if he be furious or fatuous or labouring under such unsoundness of mind as to render him incapable of managing his own affairs;" and it may be an important question whether the meaning of that is, that when a man is incapable of managing his own affairs, so that the Court could under this old law appoint a *curator bonis*, he may now be cognosced. But that question does not arise here, and there is no hardship in calling on the petitioner to take his choice, and go on either in one way or another.

Lord Kinloch concurred with the Lord President.

Supersede.

Agent for Petitioner—James Steuart, W.S.
Agent for Armstrong—J. Whitehead, S.S.C.
Agent for Swan—Wm. Kennedy, W.S.

Wednesday, November 4.

SECOND DIVISION.

THOMSON *v.* FRASER.

Relevancy—Proof—Alleged Compromise—Innominate Contract. 1. Statements which *held* relevant, and admitted to probation. 2. *Held* that an agreement to pay a certain sum of money to the pursuer of an action, in order to a compromise of it, by a party not called in the action, is provable *prout de jure*.

The pursuer in this action, after setting forth that she was a servant in the defender's service, who kept a boarding-house in St Andrews, and that she was courted by a young man, then a boarder in the defender's establishment, who promised to marry her, by whom she was seduced, and to whom she bore a child, makes the following statements in support of her action:—"(5) The said John Fraser refused to fulful his said promise of marriage; and, as the pursuer believed that he intended to leave the country, she raised a summons against him in the Court of Session, on the 3d July 1867, concluding for the sum of £1000 of damages sustained by her in consequence of the breach of engagement on his part to marry her; or otherwise of the sum of £1000 as the loss and damage sustained by her by and through the said John Fraser having seduced her in the circumstances stated. (6) The defender, the said Daniel Fraser, was very anxious that the summons should not be proceeded with, as he was afraid that if the circumstances therein stated were made public it would have the effect of ruining his boarding establishment; and he was accordingly very desirous to settle the action, and employed Mr Alexander Nicholson, writer, Cupar, to effect an arrangement of the pursuer's claims. The defender requested to be informed what sum the pursuer would be disposed to accept as a compromise of the action, and the pursuer authorised her agent, Mr Peter Fleming, writer, St Andrews, to settle the said action and claims on payment of £100; and on this proposal being communicated to him it was accepted by the defender, who agreed and undertook to pay that sum to the pursuer for a settlement of her claims. This was done by the defender on account of the personal interest which he had in the compromise of the action. A short delay in carrying out the settlement was asked on the part of the defender, to enable him to communicate with the friends of John Fraser, who lived at a distance, and this was agreed to on the part of the pursuer. It was arranged that the said summons should not in the meantime be called, or any proceedings adopted against John Fraser; and, on the other hand, the defender undertook that no advantage should be taken of the delay, and that John Fraser should not leave St Andrews without consent of the pursuer or her agent. (7) Relying on this undertaking by the defender, the pursuer delayed to execute the said summons, or to take any proceedings for the purpose of preventing John Fraser from leaving the country, which she otherwise would have done. After the lapse of nearly a fortnight without payment having been made of the sum agreed to be accepted by the pursuer as aforesaid, her agent applied to the defender to have the matter settled in terms of said arrangement, as he could not delay any longer to go on with the proceedings against John Fraser. In answer to this application the pursuer's agent received a letter from Mr Nicholson, dated 15th July 1867, in which he stated that in consequence of the absence of certain parties more delay was still required before the said arrangement could be carried out. On this ground he asked the pursuer's agent to extend his indulgence a little further, and assured him, on the authority of the defender, that no advantage would be taken of the delay so asked. (8) The pursuer accordingly agreed still further to delay any proceedings against John Fraser; but no settlement having been made, the pursuer's agent, after waiting for some time, again applied to the defender, and informed him that he could no longer delay the proceedings unless the arrangement was at once implemented. The defender then and afterwards repeatedly assured the pursuer's agent that the settlement of the action would be carried out in terms of the said arrangement. On the faith of these assurances made by the defender, the pursuer, at his request, again delayed to execute the summons, or to take any proceedings against John Fraser. (9) The pursuer frequently applied to the defender to have the said action settled in terms of the said arrangement and undertaking by him, but he delayed doing so, on the ground that John Fraser's relations, from whom he expected to receive the necessary funds, had not furnished him therewith. The pursuer also found that, notwithstanding the defender's undertaking that John Fraser would not leave St Andrews without consent of the pursuer or her agent, and the assurance of the defender, and his agent on his authority, that no advantage would be taken of the delay requested by them for carrying out the settlement, John Fraser had left the country during the delay so granted, and the defender gave him the necessary funds for this purpose, and assisted in removing his luggage from his house. In these circumstances the pursuer caused the summons at her instance against John Fraser to be executed against him on the 14th August 1867. (10) The pursuer understands that the said John Fraser has gone to India, or elsewhere abroad, without leaving any property or effects in this country, and she has not proceeded with the action against him. She has frequently required the defender to make payment to her of the said sum of £100, agreed to be paid to her as aforesaid, but he refuses or delays to do so, and the present action has accordingly become necessary."

The defender, among other pleas, maintained that the alleged promise or agreement could only be proved by the writ or oath of the defender.

The Lord Ordinary (Ormidale) pronounced the following interlocutor:—"The Lord Ordinary, be-

fore answer, allows the parties a proof of their respective averments, and the pursuer a conjunct probation: Appoints the proof to be taken before the Lord Ordinary within the Parliament House, Edinburgh, on the second sederunt day in the next Winter Session, at ten o'clock forenoon; and grants diligence at the instance of both or either of the parties against witnesses and havers."

The defender reclaimed.

FRASER and RHIND for him.

GIFFORD and STRACHAN in answer.

At advising—

LORD JUSTICE-CLERK—By the interlocutor submitted to review in this case, the Lord Ordinary has before answer allowed parties a proof of their respective averments. We have had an argument before us on objections to this interlocutor founded on two grounds; one the irrelevancy of the case as stated by the pursuer; and the other, the inadmissibility of parole evidence, if the proof is to be admitted. The reclaiming note is limited to the second ground, but, as a proof before answer as to relevancy has been admitted, we are entitled to review the interlocutor with a view to determine whether there is any relevant matter averred to support the case.

The case against the defender which is made by the pursuer, and embodied in the pleas in law, is (1) that he is liable in payment of the sum concluded for—£100 sterling—because he agreed to pay it for the compromise of the action referred to on account of the interest which he himself had in obtaining such a compromise; (2) because the defender in that action left the country during a delay obtained by the present defender on the undertaking that he would not do so; and lastly, that assurances were given by the defender and his agent that the action would be settled, and that the defender must make good those assurances as they led the pursuer to delay.

I think it unnecessary to say more with reference to this last ground than that, apart from other objections, there is no sufficiently specific statement as to the assurances, or their effect in causing the damage sued for.

It appears to me that the first and second grounds of liability cannot possibly coexist. If, as is assumed, the defender came under a direct positive undertaking to settle the case in order to prevent the exposure which judicial proceedings would have occasioned, the result is that no action was to have been brought, and therefore the loss of the opportunity of bringing such an action cannot possibly form a ground of liability. The pursuer, according to her own statement, was not to have the money for compromising the case and the action also. The money was to be paid to prevent an action, and therefore the moment the engagement to pay it was completed, the pursuer was barred from bringing such an action.

Taken by itself the first portion of the sixth article of the condescendence seems to me to be relevant. It sets out a proposal made and accepted to settle the action and claims for £100; but in the subsequent part of the article we have these singular statements about delaying this very action which was settled. It has been a matter of doubt how far, taking the whole statements together, there is not presented such an inconsistent story as to make the whole case irrelevant, but the allegation of compromise is precise, and the acts and proceedings and views stated may be looked on as a narrative which may be true or false without affecting the substance of the material averment of the agreement. I would propose, therefore, to find the action, in so far as it is rested on averments other than those in the first part of the sixth article of the condescendence, irrelevant, and to limit the proof to be allowed to the averments contained in the first portion of that article. I would allow a proof of these averments, and that *prout de jure*. It does not appear to me, after the case of *Jeffray*, that a proof of an alleged compromise can be held proveable only *scripto vel juramento*, and the specialty that the alleged settlement is made by a party having a material interest in the suit, and in respect of that interest, and not by the principal himself, does not I think affect the question as to the mode of proof. There is nothing unusual in the alleged contract. It is not the case of a gratuitous promise, or of a cautionary obligation, but of an obligation undertaken by the defender to serve a purpose in which he was deeply interested.

LORD NEAVES said the statements in the books as to the proof of which innominate contracts were susceptible, was not satisfactory. There might be innominate contracts with such peculiar stipulations that they could only be proved by writ or oath, but there were no such stipulations here. The stipulation was of a very ordinary and simple kind, and he saw no reason why it should not be proved in the ordinary way.

The other Judges concurred.

Agent for Pursuer—A. Beveridge, S.S.C.

Agents for Defender—Jardine, Stodart & Frasers, W.S.

Wednesday, November 4.

HAY *v.* BAILLIE.

Agent and Client—Use of Diligence—Personal Liability—Crassa negligentia. Circumstances in which held that crassa negligentia was not made out against an agent so as to render him personally liable in a sum which the pursuer had brought action to recover.

The defender, as one of the agents for the poor, conducted an action at the pursuer's instance against the late Philip Hall Taylor, concluding for replacement of trust funds with which Taylor and certain other trustees had intromitted, and in this action a decree of consignation for £599, 18s. 2d. was obtained against Taylor on 29th November 1850.

On 15th January 1851 the defender caused an arrestment to be used on this decree against Taylor in the hands of the trustee on the sequestrated estate of an Alexander Meldrum in Dundee; the defender states that this was wholly spontaneous on his part, and was done in consequence of certain circumstances accidentally coming to his knowledge, which led him to conjecture that some funds might be due to Taylor from this estate. After using the arrestment, the defender wrote to the trustee on the subject, and he received from him a letter, dated 24th January 1851, stating that no funds had been realised, and that whether any dividend was ever paid would depend on the result of certain litigations. He mentioned also that Mr Philip Hall Taylor had made affidavit to a claim against Meldrum for a professional account of large amount.

In consequence of a communication with the pursuer, further inquiries were made on this subject by the defender in the year 1853, through the firm of Barrie & Marwick, writers in Dundee; and