others. A petition was then presented on the 3d of June to the Court by Bryce, with consent of his interdictors, stating, that although Graham had found it for his interest to treat him as an idiot; and had, with the view of getting possession of his funds, obtained himself, in absence, nominated curator bonis to him, yet the allegation of his being imbecile was untrue—that the Court had no power to place him permanently under a curate—that the conduct of Graham had since been exceedingly cruel—or that, at all events, his appointment should be recalled, and that he should be ordained to account for his intromission, and Steele appointed in his place. The petition was signed by Mr Dickson as counsel, and Mr Steele's name was prefixed to it as agent. On the part of Graham, it was stated that this application originated with, and had been prompted by Steele—that both he and the other interdictors could not fail to know that Bryce was in a state of idiocy—that the Court, on being satisfied of the fact, was entitled to appoint a curator to a person in that condition—that the allegation of maltreatment was untrue; and, therefore, the petition ought to be refused, and the interdictors found liable in the whole consequences of presenting the petition. On advising the petition, with answers, replies and duplies,

* *Lord Hermand* observed, that this was a very irregular and irrelevant application. That he saw no title the gentlemen named as interdictors had to concur in such an application; and that it must have arisen from a wish to take advantage of the unfortunate petitioner's imbecility. A bankrupt land-surveyor could not be supposed to act from motives of humanity, as alleged. What was the use of a bond of interdiction in the present case, where the property was all moveable? It could avail nothing, but it pointed out that the petitioner was unable to manage his own affairs. The story of cruel usage was positively denied, and there was no relevant statements made against the curator's accounts. For his part, he thought the defender's conduct blameless. The story as to the defender collating without the authority of the Court, was most absurdly brought for-

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* These and the other notes of the Judges' opinions were laid before the House of Lords.

-ward. The collating showed that the defender wished to act fairly. If he had not collated, but had put the whole moveable property into his own pocket, as he might have done, then there would have been some grounds for complaint. As matters stood, however, he saw no good reason for removing him; and he therefore moved, that the application should be dismissed. May 26, 1826.

Lord Balmuto.—His Lordship concurred with Lord Hermand's opinion *in omnibus*. Were the Court to listen to such an application as the present, they might as well pay attention to the application of any common porter on the streets, who might pretend that he held a letter from any madman complaining of ill usage. There was a certificate from a surgeon produced by Mr Graham, which was sufficient evidence to vouch Bryce's incapacity, and the letters in favour of Bryce he paid no regard to.

Lord Balgray stated, that it was his opinion that their Lordships were bound to inquire farther into the present case. If they had improperly appointed the defender curator bonis to the petitioner, then he ought to be removed. He thought the taking the bond of interdiction from the petitioner a proper method, if he was of opinion that he could not properly manage his own matters. A man may be inclined to spend money foolishly, and so forth, but why not be indulged in his own folly? This Court have surely no title to tie up the hands of such a person; yet, if he chooses himself to tie up his own hands by an interdiction, he is so far right. His Lordship said that he had himself advised an interdiction in a similar case, where, after examination, the curator was removed. The line of conduct adopted by the Court in the case in which he was concerned, was to remit to two respectable medical gentlemen to examine the person and report, and he would advise some similar mode in the present case. A remit should either be granted to one of their Lordships, or to the Ordinary on the bills to take a cognition, or to medical people to report; and though he would not publicly name who he thought the best medical persons to whom the remit should be made, yet he would do so to any of the parties privately. This Court might unwarily appoint a curator to a person who did not require it, or at least who was so far himself as to be entitled by the law to manage his own affairs in the best way he could; and if they had done so, however low or mean the persons might be who gave the information of the erroneous appointment, the Court were bound to listen to it, and give redress, if necessary. He was certain, from the respectability of the gentlemen whose names were prefixed to

May 26, 1826. the present application, (most of whom he was acquainted with, and one of them intimately so,) that they could not have been induced, from improper considerations, to give their sanction to an application such as the present; and therefore the Court was bound to inquire into the true state of matters. A knowledge of Greek or Latin, or of any other language, was, to be sure, no proof of a person's capability in properly managing his affairs. He was himself well acquainted with a gentleman who was perhaps the best mathematician of the present day, but who could not be intrusted with the management of a single sixpence; yet he did not think the Court was entitled to appoint to him a curator, as he could not come under the appellation of fatuous.

Lord President.—His Lordship concurred in opinion with Lords Hermand and Balmuto, and went over nearly the same arguments, adding, that if Mr Bryce was maltreated by his brother-in-law, he should have complained to the Procurator-Fiscal of the county. The curator was an officer of Court, and had given in his accounts; and, no doubt, if objections were applicable to these accounts, Mr Bryce was entitled to make them, and the Court was obliged to listen to them, but he observed none made. His Lordship, therefore, proposed to refuse the petition, and find the interdictors, as consenters to the petition, liable personally in Mr Graham's expenses.*

The Court accordingly, without taking any proof, refused the petition, and found 'the several interdictors, with whose consent 'the petition has been offered, conjunctly and severally liable 'to the respondent in the expenses of process.' Against this judgment Bryce reclaimed, again contending that the Court had no jurisdiction to affix to him the status of an idiot or insane person; or to deprive him of the possession of his property and transfer it to another; that his state of mind could only be ascertained by the verdict of a jury; and that, at all events, the Court could not treat him as an idiot, or refuse to listen to his allegation of cruel treatment, without taking evidence of the fact. The interdictors did not concur in this petition, but Mr Steele continued to act as agent for Bryce. On advising it with answers:

Lord Hermand stated, that the interdictors had not petitioned against the interlocutors, finding them liable in expenses. He therefore thought that the interlocutor was final quoad them,

* Lord Succoth was not present.

and that they ought to be obliged to pay the expenses, as he conceived their conduct was highly reprehensible. He was clearly of opinion, that the original petition by Graham was perfectly regular, and had been properly intimated: That it had proceeded on the usual certificate of a surgeon; and that if the Court was to entertain a different opinion, then all they have been doing for a century past is wrong. The present petition, he must unwillingly hold to be the petition of James Bryce, though he was inclined to think it was not, but of the persons who had so improperly interfered in this matter. It was necessary, however, that some inquiry should be made, and he would recommend to the Court to remit the matter to Dr Gregory, or any other of the most respectable gentlemen of the medical line, with instructions to examine the petitioner and report. May 26, 1826.

Lord Succoth agreed with Lord Hermand, both with regard to the regularity of the original petition, and as to his doubts of the present petition being that of James Bryce, and also as to the propriety of remitting the matter to medical gentlemen. His lordship said that he was absent when the first interlocutor was pronounced, but that, upon reading the answers, he thought the interlocutor was correct. He believed that most of the interdictors, nay, that all of them, were respectable, but still he thought their conduct was very incorrect, and, therefore, that they should pay the expenses.

Murray, counsel for Mr Bryce, here stated he was called on personally by Mr Bryce, who gave him the information necessary to draw the petition.

Lord Balmuto stated, that the original application was perfectly regular, that it had proceeded on a certificate, not given from a casual look at the petitioner, but it bore in græmio to be on an acquaintance of years, Mr Abercrombie having been the surgeon of the family; and it also bore to be on soul and conscience, and Mr Abercrombie was a most respectable man. He believed the present petition to be that of Mr Steele, not of Bryce. What right had Mr Steele to obtrude himself either on Mr Bryce or Mr Graham? was he to become the Don Quixotte of all the mad people of the kingdom? He might as well set up as a trustee for converting the Jews.

Lord Balgray said, that as to the regularity of the original petition there could not be a doubt. The Court also was bound to hold this petition as the petition of Bryce. He was, however, clear that, by the law of Scotland, a person was not to be deprived of the management of his own affairs without proper investigation. He therefore advised that the matter should be re-

May 26, 1826. mitted to the Sheriff, with instructions to make what inquiry he judged proper, and report.

The Lord President concurred with Lord Balgray.

The Court then pronounced this interlocutor: 'They remit to the Sheriff-depute of the shire of Edinburgh to inquire concerning the condition of intellect and state of faculties of the petitioner James Bryce, and his abilities to manage and conduct his own affairs; and also concerning the truth and sufficiency of his grounds of complaint, of harsh or improper treatment, or neglect of his comfort on the part of Walter Graham his curator bonis; authorize and direct the said Sheriff to proceed in the inquiry by personal visitation of and intercourse with the said James Bryce, at various times, and without previous warning or concert, as also by examination upon oath of such witnesses, suggested by either party, who have sufficient cause of knowledge respecting the premises, and likewise by the opinion of medical persons named by the Sheriff to visit him; and ordain the said Sheriff to report his opinion on the said matters, and each of them, to the said Lords. And in case a minute shall be offered on the part of James Bryce, praying for a direction to the Sheriff to proceed in the said matter by Jury or inquest, allow the clerk of process to receive and mark the same as part of the process, and allow the said curator bonis to answer the said minute in case he shall see cause so to do.'

Bryce then lodged a minute, contending that the question of fatuous, or not, could only be determined by a jury. This minute was not answered.

Both parties led a proof before the Sheriff, in the course of which a number of witnesses, consisting of medical gentlemen, the counsel for Bryce, tradesmen, and others, were examined. Steele having been obliged to pay one-half of the expense of this proof, notified to Bryce that he thenceforth would cease to act as agent. A petition was then lodged in name of Bryce, praying for counsel and agent. The Court appointed Mr Jeffrey and Mr J. A. Murray counsel, and Mr Dymock, W. S. agent for Bryce. This petition, it was alleged, was drawn and presented by Steele. The Sheriff, on considering the proof, reported, that after repeatedly examining Bryce, and causing him to be visited by several medical gentlemen, he was satisfied from their reports, and the testimony of the witnesses, that Bryce laboured under a very great degree of mental imbecility; that he was utterly incapable to manage and conduct his own

affairs; and that there was no foundation for the allegation of maltreatment. Counsel were then heard in presence on the proof; and on resuming consideration of the case,— May 26, 1826.

*Lord Hermand** observed, that it was favourable for Mr Graham, the curator bonis, that he had of his own accord collated the heritable and moveable property, on succeeding to David Bryce.

The first point for consideration, was the incapacity of James Bryce for managing his affairs; and on that subject he thought James Bryce part of both an idiot and a madman, from the proof led by Mr Graham, for he paid no attention to any part of the evidence for James Bryce, except the deposition of Kay; and he considered it to be exceedingly wrong to give printed papers to Ross and Dr Esplin, and the account-book seemed to be made up not by Bryce himself.

The second point related to the question, whether the Court had any title to take the property of James Bryce out of his own hands without a jury. He said, many applications for curatories have been made to this Court—are all of these illegal? Certainly not.

As to the interdictors, they are volunteers in this business. They are very respectable gentlemen, I confess; but they have attempted to deceive the Court, for this man is incapable of acting, and they should be personally liable in all expenses.

Lord Balmuto.†—The question is, whether or not there is ground sufficient to warrant the curatory that was granted in this case. The application for its recall was made by certain persons, calling themselves interdictors to James Bryce, who say that there was no occasion for the curatory to be granted, and that such has been the curator's conduct that it should be recalled.

I consider that it has been the immemorial practice, and assented to by the country, that this Court should exercise a superintending power in cases similar to the present. This is now the established law. The act of sederunt passed with regard to this subject, requires the curator appointed to find security for the funds of the person whose property he is appointed to take charge of. You have every day applications for curators to persons in the situation of this unhappy man, and for persons in the highest rank in the country, to whom curators are appointed, after receiving the opinion of medical practitioners specially appointed by the Court, as to the mental situation of

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* This speech was revised by his Lordship.

† His Lordship revised and corrected this speech.

May 26, 1826.

the person to whom curators are applied for. Here, by immemorial and uniform practice, the Supreme Court is authorized to apply a remedy for such a case as the present. It would be deplorable and unfortunate for such persons, if there was not a remedy to protect them against swindlers, and persons who have only their own interest in view. This unhappy man, from infancy, appears to have been of an imbecile mind. Whence does this cause arise? Clearly from those persons calling themselves interdictors. Without any connexion, or, some of them, even acquaintance with this unhappy man, they walk into his lodgings, and persuade him he has been ill treated by his sister; that the appointment of a curator was irregular, illegal, and unnecessary. At the same time they obtain from him a bond of interdiction, appointing them to manage and take charge of his affairs, the very ground of which bond is the imbecility and weakness of the person who grants it to manage his own affairs; and being thus authorized, as they suppose, they apply to your Lordships to recall the curatory which was granted, upon minute inquiry, and a certificate by a respectable medical gentleman, of the unfitness of this unhappy man, Mr Bryce, to manage and conduct his own affairs.

Your Lordships minutely investigated this matter, and were so dissatisfied with the application for the recall of the curatory, and those persons volunteering in the business, that you found them personally liable in expenses. They ascribe their conduct to humane feeling, but I cannot give credit to such statement. I apprehend, that if this man had not been possessed of some fortune, this application would not have been made.

After the first pleading, your Lordships having ordered an investigation, upon which you could judge whether the curatory should cease—what has the proof brought out? It shows that Bryce is nearly a complete idiot, and incapable of managing his affairs. In order to mislead your Lordships as to Bryce's capability of exercising his own judgment, he was instructed, with the assistance of the clerk of one of the interdictors, to purchase some trifling articles, and enter the same in a book, of which the poor man himself did not understand the meaning. Such conduct was certainly improper. Papers in the cause were also given to particular persons, who were to be examined as witnesses, which was highly improper.

Upon the whole circumstances of the case, and proceedings that have taken place, I am perfectly satisfied we were called upon, and in duty bound, to appoint a curator for this unhappy man; that the conduct of the curator so appointed has been highly proper and correct; and that there are no grounds what-

ever for recalling it; therefore, that the present application for recalling the same ought to be refused, and the petitioners found liable in the expenses. May 26, 1826.

*Lord Succoth.**—This case appears to me to involve a question of the very first importance—a question of general, and, I may almost say, of constitutional law. Viewing the question in that light, I consider it my duty, after hearing the very able pleadings of the counsel, to go minutely into all the authorities to which they referred. And after attending carefully to these authorities, I still consider the question, whether the Court of Session has an original radical jurisdiction to judge of the situation of a person alleged to be incapable of managing his own affairs, without a cognition by a jury, as one of great difficulty; the more especially as it goes, not merely to a temporary arrangement, but to the permanent management of the unfortunate person now before us. If that is the true nature of the question, I need hardly say, no more important case has, perhaps, ever been before this Court.

In the view that I have taken of this question, your Lordships will at once see, that it is not necessary for me to go minutely into the proof which has been led. It is clear from the evidence, and particularly from that of the medical gentlemen, that Bryce is not an absolute idiot, although some of the witnesses say that he is not capable of managing his own affairs. But supposing that to be the clear opinion of many of the witnesses, the question still remains, whether, before this Court can permanently appoint a curator bonis, the situation of the unfortunate man ought not to be judged of by a jury upon a brieve for cognoscing him, when the proof will be taken in presence of the jury.

When such a proceeding is adopted, (which I shall show is the regular mode,) it seems to me to be attended with various advantages. As the evidence is taken before a jury, there is a better opportunity of sifting it fully. The jury have likewise the advantage of seeing and conversing with the unfortunate person whose status is in question.

I admit, from the well-known ability of the person by whom this proof was taken, that it would be conducted in the very best manner, but still it comes to us at second hand.

On this part of the subject I shall only say, I wish some more questions had been put to the medical gentlemen. They all say they do not think Bryce capable of managing his own affairs, but I wish more special questions had been put to them.

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* His Lordship revised this speech.

May 26, 1826. I should have wished this question had been put, among others, Whether, in their opinion, from what they had seen of him, he has any disposition of a spendthrift in him? whether they thought there was any danger of Bryce's squandering his fortune, or of his throwing it into the sea. From what I see in the evidence, I do not believe the medical gentlemen would have said there was risk of any such thing. There is no appearance in the proof of his being of prodigal habits. On the contrary, he appears to be careful—not inclined to drink in tippling-houses, or spending money in any improper way.

But I am only stating this in passing. According to my view, all this will be better investigated when the case shall go to a Jury on a brieve, procured by a person having interest.

The general principle, I conceive, is, that when a question of status of this description has been rendered contentious by opposition being made, and the matter has been brought fully before us by persons authorized to act for the party, as in this case, the Court of Session has not an original radical jurisdiction to judge whether the man is an idiot or compos mentis. The situation of the person ought to be previously ascertained by a Jury, summoned upon a brieve from the Chancery.

In saying this, I beg to be understood to make a distinction between an interim and a permanent management—a distinction which it appears to me material to keep in view, considering the authorities appealed to on both sides.

A temporary management may with propriety be ordered by the Court of Session, but it is a different question whether they can authorize a permanent management without a previous cognition. In the case of a mere temporary arrangement, the Court acts ex necessitate to preserve matters entire—to guard against risk of the subject of contention being lost before there is time to ascertain the state of the person by means of a Jury.

I therefore agree, that nothing wrong has been hitherto done by the Court—that we have been acting justly and agreeably to former practice, by naming a curator bonis to act till a cognition takes place, because I conceive it to be within the power of your Lordships, acting in cases of this kind ex necessitate, in order to prevent great evils, to order a temporary arrangement of the kind to take place. But my difficulty in the present case arises from this, that those having interest decline to bring this unfortunate person before a jury.

I admit that this Court has a right to judge of the status of a man in all cases, where that question occurs incidentally in another question, in which the Court has clearly jurisdiction,

as whether a marriage is null or not on account of the person being alleged to be incapable of consent. When a question of marriage occurs, it is unquestionably competent, and within our powers in deciding the question of marriage, to judge incidentally whether the person is an idiot or not. May 26, 1826.

In the same manner, when another class of questions come before us, viz. such as relate to deeds or settlements made by a person alleged to be non compos, we necessarily must judge of his situation at the time of the execution of the deeds, for unless we do so, we cannot explicate our own jurisdiction.

This was the situation of the case of Blair of Borgue and others, which were much commented on by the Counsel. In the case of Blair, a marriage was declared null from the idiocy of one of the parties, though a child had been born of the marriage. We were obliged there to judge of the situation of the parties, in order to decide whether the marriage was good or not.

But in the present case my difficulty is this, that here there is no marriage;—no settlement executed, no deed done by this person Bryce, the validity of which is brought before us. We are not called upon here to judge incidentally of the status of this man, in determining a question to the decision of which we are clearly competent. If that were the nature of the case, I could have no difficulty about it. But here the situation of Bryce is the only question. The point is whether Mr Bryce is capable of managing his affairs or not, and the question is whether it is competent for us to judge of that matter upon the proof before us—or whether it is agreeable to the law of Scotland, and to the principles recognised by the different authorities appealed to, to do this without having the status of this man ascertained by a Jury, in a regular process of cognition.

There are a variety of cases which are extremely analogous to the present, which throw considerable light on the question.

Take first the case of a tutor at law served to a pupil. It is the law of this country that tutors at law cannot serve till there has been a cognition.

Take the case of a testamentary tutor, where a father has named a tutor to his son, thinking him incapable of managing for himself. There also the tutor cannot enter upon his office until there has been a cognition and verdict finding the son incapable. I see that clearly laid down by Mr Erskine, B. I. t. 7. § 49. He says, 'There has been, it is believed, no instance in our prac-'tice of testamentary tutors given to idiots; but surely where

May 26, 1826. 'any natural incapacity appears in a son for management, the 'father is as justly entitled to name a curator to manage for 'him, as he is to appoint one for protecting him against the 'follies of youth; and this was the doctrine of the Roman law. 'L. 16. De Cur. Fureis. Yet before the testamentary curator 'can enter upon the exercise of his office, the son ought to be 'declared or cognosced an idiot by the sentence of a Judge; 'since no person is after majority to be denied the right of con- 'ducting his own affairs, unless he be properly declared incapa- 'ble of it. The regular method, therefore, pointed out by our 'law for declaring fatuity or furiosity, is by brieves issuing from 'the Chancery, and directed to a Judge, who is ordained to call 'an inquest for inquiring first into the person's true state.'

Both the case of the tutor at law served, and the case of the testamentary tutor, not having power to act till a proof has been regularly led before a Jury, do strongly operate with me in judging of the present case. They show what is the genius of our law on that point.

Let us now look to another class of those tutories, of which a good deal was said in the course of the pleading. I mean tutories dative. With regard to them there is certainly more doubt. It appears to me that the practice in Exchequer has been different at different periods. In the earlier times, both the Privy Council and the Court of Exchequer sometimes proceeded without a cognition: but the more recent practice has been otherwise; and I believe I may safely say that for 40 or 50 years, it has been the practice not to grant tutories dative till after the party has been cognosced by a Jury, although these are in some respects of a more temporary nature than the other tutories, as they take effect only till a tutor at law shall serve. Surely it is to the modern, and not to the ancient practice we are to look.

Sir G. Mackenzie, in his observations on the Act 1475, c. 66, says, 'at least the Exchequer will not grant tutories da- 'tive, unless their condition be first tried by an inquest.'

In his observations on the Act 1585, c. 18, he seems at first sight to lay down a different doctrine; but he is then speaking only of a temporary management, and his meaning is, that the Lords of Session were not then in use to appoint curators bonis, except for a temporary purpose.

There is another subject, which I shall just touch upon, to show the difficulties that here occur, and that is as to the right of Mr Bryce to make a settlement. We all know that a person of very little mind may make a settlement, and various instan-

ces might be pointed out of settlements made by persons of very weak understandings, and in circumstances similar to those which arise here, which have been sustained. May 26, 1826.

Suppose your Lordships without any qualification continue this curator bonis, and this Mr Bryce makes a settlement, it strikes me that the continuing this curator bonis would operate strongly against such settlement.

There is another class of cases, which throw difficulty upon this question, and which have occasioned considerable doubts in my mind. I allude to a case where there has been a cognition, and where the party has been alleged to have become convalescent. In such cases I understand it to be competent to proceed in this Court by a declarator, with a reductive conclusion at the instance of the person cognosced.

Suppose such a declarator brought, I understand it is competent for us to judge of his convalescence without sending him again to a jury. That certainly is a case which throws difficulty on the present. But I think there is room for a distinction between the cases. In the one case you are setting a person aside from the management of his property: in the other, you are setting him free from the restraint imposed upon him, which is a more favourable case; and besides, in it the Court are not exercising an original radical jurisdiction. Accordingly, the law from Lord Elchies, Tutor No. 12, recognises this distinction. A declarator of reconvalescence had been obtained, and then a relapse was alleged; but as he was relapsed and a call upon your lordships to take away his management, the Court thought that although they had it in their power to judge of the reconvalescence, yet they could not take it upon them to judge of the question of relapse, and therefore refused to interfere, and sent the case again to a Jury. Whether that distinction is founded on sound principle or not, I shall not pretend to say; but it shows the Court felt strongly the difficulty of taking away the management of a man's affairs from him without the verdict of a jury.

However well founded in principle I may consider the view which I have taken of this case, I should have given it up, if I had seen that it was contrary to the decisions of this Court; but no cases in point have been appealed to by the counsel as having occurred in this Court, where a person alleged to be incapable of managing his affairs and not far from being an idiot, was brought into this Court, and then in opposition he, or some other for him, had said, I am not of that description, and I am capable of a certain degree of will, and I know one thing from

May 26, 1826. another. I know my mind from yours, and I can give directions to somebody to plead my case, and to say who is the person should manage my affairs. If I had seen such cases, and disregarded all that had been said and judged on the proof led, I would have considered it right to abide by these decisions; but I have not been able to see such decisions.

The only two cases approaching to the present are what are mentioned in a note to Erskine's Institutes; the one something like the present, where the management was taken from a person by your Lordships; and the other where the management of affairs was taken from a person, on account of old age. But unfortunately I could get no more light from those cases excepting what is stated in the note in Mr Erskine's book.

They are not reported in any of the books of decisions, from which it would seem the reporters had not thought they were worthy of being reported. But if these cases had established the power of this Court to appoint a curator bonis without a cognition, when the fact of the party to whom he was so appointed being incapable of managing his own affairs was disputed, the collectors of Decisions would undoubtedly have reported them.

I have also looked through the papers of the Judge who then sat in the chair, and who was in use to preserve every case of importance, without being able to find either of these cases, and I am led from these circumstances to conclude that in neither of these was there any point of importance determined, or any considerable discussion.

Even in that note in Erskine, as it has been given to us, the ground of the Court's interference has been stated to be necessity. The act of sederunt 1730, therein referred to, it is to be remarked, specifies persons 'under some incapacity for the 'time to manage their own Estates.' These words are clearly applicable to a temporary incapacity. The act of sederunt indeed does not apply to such a case as the present. It applies chiefly to the case of persons absent. The words may perhaps apply to a person not absent, but under a temporary incapacity, when your Lordships must do something in the meantime, before cognition. But it would seem from the way in which the matter is stated in the preamble of the act of sederunt, that it was not in the contemplation of those who drew the act to authorize any management, even of a temporary nature, in the case of idiocy.

The case of pupils not having tutors is a very different one, and is a proper case for the Court exercising its power. There

is no room for cognition there. The same observation applies to the case of a person absent. Therefore, there is no arguing from the act of sederunt, to such a case as the present. May 26, 1826.

I am aware, after all I have said, that there is one considerable difficulty remains behind. How are we to get a cognition in the present case? It is argued that the thing is impossible—If I understood properly, this unfortunate man has no other relations except his sister, and she says she will not purchase a brieve for cognoscing him, and that your Lordships cannot force her to do it. It is admitted that the sister has both a title and an interest to prosecute the brieve, but it is said that nobody else has such title and interest. I believe this is well-founded, for I am inclined to think it is not competent to the public prosecutor to purchase or follow out a brieve.

But suppose no other party to have an interest, there appears to me to be one way in which we can make it the interest of this lady to bring her brother before a Jury. Continue the curatory bonis for a limited period, ex. gr., two months, to give her time to purchase a brieve, and to take her brother before a jury, with this certification, that if she do not, the curatory bonis shall be recalled. That will make it her interest to take this step, which I hold to be the only legal mode of ascertaining whether her brother is capable of managing his own affairs or not.

That is, under all the circumstances of this most important and extraordinary case, the only conclusion to which I can arrive. This would be only a temporary management, an interim appointment of a curator bonis ex necessitate to prevent mischief, till there is time to bring this unfortunate man before a jury. As to what would be the consequence if the jury should not cognosce him, I do not think it at present necessary to say anything.

*Lord Balgray.**—The uncontrolled right or power of managing our property, is one of our most important rights that is protected by law. No man can be deprived of this power without a due investigation, and that done in a manner prescribed by law. In the case of an imbecile person, the Court has a peculiar duty to perform. You ought to be the guardians, protectors, and counsel for such persons. You are bound to protect them in their rights, and if it be one of their rights that they must be deprived of the management of their concerns in a certain way, you are bound to secure it to them.

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* This speech was taken from his Lordship's notes, and those of a short-hand-writer.

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When you are erecting yourselves into an authority to remedy the common law, you must look to what the common law says; and by it no man can be deprived of the management of his affairs except by a jury.

The original principle of our common law is feudal. The Prince, as Pater Patriæ, took the care of idiots and madmen, and tutories dative were given to whatever persons asked the office. This was the source of most gross abuses. It formed a public revenue to the Crown, both here and in other countries. The Act 10, James VI., c. 18, 1585, was meant to check that improper proceeding, and that none should have power to obtain custody of the person but the next agnate; that is the import of your law. The Act of Parliament lays it down, that there shall be cognition by a jury, and the Crown shall not have power to take charge of the person for whom the curatory is given from the agnate. Have you power to dispense with the common law of your country? And when you come to examine the authority of Mr Erskine, does not that tend to the same doctrine, and show the proper form of that common law, and that cognition is required as to the condition of every one, in whom is vested the natural power to manage his own affairs? I think that is a wise law. The rights of personal liberty are to be guarded, and the right of every one to manage his own affairs. Those are rights flowing from the law of nature, and are to be protected in every well-governed country.

In Scotland, the Privy Council were in use to interpose in all extraordinary cases, and, upon their abolition, many of their judicial powers gradually came to be exercised by the Court of Session; and in 1730, the Court made an act of sederunt, by which such factors as they appointed were to be regulated; but the preamble of that act of sederunt shows, that the Court limited themselves in these appointments to cases of temporary incapacity. It is a voluntary jurisdiction, by which they interfere to appoint factors and curators; and where all are agreed, no harm is done. They have no radical power; it is in the Crown. They have no right to dispense with cognition by a jury, and the interference of the Privy Council in such cases of necessity never could have superseded the ordinary rules of law.

The law of England is the same as ours. The radical jurisdiction in such cases was in the Crown, and the most gross abuses took place in granting curatories, as I said before, that could be imagined. Of late years, the mode proceeded in is this, that where a person's situation attracts notice, a petition is pre-

sented to the Lord Chancellor, backed with affidavits, and he grants for a time both the charge of the person, and the management of the property. May 26, 1826.

But I beg leave to mention, that when it appears to be necessary that there shall be a permanent management, he takes care the question of the necessity shall be properly tried.

Look to the Act, too, for Managing Mad-houses, 31st section; where an individual is entitled to apply for his habeas corpus, there is a most anxious charge for that purpose.

As to the proof that has been led in this case, as far as regards the report of the physicians, and a report of the Sheriff, how far are they conclusive? They are so to a certain extent. But what appears to me is, that we, who are to judge in this case, are not to be entirely guided by the opinions of any description of persons as to the condition of Bryce, but are ourselves judges of the proof. I do not care what any one says—he is not to lead my opinion. I am to judge in the matter as it is—I, who am to be responsible for what may be done in consequence.

When I come to view the evidence, I see there are some persons altogether unexceptionable, and who must have had opportunity of knowing Bryce, and whose testimony is in his favour. I cannot lay out of view the evidence of Mr Borthwick, advocate, and the Rev. Mr Johnston. It is impossible I should lay their evidence out of view; and it shows you, that what has been stated of Bryce's incapacity by his curator, cannot be true to the utmost extent; for though Mr Bryce was rejected on his trial as a clergyman by the Presbytery, yet before entering on the trial there must have been a certificate of the Professor of Divinity in his favour; and would he have granted it to a person incapable of managing his affairs? Therefore, even Mr Johnston himself, and Mr Bryce, were surprised at the rejection by the Presbytery. There is another thing I cannot lay out of my mind, viz., the evidence of the tradesmen. Part of this is said to be contaminated, but I cannot lay aside the evidence of Mr Dumbreck and some others. I know them personally. They are men incapable of giving false testimony to serve any one, and they are men of sound judgment and good sense.

Neither am I warranted to lay out of view the evidence of the curator ad litem, appointed by the Court to manage this case, Mr Dymock, nor what was stated by the two eminent counsel, appointed by your Lordships for Mr Bryce. I repose that confidence in their honour, that they would not state what they do

May 26, 1826. not believe; and if either of these gentlemen state an impression that Bryce does possess a certain degree of mind, I am not warranted to throw such statement out of my view.

What is then the general conclusion I draw? Although this person has been shown to be incapable of the management of his affairs, has he such a portion of mind as to know and feel he has a certain right, or not? Has he a sense of religion, a sense of right and wrong? Do the medical persons say he is *not* an entire idiot? Has he a sense of distinction between mine and thine? A sense of property? If he has a sense of that kind, may he not come here and say, It is true I may be put under management, and I am sensible of my deficiency in some respects, but allow me to be cognosced. I say he has a right to maintain that argument, and plea before your Lordships. If he has that right, when you come to apply the judgment, it ought to be a qualified judgment, so as to preserve the rights of both parties.

By such judgment you give the next of kin the power of preserving the property. On the other hand, you preserve the rights of Mr Bryce; for if you do not qualify the appointment of the curatory, it must be a permanent one.

Is the curator bonis ever to go further, if you do not qualify your judgment? He will go no further, and you are depriving Mr Bryce of the right which he enjoys by the law. You are turning him out of possession of his property,—putting him in a situation in which he could not easily recover that possession. How could he recover it, if he should wish the management taken from the curator? When he comes again, the curator bonis has possession of the funds; and what prudent man is to interpose to assist a man in such a situation? He must lay out his own money to assist Bryce, and expose himself to all the risk of obloquy, of interposing as from false humanity, or improper interference.

But what is the definite extent of power and onerous management, with which the curator bonis is intrusted? If it goes the length of vesting him with the custody of Bryce's person, and if he is next heir to him, it is contrary to all law.

If, again, it be most proper that the curator bonis have no concern, but to take care that his acts be not prejudicial to his estate, where does that consequence lead? Are you entitled to point out where shall be the personal residence of this person? Certainly not. And if he is inoffensive to other persons, and does nothing to call for the notice of magistrates, he is entitled to go where he pleases.

Then, I ask, what is the nature of his personal powers? If we look to all the different contracts, where they appear moderate and proper, so far, for instance, as regards his maintenance, clothing, and comforts of life: Are not all these effectual? No lawyer can dispute it. What becomes, then, of all his personal privileges? There are many he has, which no curator can exercise for him. Suppose him a freeholder, and capable of voting at an election for a representative in Parliament: what power can deprive him of exercising his privilege of voting? what more valuable privilege could he enjoy? May 26, 1826.

What more valuable privilege is there, than the persona standi in judicio? If he have a certain portion of mind, what right have you to say, I think you are an idiot, and you shall not stand at the bar? Have you that power? Has he not a right to come here, and if he makes a reasonable plea, must not you sustain him in that plea and right?

When you come to examine altogether the nature of the office of a curator bonis, as conferred by this Court, it is so anomalous, tending to such consequences, that such cases should be considered well before granting the office. Here it is granted without even summoning or informing the person whose affairs are to be taken out of his own hands.

Another point of consequence is this. I do not think that when an application is made in this way, the best evidence can be brought before you, to get at the person's situation. You have no primary jurisdiction: You do not get at the evidence which the law requires. What is the nature of the evidence? The proceeding is just of the nature of a precognition. The evidence is all taken on one side. You take the best you can get, but it is not evidence in foro contentioso. A person may be misled. And if in such a case it were possible to do an illegal thing, as in the time of the Privy Council, what is to hinder the same thing to be done here? It may be said that punishment would follow; but that is not sufficient. Law has a jealousy of such things. The evidence is of the nature of a precognition. The witnesses are examined only on one side, and such questions only asked from certain persons, as are sufficient to get the end in view accomplished.

Another material thing is, that before Bryce be deprived of managing his affairs, he should be before you: He should be cited and examined. A jury cannot pronounce a verdict unless they examine the person. In one case, from an error as to this, committed by the jury, and from the gross irregularity of the jury not calling the person before them, you set aside the ver-

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dict. No verdict can be returned unless the person be present. And it is only in cases of necessity where that presence can be dispensed with.

The person must be produced for examination; and by the constitution of the law, the jury must return their verdict according to their own knowledge. The person cognosced has a right to that examination.

Upon these grounds, this case appears to me to be of very considerable importance. I am not moved by what Mr Clerk, one of the counsel for the curator, stated as to questions of status being entertained incidentally in questions of marriage. He might just as well say, that the Commissaries or Sheriff could name curators, because they may vindicate their jurisdiction in a similar way.

Can it be said that Bryce's property might be endangered by recourse being had to the common remedy of law? At the very instant a brieve is served, the whole acts and deeds of the person in question are interdicted. But the case is different in an application to your Lordships, till a certain period.

Then as to the expense of a cognition by a jury, I am astonished at that being stated as argument: and when persons of such ability as the counsel here lay hold of such a thing, I am apt to suspect that there is something wrong at bottom in their case. The expense is not a tenth part of what will be incurred in this Court, nor a fourth of the expense of the original petition to your Lordships. The brieve is 5s.; a retour 22s.; and all the witnesses being on the spot, the verdict is immediately obtained.

But, in the last place, what affects my mind most strongly is, that the Court of Exchequer is the proper Court for granting this authority. I go to the fountain head. Is not it the original proper Court at common law? It proceeds in a certain manner; and upon what ground of reason or justice are you to adopt a different mode? If another Court follow the correct mode, should not that make you follow their example? Is it not the more cautious and correct mode?

Therefore I concur in the opinion last delivered, which does justice to all the parties.

I am for refusing the desire of the petition, so far as it goes to the instant recall of the appointment; and I am for authorizing the curator to continue in the management for a short space, so as to enable the party having an interest to apply to the common authority by law.

*Lord President.**—I am very sorry that this discussion has taken place, because I shall never think hereafter that there is anything fixed in the forms or in the law of this country. I shall never think there is anything so clear, so fixed in point of form and procedure, that we may not be driven, by long arguments, to say whether it is to continue or not. May 26, 1826.

I never wish to make law; and if I did, I do not pretend to be a better lawyer than the number of great men who have preceded me on this Bench. If the forms that have been prescribed in this country now for near a century, which were introduced by practitioners, and sanctioned by our act of sederunt, and the practice of the Court, be erroneous, let them be reconsidered by the whole Court, and let more constitutional forms be adopted in future, and regulate future cases.

But, while talking of law, justice, and equity, the most arbitrary proceeding is to make, ex post facto, laws and forms that are to have a retrospect, and to regulate particular cases that come before us, according to the views and maxims of individual Judges who happen to be seated on the Bench.

The first question here is as to the point of fact; and with regard to which, there is no difference of opinion. It is whether this unhappy man be fit or not to manage his own affairs. Upon this we are all agreed, that at the present moment he is not so; and therefore that, in the meantime, there is a necessity of continuing this curator. There is no difference of opinion upon that point, and there could not well be, for a more lamentable, melancholy, and humiliating picture of human nature, I never knew.

The little of mind in Bryce, that one of the counsel founded on, was that Bryce bought a pen-knife, and higgled about the price. I have seen a dog do as much. I happen to have seen one which can go and make a purchase. If a penny be given him, he goes and buys a roll, and will not take a halfpenny roll; but if L.1000 were presented to him, it would puzzle him; and a curator bonis must be appointed to that honourable animal, although, like Mr Bryce, he knows the difference betwixt mine and thine.

I happened to be one of the counsel in the case of Sir Archibald Gordon Kinloch, Bart. Look at the printed trial. It was there stated by professional men, that the greatest madman in bedlam might know the difference betwixt right and wrong, if the abstract question were put to him. But Sir Archibald Gordon Kinloch's madness consisted in thinking that his bro-

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* His Lordship revised this speech.

May 26, 1826. ther was in a conspiracy against him, and that therefore he had a right to resist him.

That which I noticed a little ago, being the only degree of mind given to Bryce by one of the counsel, what was the explanation given by the other, of a disgusting circumstance mentioned by one of the witnesses? Mr Jeffrey said it could be easily accounted for. I allude to the circumstance, that, in broad day-light, and in the face of persons going to the church, this person amused himself by making water in his hat, tasting it, and then putting the hat on his head. Mr Jeffrey explained this as a chemical experiment on his urine. Did Mr Jeffrey intend to laugh at the Court, or to be laughed at by the Court? It may have been meant as a good joke; but if he meant it as an explanation of the fact, he might have spared himself the trouble.

It is impossible to read that proof without being satisfied that Bryce is totally incapable of conducting his own affairs, and that the curatory ought not to be recalled. And the only question is, whether we are to go on, and, of our own power, continue the curator we appointed, or introduce the novelty that has been proposed, in order to force this person into a cognition.

On part of what has been stated on that subject, I do not differ with any of your Lordships. This is not the regular and original mode of proceeding. The regular way of cognoscing, is by an inquest before a jury, who fix certain characters upon the person as to whom evidence is adduced, and certain powers are then given to a tutor.

For anything I know, many of the things stated by my brother may be true. All that follows is, that if Bryce retains any privileges, we do not take away any of those privileges.

Another brother says, Bryce may be capable of marrying, and making a will. If so, let him do it; we have injured his rights the less.

But let us come to the question, whether we have, or not, a jurisdiction in this case? We have no jurisdiction to make tutors at law or tutors dative. But you know, and you have conceded, and, whether or not, law has laid it down, that this is a Court of Equity. It is itself the guardian of those incapable of managing their affairs. If, in a process, we incidentally discover that a party is incapable of taking care of his interest, we have a right to interfere.

I agree also to what was said about the origin and mode in which the jurisdiction came to be exercised by the Court. It was on the abolition of the Scotch Privy Council. But that

body was different from the Privy Council of England. Whether they ever exercised improper power at a certain time, is nothing to the purpose. It was a Court which exercised jurisdiction in such cases as this. Cases of contentious jurisdiction were pleaded before them; and if this case had come before them, they would have taken evidence upon the subject. If a petition was presented, and opposition made, the Privy Council would have exercised their own jurisdiction, not to the effect of giving to any one the power of tutors at law or tutors dative, but that of managing the affairs. And if the powers of the Privy Council in such cases have come to this Court, must not all the particulars of those powers be attached to it? May 26, 1826.

It has been pleaded, as if we were to do everything against the liberty of the subject here. We have liberty, it was said, to lay on the curatory bonis, but no liberty to take it off. The argument was applied to that extent, though your Lordships, I think, have not gone that length.

The jurisdiction did so devolve upon this Court as a matter of necessity, and what does the preamble of your act of sederunt 1730 say? Does it lay down rules for cases never occurring before? No. It proceeds upon the narrative that frequent applications had been made before to the Court, between the Union and that period. Finding the country had called upon them to exercise the jurisdiction, they lay down rules for its exercise. Down to this day, we have proceeded in one uniform course, by one uniform interlocutor, which never has been varied. I have before me an old original application, where the Lords appointed a curator bonis. Not a word about serving the petition on the unhappy person himself. If you think, with Mr Jeffrey, it would be better to make a new act of sederunt for that purpose, I have no objections, though I mentioned the other day what I thought the reason why our ancestors had not adopted the plan proposed. It is this: A brieve is purchased without any prima facie evidence as to the state of mind of the party. It is set forth in the petition in Bryce's case, that there were no relations by father or mother, otherwise they would have been called. But there is prima facie evidence of his condition, by a certificate from a respectable medical person, declaring, 'I certify, 'upon soul and conscience, that having been for several years 'in the habit of professional attendance on the deceased Mr Da- 'vid Bryce, merchant and banker in Edinburgh, I have had 'ample opportunity of being acquainted with the situation of 'his brother, Mr James Bryce; and I am of opinion he labours 'under such a degree of mental imbecility as renders him un-

May 26, 1826. 'fit for being intrusted with the management of his own affairs. '(Signed) JOHN ABERCROMBIE, Surgeon.' I stated a plausible reason why your Lordships, in adopting this form, did not go the length of serving the application on the person himself. But whether right or not, our practice has been established since 1730. My brother mentioned how cautiously our ancestors procceded. I daresay they did. I hope we always do. But the very first interlocutor must have called their attention to the wording of it; and down from that day to this, the form has gone on, and it must be adhered to till it be altered as a general rule. You have acted upon that principle in a hundred cases.

You remember the case of Aberdeen, where a practice had prevailed as to sasines against the act of Parliament, and the security of the lieges. You saw the mischief and injustice there; and though that was an error entirely of the officers, you saw the injustice of laying hold of a common error in an individual case.

So here the practice may be wrong, but do not visit your own ignorance and inadvertence upon an unfortunate person who relied upon your form.

The only question then is, are you to introduce this novelty of limitation till a regular cognition shall take place?

I agree with all of your Lordships, that our remedy is but temporary, because the instant a tutor at law or dative appears, that moment your Lordships are superseded. But this is no more than what happens in other cases. In the case of minors, the tutor dative is temporary till the tutor at law appears; and the latter is also so till the tutor testamentary appears; but the absurdity is, to hold that in such appointments it is to be mentioned that they are only temporary, in express words. The law knows all these things are temporary.

If we were to rake up the forms of this Court that have been established for near a hundred years, and to go back into original principles, and consider whether a form, if canvassed at the time, might not have been made better, more constitutional, and more advantageous to the lieges, where is the law of this country? We have been accused of vacillating a little as to form in our acts of sederunt, and of not being so steady as in the neighbouring country; but if we are to vary our law and forms, in particular interlocutors, according to the views of particular judges, I do not know what is to become of the law of this country, or what is or is not law.

Our interlocutor implies a temporary appointment. It is said the act of sederunt alludes to persons under a temporary in-

capacity. The duration is known to God alone. It is supposed, in general, that fatuity differs from insanity, from the former being permanent, and the other not so. But recollect that one of the greatest, most beautiful, and sublimest of our poets, was a natural born idiot till nearly twenty years of age. He was not capable of learning to read or write till of that age. And therefore it is impossible to say what is permanent or temporary. May 26, 1826.

But all these things are temporary. The cognition itself is temporary. If this curatory has been laid on according to the practice of this Court, are not you to deal with it as with the cognition itself? You are allowed to take proof and judge of a cognition, this solemn act of a jury. If it be called in question, you may cut and carve upon it. In a reduction, you may judge of it. In a declarator of convalescence, you may judge of it without sending it back to a jury. But here it is said you must send your own judgment to a jury. Now that appears to me extraordinary, that the more solemn proceeding of cognition before a jury, regarding the status of a man, may be reviewed by this Court without a new cognition, while a temporary and less solemn measure, which could not settle some important points as to this man, is to be held so sacred that your Lordships cannot touch it. For as to the wild doctrine, that it is to fly off at once upon the person declaring himself well, ipso facto, that seems to be given up on all hands.

If the law allows you to have power to review, confirm, or set aside the verdict of juries, and you are not to have the mi-nor power of overhauling your own interlocutor, it is strange.

But we heard of this being voluntary jurisdiction—that it is all well while there is no opposition. If so, this limitation of your judgment, as to time, should go into your appointment at first as well as now.

According to this, all you are now called on to do should have been done originally. In the original interlocutor, the appointment should have been, not during the subsistence of the disability, but during some short period, till an opportunity occurred to cognosce. Why not then as well as now? If only from necessity you act, it always existed. If two months is a proper time now, why was not that limitation introduced at first? You have pronounced twenty interlocutors since that question was stirred, appointing curators during the term of disability; but according to the present argument, the appointment ought to be only till the cognition can be effected.

The case of the Duke of Buccleuch was cited, and some pas-

May 26, 1826. sages were read, as if the Court had doubted of the propriety of what they had done in the appointment of a curator bonis. Some individual Judges may have doubted, but the Court did not doubt. They appointed the curator. What they doubted upon, was as to the curator bonis coming and getting his accounts *approved of* during the minority, when there was no person to canvass them on the part of the minor. Most properly they doubted. They had received the accounts for several years. The accounts were signed and audited, and this had not been understood to be an extraordinary proceeding. But the time for exoneration was the end of the curatory. And what your Lordships doubted of in the case of Buccleuch, was, as I have stated, as to approving of the accounts, pending the curatory, without examination on the part of the minor.

Then we were told of the case of Lord Annandale—that good advice was given in that case—that your Lordships should not appoint a curator. The Court did not do it, for there was no application to the Court. But I know when the noble person, the next heir, came to take out the brieve, that very advice puzzled them all in the Court; for the question was how to go on, when Lord Annandale was in England, and could not be produced to the jury. What did the Court do? They acted from the necessity of the case, and gave commission to the Lord Advocate to take an examination in London, and report it to the jury; so that if the learned advice given in that case relieved them in one difficulty, it landed them in another.

But we were told of another very extraordinary mode of proceeding. It was said that this man, though incapable of managing his affairs, had that degree of mind sufficient to enable him to insist on being cognosced. This would be a new purchaser of a brieve. I never heard of the purchaser himself being the subject of such a brieve; and what the jury could make of such a case, I know not. Would it not be novel to see a man come forward and say, I am understood to be an idiot, but, at the same time, I tell you, I have such a degree of mind as to purchase a brieve, and to call upon you to cognosce me? I wish to treat what falls from my brother with respect, but what to make of this argument I know not. A purchaser of such a brieve to say I have that degree of mind that I can understand all the arguments here used as to the different modes of proceeding, and thinking the mode of cognition the most legal, I prefer it, and now call on you, the jury, to find me to be an idiot. It would be an extraordinary jury that would cognosce that man.

But we are told there will be no cognoscing if you do not re- May 26, 1826.
call the curatory, because the curator bonis has got all that he wished. But if a great part of the doctrine held forth were true, it would be his interest to move a cognition; for if Bryce is capable of making a will, it is clear it will not be in favour of the curator bonis. It must be in favour of a person who has made himself curator bonis; and let him try it. It is, therefore, the supposed capability of making a will, which appears to be at the bottom of a great part of this proceeding. If he is capable, let him make it. You will judge of it when it comes before you. Let him marry. There is nothing in your interlocutor to prevent all that. If a freeholder, let him vote. Ours is only a remedial measure for an evil not provided for by the law.

The law does not go upon the notion that it is always absolute madness, or idiocy, or the contrary, that can be in question; for there are ten thousand degrees or gradations in both. The characters of the sane mind are not more diversified than those of the insane, and, in cases where a person could not be cognosced as either furious or fatuous, there is an unfortunate situation in point of fact when a man is incapable of managing his affairs, and that has driven this Court to appoint curators bonis; there being no form of brieve for such a case. For, where there is a brieve of idiocy, and the person is not really an idiot, it is null and void; for no jury, in a service of any kind, can travel out of the brieve before them. They must make a precise answer to the question put to them. The question in the brieve of idiocy and furiosity is, 'Si sit incompos mentis, fatuus et natura-'liter idiota, sic quod timetur de alienatione tam terrarum su-'arum, quam aliarum rerum mobilium et immobilium.' I take upon me to say, that a retour not in terms of that brieve is no retour at all.

But I go a little farther in point of principle; and I doubt extremely if the Exchequer law (if it be law) can allow of a retour of cognition, without noticing who is to take care of the person—who is the nearest agnate. That is not law here. I put this question: who, in point of principle and justice, can have a title, right, and interest, to declare a man an idiot without providing means for taking care of him? Was that ever the law of this country? I doubt it in point of principle. Your Lordships know very well, that even in the brieve of service of heirs, so strict was the form of making an answer to a brieve of inquest, that the general service was originally incompetent. The jury did not stop short in it, and they could not. The whole heads were to be answered, and if not for a special service in land, it

May 26, 1826. could not go on at all. See Appendix in Erskine for the first instance of the kind that was known, Stirling of Keir. It was doubted of extremely, and long after it. But on the head of necessity, you know well, that in one of the most material parts of the law, a precept of clare constat was introduced, superseding the service altogether. Yet, according to the principle now maintained, that could have never been introduced. You have found, by practice, that it is a convenient, proper, useful mode of ascertaining who is next heir. I say the same necessity exists here. There is a distinction when a person is incapable of managing his affairs, and yet, when you could not say, in terms of the brieve of cognition, that he is an idiot. But you are told, leave that to the operation of the common law; for if he grant deeds, they will be set aside; if he marry, the marriage will be annulled. But is it by granting deeds only that a man spends all his fortune? what becomes of contracting debts, &c. As one of your Lordships said, what is the curator bonis appointed for but to take care of his fortune? His personal contracts could not have effect. Allowing this curatory to be good for a week, his personal contracts cannot be good.

We were asked, has he not a persona standi in judicio? If you can find a law-suit by which he is neither to win nor lose, then I have no objection to his persona standi. But if he is to engage in any law-suit by which his affairs may be injured, this cannot be allowed by any means. Did you ever see, after such an appointment, that an action could proceed in the person's name without the consent of his curator, unless the action be against the curator himself? We had one this session, where it so happened that a question occurred with a curator, and then you appointed a tutor ad litem. But, in a question with a third party, after the appointment of a curator, his, the curator's, consent must be had; for the bond may be affected by any such action, if he were to lose his case. For the expenses incurred by the other party somebody must be answerable. Therefore, in point of principle, after such an appointment, indefinitely, or otherwise, while the curatory lasts, the person under the curatory has no persona standi in judicio.

I know that, ex necessitate, we must in hoc statu sustain this action; but then, every person who meddles with another's affairs, does so suo periculo. With a cognition staring one in the face, if a declarator of convalescence be brought and failed in, thereby occasioning a great expense, it might be supposed for a moment there was a persona standi in judicio; but when it fails, the expenses must land on the person who usurped the conduct

of the proceeding; otherwise, any officious rascal who brings such action might create a good job to himself, at the expense of the poor idiot, and might pass unpunished. May 26, 1826.

In such an event, you must allow a proof—it is a relevant allegation, but it is made periculo of the person who takes upon him to interfere. Whether your Lordships ought not to require prima facie appearance of relationship, I do not know, but there is not a permanent persona standi in judicio.

We were told by Mr Jeffrey, in a confident manner, that in cases of imbecility from old age, there is no instance of the Court interfering, but that such persons are always left to the easy management of friends, as sons, daughters, or other relations. But there are not only instances of interference in such cases, but the Court has never refused to interfere when applied to by petition.

The distinction was stated between a court having power to take cognizance of the fact, and of the law in such cases; a distinction which would make a curious court of justice. But in the case of Jerdan of Bonjedward, where there was a very contentious long inquiry, whether a person was incapable from age, a case which occurred in 1784, before fifteen as able men as ever sate in this Court, not one of them ever thought or dreamt of this notable point, that the moment opposition is made, we must stop and remit to a jury. I cannot take it off the hands of any one, that, in a question so momentous as it was described to be by one of the counsel, a matter, from his account of it, attended with such danger to the constitution as to make my wig almost leap off my head, fifteen of your predecessors should go blindly into an inquiry into facts, and leave the law behind.

What is it that makes the law, according to this? The more a point has been acted upon, the more it is to be considered as doubtful; the more unchallenged it has been, the more you are to doubt of its legality.

I end where I began, by remarking, that, after what I have heard this day, I never can consider any point of law or form as fixed.

I am clear for adhering to the forms of our ancestors in the case before you. If you think there can be a better mode, let it be introduced by a new act of sederunt; but at present I am for adhering to what has been the usual form these eighty-eight years past. And therefore, I am for refusing this petition and adhering to the interlocutor, continuing the curator during the subsistence of Bryce's incapacity.

There is only one other point remains. Mr Steele, who ori-

May 26, 1826. ginally moved in this case, without authority, must pay the expenses on both sides.

The Court then pronounced this judgment: 'Find it sufficiently instructed, that the petitioner, James Bryce, still remains incapable of managing or conducting his own affairs, and therefore refuse to recall the appointment of the respondent, Walter Graham, to be curator bonis to him during his disability, and so far adhere to their former interlocutor reclaimed against. But with respect to the question of expenses,' ordain Mr Steele to lodge 'a minute on his part, relative to the subject of his personal liability for the expenses incurred on both sides, and also in explanation of his conduct relative to this application, in the course of the proceedings therein.' A minute having been accordingly lodged, and answered, the Court found 'Steele liable in the whole expenses incurred on both sides, upon and in pursuance of the application of date the 3d June 1818, made to the Court in the name of 'James Bryce.' Steele reclaimed; and Graham, to avoid an objection of incompetency, presented a petition and complaint against Steele, and prayed conjunction with the application for recall; and, in the conjoined actions, to be allowed the whole expenses incurred on both sides. Steele objected to the competency of this complaint, and maintained, that as he had acted merely as agent, and from humane motives, he could not be liable in expenses. But the Court being of opinion that the proceedings had originated with Steele, pronounced this judgment: 'Repel the objections to the competency of said petition and complaint; conjoin the same with the former application in the name of James Bryce, and in the said last-mentioned application refuse the prayer of the reclaiming petition on the part of Andrew Steele, and adhere to their former interlocutor, therein complained of; and in the said petition and complaint, they de novo find the said Andrew Steele liable in the whole expenses incurred on both sides, upon and in pursuance of the application of 3d June 1818, made to this Court in the name of the said James Bryce; and, farther, find the said Andrew Steele liable to Walter Graham in the expenses of the said petition and complaint and procedure, in pursuance of the same.' Steele was accordingly compelled to pay upwards of £300 of expenses. An appeal was then entered by the interdictors and Steele, in so far as they were subjected in expenses; and at a subsequent period Bryce also appealed.

Appellants.—The curatory was constituted and continued, without cognition by an inquest summoned in consequence of a brieve from Chancery, which, when opposition is made, is the only regular and competent mode known in the law of Scotland, for subjecting a person to permanent curatory as an idiot. No doubt the Court of Session can appoint a curator till the issue of trial by inquest, if the circumstances of the case seem to render that temporary expedient requisite for the protection of the person or property of the individual alleged to be fatuous; but the Court are not warranted by any principle or precedent to determine the question of idiocy, especially when opposition is made. It is of no consequence that Bryce had not a male agnate to be his tutor. It would be absurd to suppose that the destitution of qualified near relations should deprive the party of the valuable right of trial by inquest. But even if cognition by inquest and brieve had not been necessary, Bryce was not a fatuous person, in the sense of the word required, to justify reducing him to a state of absolute dependence, and putting him under tutory. Such a proceeding is never authorized in a case of mere weakness of understanding. Besides, if a curator should be appointed, Graham was an unfit person to be continued. If these grounds are well founded, then it follows as a natural consequence, that the appellants—the interdictors and agent, having acted on reasonable views, and in perfect good faith—having in contemplation nothing but what they regarded as a humane and justifiable interference, ought not to have been found liable in any expenses. Above all, there was a manifest injustice in making Steele liable in expenses after he had retired from the suit, and another person, by order of the Court, had become agent—particularly for expenses on both sides. Besides, it was incompetent to award expenses at all under the original action, and the petition and complaint did not remedy the defect. May 26, 1826.

Respondent.—Bryce was, from his youth, imbecile in his mind. His imbecility increased with his years; and latterly, he became totally incapable of any rational pursuit, or of devoting his attention to any intelligible object. His only known relation is his sister, Mrs Graham, who has taken every care of him. By the law of Scotland, when a person is either furious or fatuous, the nearest male agnate may take out a brieve from Chancery to the Judge Ordinary of the territory where the insane or fatuous person resides, to have the person's incapacity declared by verdict of a jury, and the next agnate served tutor

May 26, 1826. at law to him. But it early was the practice, when there was no agnate, or the agnate did not choose to appear and serve tutor at law, for the Sovereign with advice of his Council, to make gifts of tutory to some proper person. These passed without any trial by inquest, and if, after such appointment, the agnate chose to come forward, his service superseded the appointment. This function in time devolved on the Court of Session, and in order to direct the conduct of parties to be so appointed, and secure a fair administration of the estates confided to them, the act of sederunt, 13th February 1730, was passed, and it has been ever since extensively acted on. The respondent's application, in 1816, was therefore perfectly authorized in point of form, and its necessity has been proved by the evidence led, and the report of the Sheriff, and indeed confessed by the very interdiction under which the appellants themselves placed Bryce. The interference, therefore, of the appellants was quite uncalled for. On the part of Steele especially, it proceeded from the most unjustifiable motives; his conduct throughout, in endeavouring to get up a supposed case of sanity, was altogether exclusive of any pretence of bona fides. He had no authority, and could have received none, from Bryce. This is truly an appeal as to a point of expenses, which is incompetent. It is in vain to try to escape, by raising the question of law, whether Bryce should have been, or still should be, cognosced by a jury. The interdictors were parties to the first application; and as to the costs that followed, it is a rule of Court, that, if a person carry on a suit without proper authority, he must pay the costs; seeing he has chosen to make himself the dominus litis. Steele did not attempt to withdraw until after the Sheriff's report was prepared; he forced on the latter discussion by drawing the petition for appointment of agent and counsel, and thus was just as much the cause of the subsequent, as he had been of the preceding expenses.

The House of Lords ordered, 'that the said cause be remitted back to the First Division of the Court of Session in 'Scotland, to review the several interlocutors complained of in 'the said appeal; and in such review, to have regard only to 'the consideration, that such interlocutors nominate, appoint, 'and continue the said Walter Graham curator bonis to the 'said James Bryce, during his alleged disability, without cognition by brieve and inquest, however long that disability may 'endure; and upon so reviewing the said interlocutors, to do

'as to the said Court shall seem just, in either adjudging that May 26, 1826.
'the same ought to remain unaltered, or to be altered: And it
'is further ordered, that the Division to which this remit is
'made, do require the opinions of the other Judges of the Court
'of Session, whether, according to the law of Scotland, in case
'of an alleged continuing disability, the Court of Session hath
'the jurisdiction and power to commit the management of the
'supposed disabled person, or of his fortune, to such person as
'the Court may think proper, not only by a temporary appoint-
'ment for a reasonable time, and until a cognition by brieve
'and inquest shall be obtained, but during any continuance,
'however long, of the alleged disability, without any such cog-
'nition, which opinion the other Judges are required to give:
'And this House thinks proper to reserve the consideration of
'all matters in this and the other appeal, in which John Dick-
'son, Esq. and others, are appellants, and Walter Graham is
'respondent, now before this House, respecting the appellant,
'James Bryce, his interdictors, agents, or others, until after
'such review shall have been had, as aforesaid, under this re-
'mit.'

17th March, 1824.

LORD CHANCELLOR.—This is a case in which the proceedings must be very narrowly examined, before pronouncing judgment. The Court of Session have not been unanimous in their judgment, which is of itself a sufficient reason why the House should pause in giving theirs. But the case is in itself one of great importance, because, in this free country, every man is entitled to be protected in the exercise of his rights of property unless it appears that he is incapable of that exercise, and persons seeking that protection are entitled to just consideration, in any application they may make for that purpose, properly made; but still, it is to be seen whether such protection is the object of such application. I may advert to the nature of this application. It is one by the appellants, that is, made by them in this sense, that it is made in the name of a person called James Bryce, with their consent as interdictors. This appointment necessarily implied that James Bryce was capable of choosing them as interdictors, which is a point that ought to be well considered. The object of the application is, to recall the nomination of the respondent as curator bonis to Bryce, made by the Court, which, whether they proceeded in doing so under a sort of necessity that is sometimes felt in this country, of casting round a person in the situation of Bryce some protection until the more regular means of protection held out by law could be afforded, or whether it took place pursuant to the act of sederunt passed in the year 1730, it is certain that the Court had, in practice, made such appointments. I do not, however, see how the cognoscing of

May 26, 1826. Bryce could take place under the proceedings which have been resorted to. As to his capacity, looking to the proof that has been taken before the Sheriff, it appears that he could hardly be stated to have a glimmering of reason. As to the manner in which the Court have found expenses due, the Court, in so far as regards Mr Steele, who is stated to be a respectable man, and writer to the signet, must have acted in the belief that the proceeding was to be ascribed to him from the beginning to the end. It is, therefore, for your Lordships to ascertain whether this was the fact, and whether the proceedings were of a character which should throw these consequences upon him. For these reasons, it appears to me that the proceedings in this case should be examined very narrowly, and which I propose doing, before the day when I shall again sit in this House, and I therefore move your Lordships that the further consideration of this case be postponed until then.

July 4, 1825.

LORD CHANCELLOR.—My Lords, there is a case which I am really very uneasy about. I cannot, at this moment, take on myself to determine whether I shall propose to your Lordships finally to proceed to judgment to-morrow, or whether I shall desire the cause to stand over. It is the case of Bryce *v.* Graham. Upon looking into the books of Scotch Law, it seems to me, according to the text writers, that where a man is conceived to be fatuous, you must, in order to take from him the management of his own affairs, proceed in a certain course. That is by cognition by brieve, and verdict of a jury.

It is perfectly clear, that, for nearly a century, if not more than a century (I cannot give the exact date of the act of sederunt), the Court of Session have admitted of an immediate application to them founded on an affidavit, to appoint a curator to take care of the person and the affairs of the individual, who is the subject of that application. Whether that was originally intended to operate in the way in which similar acts in this country operate, or whether it was originally intended to destroy the necessity of farther proceedings, I cannot take upon myself to say, save that it does appear to me, that there are terms in the language of that act of sederunt, which import that it is rather a temporary provision, than one intended to convey permanent authority, under which the man was to be dealt with as a man incapable of taking care of his own affairs; and that his affairs were to be placed in the hands of the other persons, not proceeding to acquire that authority in the mode pointed out. I state that as the general question arising in this case, because, in this particular case, the Court of Session, upon a second application, after the curator was appointed, did remit the question to the Sheriff, and there was an examination of witnesses before him, and that examination concluded not with the verdict of a jury, but by his forming an opinion, and reporting to the Court of Session, that the state of this individual was such as required this care and attention. It was afterwards much discussed in the Court of Session; and upon this point there was a difference of opinion

among the Judges, whether that proceeding could be a sufficient authority to deal with this individual in the way in which the Court of Session have dealt with him, that is, by continuing the curator, instead of calling upon the person, who had been so appointed curator, to sue out a brieve, and to have the verdict of a jury upon the subject. May 26, 1826.

My Lords, I think that much more attention should be paid, than has been paid, to this question. It may possibly appear that the same care has not been bestowed on the concerns of persons in this situation in Scotland as in England. Your Lordships know that there is no subject to which, in this country, more attention and more jealous care has been applied, than to the question, how authority is to be given to one person, to consider another as under his care, with respect to his property, his person, and so on—on the ground of the imbecility of his mind. The administration of that devolves upon the person filling the office I have the honour to hold, not as Chancellor, but from a special commission, usually indeed given to the Chancellor, to take care of persons in this calamitous situation. When an application is made for a commission of lunacy, the grounds of it are stated in affidavits, which are carefully examined before the commission issues; and all parties have a right to apply to prevent the issuing of the commission. The Court, therefore, which is authorized by this commission to execute this important function, and which ought to be most carefully executed—the Court itself can do nothing except to interpose some temporary care, when that temporary care is found to be necessary, and to send the matter to a jury. It does not grant the commission until a jury shall have found that the person is a party who ought to have that protection afforded to him, and who ought not to be trusted with the management of his own affairs. The caution of the Court does not stop there, because it gives the party a right to traverse that inquisition, and to bring the question before another jury. It affords likewise to persons interested in the decision, a right, without asking the leave of the person immediately interested, to traverse that inquisition. It will appear to your Lordships, from this statement, that it has been felt to be necessary to throw round the individual that sort of temporary care which is supposed to be for his benefit, until there is the decision of a jury. That temporary care has been as well managed as it could be; but the consideration of that subject has led to an improvement in the laws in that respect, by an Act of Parliament, which has been passed in this very session of Parliament.

My Lords, that the act of sederunt I have referred to, has been acted upon very long, is unquestionable. It is uncontradicted in this very case. Whether the instances that have been produced are instances in which the authority was acquiesced in, or whether those cases, to which I am now alluding, were only of a temporary nature, is another thing. The language, as I have before stated, of the act of sederunt, appears to me to import, that the appointment was of a temporary nature. It is contended that a curator cannot be permanently appointed without having a brieve and a verdict by inquisition. On the other hand, it is stated that

May 26, 1826. this act of sederunt has been acted upon, until some of the Judges were satisfied it could not be disturbed. Some of the Judges appear, in this very case, to have renounced the authority of the Court to act upon this act of sederunt, in case the party, who was the subject of the proceeding, chose to insist on the proceeding by brieve and inquisition. Your Lordships will see the very great consequence of the decision of this point; and, I apprehend, in a case of this great importance, the utmost care is requisite. I will not pledge myself to the proposing the judgment to-morrow; at the same time, if I find that I can, consistently with my duty, I shall do so; if not, I shall propose that the cause stand over for the reasons I have stated.

My Lords, what I have said hitherto, applies to the case of Bryce *v.* Graham. There is another appeal of Dickson and others *v.* Graham, which my noble and learned friend (Lord Redesdale) attended with me; and that is about the costs. Certain persons having interposed on the part of Mr Bryce, the Court ordered them to pay the costs of the proceedings. It does appear to me that is a question of costs, to be considered, not merely with reference to cases in general, but with reference to a case of this particular nature. This is a question undoubtedly of some importance to the individuals concerned, but certainly, with reference to the other question, of minor importance. At the same time, perhaps my mind may be more influenced than it ought, by the consideration of that case which we have always thought it proper to exercise in relation to persons in this unfortunate situation—that we may not prevent persons applying on behalf of others, who are not able to apply on behalf of themselves—that is a question to which my attention has been necessarily directed in the exercise of the jurisdiction which has been committed to me. We certainly do permit the interference of others; and we receive information on the state of a person who is represented as one, with respect to whom a commission ought to issue. With respect to this case, it may be more easy of decision than the other; but the two cases must be taken, in some measure, together. If it be found, on examining both together, that it is prudent and expedient to dispose of them this session, I shall trouble your Lordships further upon the subject in the course of to-morrow. If I find that the case cannot be properly disposed of, I shall be obliged, on account of the importance of the case, to let it stand till the next session of Parliament. However, I shall endeavour to avoid the necessity of that.

July 5, 1825.

Lord Chancellor.—I have, my Lords, looked into the cases of Bryce *v.* Graham, and Dickson and others *v.* Graham; and I beg leave again to repeat to your Lordships my desire that these causes may stand over until the first week in the next session of Parliament. My Lords, I am extremely anxious to learn, and I shall, in the interval, have leisure to address these inquiries to persons in stations in Scotland, who will be able to give me the information, to what extent this practice has actually gone, of appointing curators to a person who is stated to be of unsound

mind, and proceeded no further, and without having the inquisition of a jury; because it strikes me that it might be a very great inconvenience to many individuals who are in that state of unsoundness of mind, if your Lordships were to pronounce a judgment, which might disturb that great care and attention which are thrown around individuals, who may happen to be in a state of lunacy, by parties who may not be able to substitute any other species of care; but which by private attention could be paid to individuals in that unhappy state. Therefore I do feel the necessity very much, of having a perfect assurance on the subject, and of taking an opportunity of inquiring of those who may have to act upon the opinion that this House may please to form, in giving their judgment; and to attend to the changes which such a judgment may possibly make with respect to the condition of many individuals. If I were obliged to state the only opinion which at present I profess, I should state that I have not been able to form any satisfactory opinion, upon which I could possibly rely, as leading me to think that the Crown has in Scotland what it unquestionably has not in England, namely, the power of taking upon itself the care of any individuals either as to their persons or their property, on the ground that they are of unsound mind, without the verdict of a Jury. That this was the old law of Scotland, appears to be clear upon their books; and how far an act of sederunt could alter the law in that respect, appears to me to be a very important question; for if the Crown could not assume the care, except for temporary purposes, of the person and estate of an individual, without the case being fully inquired into—if it could not assume the care of the person and property of an individual to whom unsoundness of mind was imputed, without having, as a foundation for the exercise of that power, the verdict of an inquest, I cannot help doubting whether there does exist in any Court, either in that country or in this, a power by its own authority—I say by its own authority—to take upon itself a jurisdiction over the person and property of an individual, upon that ground, without the intervention of a jury. It seems to have been formerly the law of Scotland (unless I have been misinformed), previously to the act of sederunt, which is said to be the authority upon which these curatories are granted, and with reference to which they have been supposed not only to be granted for the purpose of temporarily taking care of an individual until an inquest could be taken, to give an authority to appoint another species of care over the individual, but for the permanent care of the individual. I cannot help doubting whether an act of sederunt could go the length of that, but for the reason I have stated, which I think is a reason of feeling, as well as a proper reason, and one that ought to be attended to. I shall inquire into the subject, more especially as, in this individual case, I do not think that the delay will be attended with prejudice. May 26, 1826.

With respect to the other cause of Dickson and others *v.* Graham, I mentioned to your Lordships yesterday, and I take the liberty to mention to-day, that I think it ought to be very carefully attended to, how far, on the part of persons in this unhappy state of mind, the application

May 26, 1826. to tribunals, which must, by their regulations under the authority of the Crown, take care of the persons and of the property of individuals of unsound mind—how far it may be prudent to discourage fair and reasonable applications made by persons having really no interest, but an interest which tenderness and affection induce, and who are only desirous to have the persons and property taken care of—how far your Lordships will prevent them, by holding that if their application be not well founded, or turns out to be improper, tney shall be subject to great costs and expenses. I am ready to admit, that there may be cases where, in order to guard against persons making improper applications, no costs should be granted; but, in the present case, if the forms of the Court of Session would permit it, I should apprehend that there might a very material question arise with respect to the costs; whether there might not be a distinction taken between the expenses that have been incurred in the proceedings, and other expenses that have been incurred. For it does appear to me, that there is a very considerable difficulty in saying, after this matter had proceeded up to a particular period, that the persons who now appeal in the other cause, should, out of their own pockets, be liable to those expenses—the Court itself appointing another agent and another counsel to act,—who, in the subsequent proceedings, may reasonably contend that they are discharged altogether from the situation in which they were placed, when they originally made the application to the Court; and who, nevertheless, are subjected in the costs and expenses, not only of what took place when they were engaged in the business, but the costs and expenses after they had ceased being engaged, and had withdrawn from it.

These observations, I hope, will satisfy your Lordships as to the propriety of the delay which will be occasioned, and that you will consider them, in some measure, as reasons explaining why it appears to me that it would be perfectly right not to proceed in the judgment of those cases at the present moment—and why I beg to move your Lordships that these cases should stand over till the first week in the next Session of Parliament.

May 26, 1826.

LORD CHANCELLOR.—My Lords, I have now in my hand the papers which relate to a case which appears to me to be of very great importance indeed. I should rather say several cases,—but they all relate to one point, which I look upon as a point of very great importance,—I mean the cases in which Mr Bryce is the appellant, and those other cases in which certain persons, who were what is called, in the law of Scotland, his interdictors; and likewise a Mr Steele, who was both an interdictor, and likewise a person who interfered as a man of business in the concerns of this Bryce, were parties.

My Lords, the question which I take the liberty to state as a question of importance, is this, Whether the Court of Session, which, as it appears to me, has undoubtedly a right to appoint, in the case of a person of imbecile mind, a curator bonis ad interim, that is, until some other pro-

ceedings of a judicial nature can be had,—has also a right to change the status and condition of the party, upon its being represented to them that he is of imbecile mind, without following that up by a cognition before a jury. My Lords, there is perhaps no question that one can represent to one's own mind, as a case of greater difficulty, than under what authority a man should be treated as a man incapable of managing his own affairs, and separated from the world in that respect ;—namely, that he is to be considered of such weak mind, that he ought not to be trusted to do any one action for himself. May 26, 1826.

My Lords, on looking into that which is stated in the opinions of the learned Judges, I find that I am obliged likewise to represent to your Lordships this case as a case of very great difficulty and importance, on account of the different opinions held upon it in the Court below. Two of the Judges state,—and repeatedly one of them, (my Lord President,) —that he must admit that he knows nothing whatever of the law of Scotland, if they have not the authority which has been exercised in this case. I should tell your Lordships, that the first interposition in this case is upon the mere certificate of a medical man ; not a judicial inquiry by affidavit, but upon a mere certificate of a medical man. The Court thought proper, afterwards, to remit the matter to a person, who, I believe, now holds the office of Lord Advocate of Scotland, to examine witnesses with respect to the state of mind of this individual ; and your Lordships have, in this bundle of papers, a very long statement of what those witnesses deposed to, with respect to this person's state of mind. They were very much pressed to have this matter sent to a jury ; and the Court seem to have been very much divided upon it ;—some of the Judges holding most clearly, that they had no right whatever to appoint a curator bonis, who should continue in that situation, without further inquiry, and without further information upon the subject than that which they had received ;—others of the Judges holding that their practice had been, for a hundred years, and upwards, to take the authority which the Court was then administering upon them ; and that, in truth, it would have been an entire change of the law of Scotland, if the opinion of the former Judges were supposed to be right. These opinions are delivered at great length, and some of them certainly are very worthy of grave consideration.

Now, my Lords, I can have no doubt that your Lordships will concur with me in thinking, that a case of this nature ought to be determined after the fullest information this House can receive. Our course in England is clear ; and I doubt very much, after all I have read and seen upon this subject, whether, by the law of Scotland, notwithstanding what has been stated in the papers to which I allude, unless it has been changed, his Majesty, as parens patriæ, has not the care of those who cannot take care of themselves. That duty he cannot personally exercise ; and therefore he remits the discharge of that duty to such persons as he may think worthy of being considered able to execute it. It is usually here placed in the hands of the person to whom the Sovereign has delivered the Great

May 26, 1826. Seal of England—usually, I say, not necessarily. It is quite obvious that several of his subjects may be in a state in which it is absolutely necessary to throw around them protection, before you can have the opinion of a jury upon the question whether they are or are not of unsound mind, and unable to take care of themselves. The person to whom this jurisdiction is committed, by special commission, therefore, never hesitates to interfere temporarily for the purpose of taking care of those individuals, until it can be seen, upon the acknowledged authority of the verdict of a jury, what is the real state of their mind. That temporary authority he does not exercise, except upon receiving information which makes it his duty to interpose even to that extent; and your Lordships are very well aware, that in this part of the united kingdoms, even after that a jury has, to use a Scotch phrase, cognosced a man of imbecile mind, he has a right himself to traverse that finding, without asking any one's leave, unless a certain length of time has occurred; and with respect to any individuals who suppose their interest affected by the acts he has done, they have a right to apply to the Great Seal for leave to traverse that inquisition; and that leave is never refused in any proper case. Every care is taken in our law, before a man can be said to be permanently fixed in a state in which the whole management of his affairs is delivered over to other persons; and I think I can see, in the law of Scotland, abundant reason for saying that the Court of Session have, as I think they must have, a right to appoint a curator ad interim, if I may so express myself: That is, that they may take upon themselves to appoint a person to take care of an individual who cannot take care of himself, until they can have an opportunity of inquiring by a jury what is his state, and whether he ought to be permanently treated, as in a state in which he is not capable of managing his own affairs. But, upon looking at the books, to which here alone we can have resort, I confess I do not find an authority for saying that the Court of Session can, without a brieve and inquest, exercise the power which they have exercised in this case. My Lords, I do not mean to say that they have not that power; because the very nature of the question, the difficulty of the question, and the importance of the question, make it extremely fit that we should be cautious what we say upon such a subject; but recollecting the extreme importance of the subject, and looking at what are called the authorities in the judgments of those Lords of Session, who thought that they had the authority, it does appear to me that it would be proper for your Lordships to remit back to the Court of Session, to review the interlocutor, which in substance refuses the claim of having a brieve and inquest; and then to reserve the consideration of the other cases till you have the opinion of both the Courts, including likewise the Lords Ordinary, upon this question, which is of so much public importance. And I have myself, my Lords, no difficulty in saying, that, as at present advised, if it should turn out to be the clear opinion of the Lords of Session of Scotland, that they have this general authority, as my mind is at present affected with the importance of this question, I should be very much disposed to submit to your Lordships something in

the shape of a bill, to declare, by act of Parliament, in what manner this authority shall in future be exercised. I am desirous of putting it in this way, not because, my Lords, I should be unwilling to express my own opinion, if it was a case in which the expression of that opinion might not do a great deal of mischief, in the meantime, before a question of this importance can be regulated, in the only way in which it can be usefully regulated; because, if your Lordships were now to come to a decision, that this curator bonis should no longer act; that is, if your notion of the law should be, that there ought to have been a brieve and inquest, and if the learned Judges who say that this has been the practice of Scotland for a hundred years and upwards, are right when they state that fact, it cannot but be that your decision, to the effect that I have mentioned, would not only put an end to this curatorship, but to all curatorships that exist at this time in Scotland; and which, existing in Scotland, there must be, in all human probability, so many of them, that it would be attended with very great inconvenience to interfere brevi manu, in a manner that would affect so many individuals as would, in all probability, be affected by it. May 26, 1826.

My Lords, having said thus much, I refrain from stating anything with respect to the questions which relate to the judgments that have subjected these interdictors, Mr Steele and others, to costs and expenses; and which, so subjecting them, are likewise made the subject of appeal to your Lordships. How they may be disposed of, after you have had the opinion of the Court of Session upon the principal point, will be matter for your Lordships' discussion and decision. I own it appears to me, unless it can be proved that they had some improper object in thus interfering, to be rather a hard way of dealing with persons who are interposing for the purpose of protecting an individual from being placed in a state in which they thought (at least so they pledge themselves) that he ought not to be placed at all. It is conceived to be a matter of very considerable importance, (and it has always been so in this part of the country,) not to be too unwilling to receive that information, with respect to the state of those unhappy persons, which it may be necessary for you to have, in order to give them the relief they may require; and one circumstance which has made me hesitate about humbly advising your Lordships to remit the case, to which I have before alluded, is, that I do not know but that the remit in that point of view might be inconvenient, by its subjecting the individuals to costs, which assuredly they ought not to pay, if the remit goes from this House.

There is another question which I think will deserve some consideration too, and that is this: Some of the Lords of Session express a doubt as to who is to sue out this brieve. The curator is generally the next of kin. The man himself, they say, cannot sue out the brieve; but then those Lords who think there ought to be a brieve, express their opinion in this way, That the curatorship of the goods should be committed only for a limited time; and then if the individual who is made the curator of the goods for a limited time, does not think proper to sue out the brieve and inquest, if that brieve and inquest be necessary by law, that then he

May 26, 1826. should no longer be continued the curator bonis. Still there arises a difficulty to which regard must be had: If he is not the person, what other person is there who will be entitled to sue out that brieve and inquest? My Lords, I certainly speak without sufficient information; but I cannot believe that the subjects of his Majesty in Scotland who may unfortunately be visited by this dreadful malady, are in a state in which it is the duty of no one to interfere; and I apprehend it may be very well worthy of consideration, whether my Lord Advocate of Scotland is not a party entitled to interpose in such cases. I have made these general observations, for the purpose of asking your Lordships' permission to word an order of remittal of the case of Bryce *v.* Graham to the Court of Session in Scotland, to the same Division before whom it had been heard, desiring them to take the opinion of the other Chamber, and likewise of the Lords Ordinary—that is, the whole of the Fifteen Judges; reserving the consideration of the questions in the other appeal, until we have the opinion produced to us which that remit is calculated to bring before this House.

Appellant's Authorities.—4 Ersk. Inst. 3. 6.—2. 7. 48. 53.—1. 7. 49.—A. S. Feb. 13, 1730. (1475, c. 67.)—Balfour's Practics, c. 7.—Craig de Feudis, 1. 12. 29.—Stair's Inst. 4. 3. 7.—1. 25. 6.—Mackenzie on the Statutes, (1475, c. 67.)—Bank. Inst. 1. 7. 9. and 4. 14. 11.—Lock. July 29, 1638. (6278.)—Christie, Feb. 13, 1700. (6283.)—Blair, June 18, 1748. (13217.)—Stuart, Jan. 21, 1663. (6279.)—Moncrieff, Feb. 23, 1710. (6286.)—Ederline, Feb. 27, 1740. (Elchies.)—Haliburton, June 1791. (16379.)

Respondents' Authorities—A. S. Feb. 13. 1730.

SPOTTISWOODE and ROBERTSON—ALEXANDER MUNDELL, *Solicitors.*

No. 37. JOHN DICK, Esq., Appellant.

JOHN DONALD, and (by revivor) DONALD CUTHBERTSON, Trustee on the Sequestrated Estate of James Corbett, Respondent.

Sale.—Husband and Wife.—A party having purchased a property, and taken the title in name of his wife, and thereafter become bankrupt, and fled the country; and his wife having, in his absence, conveyed the property to the trustee for his creditors, who exposed it to sale, under articles of roup, by which he bound himself to execute, and deliver to the purchaser, a valid, irredeemable disposition; and the purchaser having objected that the title granted by the wife was inept, and refused to pay the price; and the Court of Session having found that the trustee was not bound, at the expense of the bankrupt estate, to make any addition to the title, but only at the purchaser's expense—Held, (reversing the judgment,) that the trustee was bound to give the purchaser a good and valid title, and that the one which he offered was not good.

Dec. 12, 1826. 2D DIVISION. Lord Reston.

IN April 1813, James Corbett purchased from Andrew M'Kendrick five acres of land near Glasgow, at the price of L.800; and took the title in name of his wife, who was infeft.